

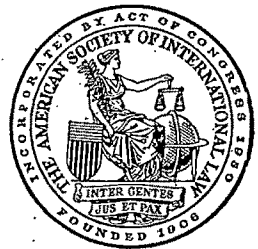
Culc - H102673 - 93 - PO 14715

Am. Soc.

# *American Journal of International Law*

93

**VOLUME 65**  
**1971**



*Published by The*

*American Society of International Law*

p14715



## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$30 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$35 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$25 for residents of the United States, \$10 for non-residents; professional, \$40; intermediate, \$15; student, \$7.50. Application forms and further information may be obtained from the Membership Secretary of the Society.

### OFFICERS OF THE SOCIETY, 1971-1972

<i>Honorary President</i> .....	PHILIP C. JESSUP
<i>President</i> .....	HAROLD D. LASSWELL
<i>Executive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>Vice Presidents</i> .....	RICHARD A. FALK, JOHN N. HAZARD, WILLIAM D. ROGERS
<i>Honorary Vice Presidents:</i>	DEAN G. ACHESON,* WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, LEO GROSS, GREEN H. HACKWORTH, JAMES N. HYDE, HANS Kelsen, CHARLES E. MARTIN, BRUNSON MAC- CHESNEY, MYRES S. McDUGAL, OSCAR SCHACHTER, JOHN STEVENSON, ROBERT R. WILSON.
<i>Secretary</i> .....	EDWARD DUMBAULD
<i>Treasurer</i> .....	FRANZ M. OPPENHEIMER
<i>Assistant Treasurer</i> .....	JAMES C. CONNER

\* Deceased Oct. 12, 1971.

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER  
Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. LILLICH  
University of Virginia Law School

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. MCDUGAL  
Yale Law School

STANLEY D. METZGER  
Georgetown University Law Center

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS KELSEN  
University of California

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$30.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$6.00 a copy; other available back numbers at \$7.50 a copy.

Manuscripts may be sent to either the Acting Editor-in-Chief of the JOURNAL, Northwestern University Law School, 357 East Chicago Avenue, Chicago, Ill. 60611, or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N.W.  
WASHINGTON, D. C. 20008

Copyright © 1971 by The American Society of International Law  
Second-class postage paid at Lancaster, Pa.

AMERICAN JOURNAL  
OF  
INTERNATIONAL LAW

## CONTENTS

1971

[No. 1, January, 1971, pp. 1-252; No. 2, April, 1971, pp. 253-458; No. 3, July, 1971, pp. 459-704; No. 5, October, 1971, pp. 705-927]

PAGE

## SYMPOSIUM ON UNITED STATES ACTION IN CAMBODIA

The Cambodian Operation and International Law	Richard A. Falk	1
The Constitutionality of the Cambodian Incursion	William D. Rogers	26
Legal Dimensions of the Decision to Intercede in Cambodia	John Norton Moore	38
Comments:	George H. Aldrich	76
	Wolfgang Friedmann	77
	Robert H. Bork	79
	John Lawrence Hargrove	81
Marine Pollution Problems and Remedies	Oscar Schachter and Daniel Serwer	84
Developments in the Law and Institutions of International Economic Relations: Unauthorized Changes of Par Value and Fluctuating Exchange Rates in the Bretton Woods System	Joseph Gold	113
The International Court of Justice: Consideration of Requirements for Enhancing Its Rôle in the International Legal Order	Leo Gross	253
Barcelona Traction: The <i>Jus Standi</i> of Belgium	Herbert W. Briggs	327
The Rann of Kutch Arbitration	J. Gillis Wetter	346
<i>Vae Victis</i> or Woe to the Negotiators!	Judge Sir Gerald Fitzmaurice	358
Self-Determination	Rupert Emerson	459
The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	Robert H. Miller	476
Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations	Chris Osakwe	502
The <i>Travaux Préparatoires</i> of the Vienna Convention on the Law of Treaties	Herbert W. Briggs	705
The Declaration of Principles of International Law concerning Friendly Relations: A Survey	Robert Rosenstock	713

	PAGE
<b>The Grounds of Invalidity and Termination of Treaties</b> <i>S. E. Nahlik</i>	736
<b>Selden <i>Redivivus</i>—Towards a Partition of the Seas?</b>	
<i>Wolfgang Friedmann</i>	757
<b>Editorial Comment:</b>	
Josef L. Kunz, 1890–1970	<i>Herbert W. Briggs</i> 129
Quincy Wright, 1890–1970	<i>Eleanor H. Finch</i> 130
Arctic Anti-Pollution: Does Canada Make—or Break—International Law?	<i>Louis Henkin</i> 131
The United States Assaults the I.L.O.	<i>Stephen M. Schwebel</i> 136
Renewed Emphasis upon a Socialist International Law	<i>John N. Hazard</i> 142
The Connally Reservation Revisited and, Hopefully, Contained	<i>Louis Henkin</i> 374
<i>Two Perspectives on the Barcelona Traction Case:</i>	
The Rigidity of Barcelona	<i>Richard B. Lillich</i> 522
Nationality of Corporate Investment under Investment Guaranty Schemes—The Relevance of <i>Barcelona Traction</i>	<i>Stanley D. Metzger</i> 532
The Reports of the Death of Article 2 (4) Are Greatly Exaggerated	<i>Louis Henkin</i> 544
The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment	<i>Stefan A. Riesenfeld</i> 548
The Obligation to Register Treaties and International Agreements with the United Nations	<i>R. B. Lillich</i> 771
<b>Notes and Comments:</b>	
The Sole Juridical Expression of the Sacred Trust of Civilization	<i>Charles H. Alexandrowicz</i> 149
Tax Treaties between the United States and Developing Countries	<i>Patrick L. Kelley</i> 159
Neutralization of Israel	<i>John F. Murphy</i> 167
Regional Conference of the Society at Chicago	<i>M. Cherif Bassiouni</i> 172
Regional Meeting of the Society at Iowa City	<i>Edward J. Lemons</i> 174
Scott Prizes in International Law	<i>E.H.F.</i> 175
Journal of Maritime Law and Commerce	<i>Eleanor H. Finch</i> 175
65th Annual Meeting of the Society	<i>Eleanor H. Finch</i> 176
A Cause of the Present Crisis of International Law	<i>Miodrag Sukijasović</i> 378
Sixty-Fifth Annual Meeting of the Society, April 29–May 1, 1971	381
Annual Meeting of the Philippine Society of International Law	<i>E.H.F.</i> 387
Was Biafra at Any Time a State in International Law?	<i>David A. Ijalaye</i> 551

	PAGE
Resolution of the Bahrain Dispute <i>Edward Gordon</i>	560
Transfer or Recognition of Sovereignty—Some Early Problems in Connection with Dependent Territories <i>Jochen A. Frowein</i>	568
The United Nations Travel and Identity Document for Namibians <i>J. F. Engers</i>	571
A Sometime World of Men: Legal Rights in the Ross Dependency <i>F. M. Auburn</i>	578
Seminar on the Rôle of the United Nations in the Development of International Law <i>Subhash C. Jain</i>	582
New Student Journals of International Law <i>Eleanor H. Finch</i>	584
The Society's Eighth Annual Regional Meeting at Syracuse, 1971 <i>L. F. E. Goldie</i>	585
65th Annual Meeting of the American Society of International Law <i>Eleanor H. Finch</i>	587
Further Thoughts on a New Source of International Law: Professor d'Amato's "Manifest Intent" <i>N. G. Onuf</i>	774
The Need for Revision of the Bustamante Code on Private International Law <i>Kurt H. Nadelmann</i>	782
The U. S. Treaty of Commerce and the German Constitution <i>F. A. Mann</i>	793
"Socialist International Law" or "Socialist Principles of International Relations"? <i>W. E. Butler</i>	796
Regional Meetings:	
Denver, Colorado, May 8, 1970, April 16, 1971 <i>Ved P. Nanda</i>	800
New School for Social Research, April 2-3, 1971 <i>Nigel S. Rodley</i>	802
Mexican-American Border Relationship Conference, San Diego, May 7-8, 1971 <i>S. Houston Lay</i>	803
Correspondence:	
On the Status of United States Treaty Law <i>Salo Engel</i>	593
Teaching International Law <i>Woodfin L. Butte</i>	597
U. S. Contemporary Practice Relating to International Law <i>Steven C. Nelson</i>	178, 388, 599, 805
Judicial Decisions Involving Questions of International Law <i>Alona E. Evans</i>	195, 398, 608, 812
Book Reviews and Notes <i>Leo Gross</i>	214, 411, 632, 836
Books Received	239, 437, 665, 884
Official Documents:	
United Nations General Assembly. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. October 24, 1970	243

	PAGE
Convention for the Suppression of Unlawful Seizure of Aircraft. <i>The Hague, December 16, 1970</i>	440
United Nations Security Council. Resolution on aerial hijacking. <i>September 9, 1970</i>	445
United Nations General Assembly. Resolution on aerial hijacking. <i>November 25, 1970</i>	445
United Nations Secretary General. Statement. <i>September 14, 1970</i>	447
International Civil Aviation Organization:	
Assembly Declaration on violence against aircraft. <i>June 30, 1970</i>	452
Council Resolution on unlawful seizure of aircraft. <i>October 1, 1970</i>	453
Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at War- saw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. <i>Guatemala City, Guatemala,</i> <i>March 8, 1971</i>	670
American Convention on Human Rights. <i>San José, Costa Rica,</i> <i>November 22, 1969</i>	679
UNESCO. Convention on the Means of Prohibiting and Prevent- ing the Illicit Import, Export and Transfer of Ownership of Cul- tural Property. <i>Paris, November 14, 1970</i>	887
Mexico-United States. Treaty of Co-operation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties. <i>Mexico City, July 17, 1970</i>	895
Organization of American States. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Signifi- cance. <i>Washington, February 2, 1971</i>	898
North Sea Continental Shelf:	
Federal Republic of Germany-Denmark-The Netherlands. Pro- tocol. <i>Copenhagen, January 28, 1971</i>	901
Federal Republic of Germany-Denmark. Treaty Relating to the Delimitation of the Continental Shelf under the North Sea. <i>Copenhagen, January 28, 1971</i>	904
The Netherlands-Federal Republic of Germany. Treaty on the Delimitation of the Continental Shelf under the North Sea. <i>Copenhagen, January 28, 1971</i>	909
United States-Spain. Treaty on Extradition. <i>Madrid, May 29,</i> <i>1970</i>	914
United States. Act to Implement the Convention on the Recogni- tion and Enforcement of Foreign Arbitral Awards. <i>July 31, 1970</i>	922
International Legal Materials. Contents, Vol. IX, No. 6 (1970); Vol. X, Nos. 1-5 (1971)	251, 454, 703, 924
Index	928

# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 65

January, 1971

NO. 1

## CONTENTS

	PAGE
SYMPOSIUM ON UNITED STATES ACTION IN CAMBODIA	
The Cambodian Operation and International Law	Richard A. Falk 1
The Constitutionality of the Cambodian Incursion	William D. Rogers 26
Legal Dimensions of the Decision to Intercede in Cambodia	John Norton Moore 38
Comments:	George H. Aldrich 76
	Wolfgang Friedmann 77
	Robert H. Bork 79
	John Lawrence Hargrove 81
Marine Pollution Problems and Remedies	Oscar Schachter and Daniel Serwer 84
Developments in the Law and Institutions of International Economic Relations: Unauthorized Changes of Par Value and Fluctuating Exchange Rates in the Bretton Woods System	Joseph Gold 113
Editorial Comment:	
Josef L. Kunz, 1890-1970	Herbert W. Briggs 129
Quincy Wright, 1890-1970	Eleanor H. Finch 130
Arctic Anti-Pollution: Does Canada Make—or Break—International Law?	Louis Henkin 131
The United States Assaults the I.L.O.	Stephen M. Schwebel 136
Renewed Emphasis upon a Socialist International Law	John N. Hazard 142
Notes and Comments:	
The Sole Juridical Expression of the Sacred Trust of Civilization.	Charles H. Alexandrowicz 149
Tax Treaties between the United States and Developing Countries	Patrick L. Kelley 159
Neutralization of Israel	John F. Murphy 167
Regional Conference of the Society at Chicago	M. Cherif Bassiouni 172
Regional Meeting of the Society at Iowa City	Edward J. Lemons 174
Scott Prizes in International Law	E.H.F. 175
Journal of Maritime Law and Commerce	Eleanor H. Finch 175
65th Annual Meeting of the Society	Eleanor H. Finch 176
U. S. Contemporary Practice Relating to International Law	Steven C. Nelson 178
Judicial Decisions Involving Questions of International Law	Edited by Alona E. Evans 195

## CONTENTS (*cont'd.*)

	PAGE
<b>Book Reviews and Notes. Edited by Leo Gross:</b>	
Lauterpacht, E. (ed.), <i>International Law: Collected Papers of Hersch Lauterpacht</i> , Vol. I	214
Falk, Richard A., and Cyril E. Black (eds.), <i>The Future of the International Legal Order</i>	218
Verzijl, J. H. W., <i>International Law in Historical Perspective</i> . Vol. III: <i>State Territory</i>	220
Higgins, Rosalyn, <i>United Nations Peacekeeping 1946-1967</i> . Vol. II: <i>Asia</i>	221
Gheballi, Victor-Yves, <i>La France en Guerre et les Organisations Internationales 1939-1945</i>	223
Van Dyke, Vernon, <i>Human Rights, the United States, and World Community</i>	224
Hoffmann, Wolfgang, <i>Rechtsfragen der Währungsparität</i>	225
Pillai, K. G. J., <i>The Air Net: The Case against the World Aviation Cartel</i>	227
Al-Baharna, Husain M., <i>The Legal Status of the Arabian Gulf States</i>	227
Araya, Jonas Guerra, <i>Derecho y Practica Consulares</i>	228
<i>Canadian Yearbook of International Law</i> , 1969	229
<b>Briefer Notices:</b> Fulda and Schwartz, 232; Brinkhorst and Schermers, 233; Green, 233; McWhinney and Bradley, 234; Chen, 234; Tobiassen, 235; Gál, 236; Ginther, 236; Gilas, 237; McWhinney, 237; Holton, 238; Strössenreuther and Mössner, 238	
<b>Books Received</b>	239
<b>Official Documents</b>	
United Nations General Assembly. Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. <i>Adopted October 24, 1970</i>	243
<b>International Legal Materials.</b> Contents, Vol. IX, No. 6 ( <i>November</i> ), 1970	251

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$30.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$6.00 a copy; other available back numbers at \$7.50 a copy.

Manuscripts may be sent to either the Editor-in-Chief of the JOURNAL, Harvard Law School, Cambridge, Mass. 02138 (Tel. 617-495-3132), or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

Copyright © 1971 by The American Society of International Law  
Second-class postage paid at Lancaster, Pa.



## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$30 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$35 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$25 for residents of the United States, \$10 for non-residents; professional, \$40; intermediate, \$15; student, \$7.50. Application for membership may be made on the form printed at the back of this issue of the *JOURNAL*.

### OFFICERS OF THE SOCIETY, 1970-1971

<i>Honorary President</i> .....	PHILIP C. JESSUP
<i>President</i> .....	HAROLD D. LASSWELL
<i>Executive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>Vice Presidents</i> .....	RICHARD A. FALK, COVEY T. OLIVER, WILLIAM D. ROGERS
<i>Honorary Vice Presidents:</i>	DEAN G. ACHESON, WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, GREEN H. HACKWORTH, JAMES N. HYDE, HANS Kelsen, CHARLES E. MARTIN, BRUNSON MACCHESNEY, MYRES S. McDOUGAL, OSCAR SCHACHTER, JOHN R. STEVENSON, ROBERT R. WILSON.
<i>Secretary</i> .....	EDWARD DUMBAULD
<i>Treasurer</i> .....	FRANZ M. OPPENHEIMER
<i>Assistant Treasurer</i> .....	JAMES C. CONNER

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER  
Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. LILICH  
University of Virginia Law School

OLIVER J. LISSITZYN  
Columbia University

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. MCDOUGAL  
Yale Law School

STANLEY D. METZGER  
Georgetown University Law Center

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS Kelsen  
University of California

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY

SYMPOSIUM  
ON  
THE UNITED STATES MILITARY ACTION  
IN CAMBODIA, 1970, IN THE LIGHT OF INTERNATIONAL  
AND CONSTITUTIONAL LAW

The three articles that follow are revised and expanded versions of papers originally delivered at a forum on "The Cambodian Incursion and International Law: International and Domestic Legal Issues," held under the auspices of the Society on June 16, 1970. The fourth paper delivered on that occasion, that of Mr. William H. Rehnquist, Assistant Attorney General, has been printed in 45 *New York University Law Review* 628 (Special Issue, June, 1970).

The views presented by the principal speakers were then discussed by a group of commentators. The observations of four of the commentators follow the principal papers.

THE CAMBODIAN OPERATION AND  
INTERNATIONAL LAW

*By Richard A. Falk \**

"I believe the United States has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes."

John R. Stevenson, Legal Adviser, "United States Military Actions in Cambodia: Questions of International Law," 62 *Department of State Bulletin* 765, 766 (1970).

"... public, Congressional and international support also depends on a prompt and convincing demonstration of the legality of our actions; we cannot afford to wait until action is taken to start preparing our case."

William P. Rogers, Secretary of State, Memorandum dated June 13, 1970, reported in *New York Times*, June 24, 1970, p. 3.

The invasion of Cambodian territory by the armed forces of the United States and South Viet-Nam in the spring of 1970 raises serious questions of international law. The development of international law since the end of World War I exhibits a consistent effort to prohibit recourse to force by governments in international society. The Nuremberg Judgment called aggression against a foreign country "the supreme crime" against mankind. The United Nations Charter is built around the notion that the only occasions on which it is legal to use force are in response to an armed attack and as authorized by an organ of the United Nations. The Cambodian

\* A shorter, less documented version of this article will eventually appear as a chapter in Laurence A. G. Moss and Jonathan Unger (eds.), *Cambodia in the Expanded War*, to be published by Simon and Schuster. The preparation of this article was greatly facilitated by the research and editorial assistance of Claudia Cords.

operation was obviously neither a response to a prior armed attack upon South Viet-Nam nor an action authorized or ratified by the United Nations.

In announcing the decision to the American public on April 30, 1970, President Nixon made no effort to justify the invasion under international law. Such a failure of explanation illustrates the extreme unilateralism that has been exhibited by the United States Government throughout the Viet-Nam War. This failure lends credence to the contention that the United States is conducting an imperial war of repression in Indochina and that it owes explanations for its policy, if at all, only to the American public and, even then, mainly to provide reassurance about the relevance of a challenged policy to the welfare of American troops. Perhaps the most remarkable passage in Mr. Nixon's April 30th address is the arrogant assertion that an American invasion of an Asian country is of no international concern:

These actions [in Cambodia] are in no way directed at the security interests of any nation. Any government that chooses to use these actions as a pretext for harming relations with the United States will be doing so on its own responsibility and on its own initiative, and we will draw the appropriate conclusions.<sup>1</sup>

The United States Government had been on record over and over again in support of the position that when a border-crossing armed attack occurs, it is a matter of grave concern for the entire community of nations, and that it is a matter of collective determination whether or not a challenged action is disruptive of world order and its fundamental norms of prohibition.<sup>2</sup> What made Mr. Nixon's statement especially troublesome—and it

<sup>1</sup>Text of Address reprinted in 62 Department of State Bulletin 617 (1970). President Nixon's attitude toward international law as revealed in the Cambodian operation was foreshadowed in a significant passage in his book, *Six Crises*. In analyzing the 1960 campaign for the presidency Mr. Nixon acknowledges that Kennedy outmaneuvered him by advocating a hard line against Castro's Cuba. To differentiate his position from that of Kennedy and to shield the Bay of Pigs operation, then in a planning stage, from premature disclosure, Nixon felt obliged in 1960 to "go to the other extreme" and "attack the Kennedy proposal of such aid as wrong and irresponsible because it would violate our treaty commitments." Reflecting on his presentation, Nixon writes "that the position I had taken on Cuba hurt rather than helped me. The average voter is not interested in the technicalities of treaty obligations. He thinks, quite properly, that Castro is a menace, and he favors the candidate who wants to do something about it—something positive and dramatic and forceful—and not the one who takes the 'statesmanlike' and 'legalistic' view." Nixon, *Six Crises* 382, 384 (rev. ed., 1968). President Nixon's handling of the Cambodian invasion embodied the same scornful disregard for legal restraint, urging a bold course of action on the basis of sovereign prerogative that seemed designed to appeal to patriotic rather than to world-order impulses of the citizenry.

<sup>2</sup>One prominent example of the American attitude toward the Charter prohibition upon recourse to force was the initial statement by the U. S. delegate, Adlai Stevenson, in the Security Council debate occasioned by India's invasion of Goa on Dec. 18, 1961. Security Council, Official Records, 987th meeting, Dec. 18, 1961. Two portions of Ambassador Stevenson's statement are of particular relevance to the relationship between the Cambodian operation and the U.N. Charter, the fundamental legal document governing recourse to force in international affairs. The first, near the beginning of his presentation;

was not qualified or balanced by other statements—is the refusal to acknowledge the possible relevance of any external source of authority with respect to American claims to use force across an international boundary. The sovereign word is endorsed as the final word, and critical reactions by other countries are to be regarded, it would seem, as unwarranted and unacceptable interference in our affairs. Would the United States want the same rules of non-accountability to govern the behavior of China or the Soviet Union, or even small countries like Cuba or Israel? What if Cuba had attacked the exile base areas in Florida and Central America where planning was going forward for the Bay of Pigs operation that was to occur in April, 1961? Would the United States have indulged Cuban claims that such action was not directed at “security interests” of other nations? And not only security interests are at issue; more importantly, the concern is with the existence of minimum standards of international behavior applicable to all governments on a basis of mutuality. The United States made this very clear in 1956 when it refused to acquiesce in the limited invasion of Egyptian territory by its own allies. Such a refusal to overlook these actions at the height of the Cold War, during a period when the Soviet Union was so brutally intervening in Hungarian internal affairs, suggests how strongly the United States Government at one time supported a strict interpretation of U.N. Charter prohibitions on the use of force.

It is true that on May 5, 1970, Ambassador Charles Yost reported by letter to the President of the Security Council that the United States had acted in “collective self-defense” because of the intensification of North Vietnamese activity in Cambodian base areas.<sup>3</sup> It is also true that the Legal Adviser to the Secretary of State, John R. Stevenson, fully developed an international law argument in support of the Cambodian operation in an address delivered at the Hammarskjöld Forum of the Association of the Bar of the City of New York, which was subsequently published in the *Department of State Bulletin* as an official document.<sup>4</sup> But Mr. Stevenson spoke primarily to a domestic audience (and then not until May 28 and

---

“When acts of violence take place between nations in this dangerous world, no matter where they occur or for what cause, there is reason for alarm. The news from Goa tells of such acts of violence. It is alarming news, and, in our judgment, the Security Council has an urgent duty to act in the interests of international peace and security.” (P. 66.)

Ambassador Stevenson made it clear that the Charter prohibition, aside from circumstances of self-defense, is not properly susceptible to self-serving interpretation:

“Let it be perfectly clear what is at stake here; it is the question of the use of armed force by one State against another and against its will, an act clearly forbidden by the Charter. We have opposed such action in the past by our closest friends as well as by others. We opposed it in Korea in 1950, in Suez and in Hungary in 1956 and in the Congo in 1960.” (P. 72.)

<sup>3</sup> U.N. Doc. S/9781, May 5, 1970; 62 Department of State Bulletin 652 (1970); 64 A.J.I.L. 932 (1970). The reasoning of Ambassador Yost’s letter will be found on p. 21 below.

<sup>4</sup> John R. Stevenson, “United States Military Actions in Cambodia: Questions of International Law,” 62 Department of State Bulletin 765 (1970) (hereinafter cited as Stevenson); reprinted in 64 A.J.I.L. 933 (1970).

the publication date was not until June 22). Although his formulation constitutes the most authoritative legal argument put forth by the Administration, it hardly qualifies, because of its domestic setting and its timing, as compliance with the requirement that a government give an accounting to the world community of its decision to use military force in a foreign society. President Nixon's formulation has to be treated as the prime datum for assessing the merit of the Administration's contention that the invasion of Cambodia was consistent with the rules and standards of international law. Aggressors normally disguise their action by making claims of legal right. The Soviet Union claimed an invitation from the "legitimate" government as the basis for its action in Hungary in 1956 and again in Czechoslovakia in 1968, although in the latter case it relied more heavily upon an alleged right of collective intervention to maintain the integrity of the Socialist community.<sup>5</sup> It is always possible to put together a legal argument in support of any partisan position. The whole idea of legal order is based on the possibility of fair and reliable procedures to assess which of several competing legal arguments best fits the facts and governing legal rules. The purpose of this article is to demonstrate that the American invasion of Cambodia was a violation of international law, given the facts, the law, past practice, public policy, and the weight of expert opinion.

#### I. THE ADMINISTRATION ARGUMENT

It seems necessary, first of all, to clarify to the extent possible the scope of the claim being asserted by the United States in relation to Cambodia. The shifting line of official explanation is ambiguous about the real objective. On April 30 President Nixon repeated several times in different formulations that the purpose of the invasion was to destroy North Vietnamese sanctuaries along the Cambodian border and thereby to protect American lives. In Mr. Nixon's words, "attacks are being launched this week to clean out major enemy sanctuaries on the Cambodia-Vietnam border." The timing of the attack was justified by reference to two separate circumstances:

(1) "... the enemy in the past 2 weeks has stepped up his guerrilla actions, and he is concentrating his main forces in these sanctuaries . . . where they are building up to launch massive attacks on our forces and those of South Viet-Nam."

(2) "North Viet-Nam in the last 2 weeks has stripped away all pretense of respecting the sovereignty or the neutrality of Cambodia. Thousands of their soldiers are invading the country from the sanctuaries; they are encircling the Capital Phnom Penh. . . . [I]f this enemy effort succeeds,

<sup>5</sup> The so-called Brezhnev doctrine rests on the subordination of individual Socialist countries to the interests of world Socialism as these interests are construed by "the camp of Socialism" as a whole. For some interpretation see Falk, "The Legitimacy of Zone II as a Structure of Domination," in Davis, East, and Rosenau (eds.), *The Analysis of International Politics* (forthcoming), and Firmage, "Summary and Interpretation" in Falk (ed.), *The International Law of Civil War* (1971).

Cambodia would become a vast enemy staging area and a springboard for attacks on South Viet-Nam along 600 miles of frontier, a refuge where enemy troops could return from combat without fear of retaliation."

President Nixon seemed to suggest that the invasion was responsive to both of these occurrences, given the parallel American decision to provide the Lon Nol régime with arms assistance and to pay for Thai "volunteers." In essence, then, alleged North Vietnamese actions within Cambodia were given as the sole basis for initiating a military attack across the boundary. Mr. Nixon seemed to emphasize *future* danger rather than any *immediate* threat to the safety of American lives—"Unless we indulge in wishful thinking, the lives of Americans in Vietnam after our next withdrawal of 150,000 would be gravely threatened." And in the course of a news conference on the evening of May 8, Mr. Nixon made even clearer that the focus of his concern was the rather distant set of circumstances existing after the scheduled withdrawal of 150,000 American soldiers has been completed in April, 1971.<sup>6</sup>

The invasion claim was limited in mission, scope, and duration, although in *execution* villages were destroyed that were neither sanctuaries nor weapons depots, and vast quantities of rice belonging to Cambodian peasants were either confiscated or destroyed. The mission was confined to the destruction of sanctuaries which were supposed to have included, according to Mr. Nixon, "the headquarters for the entire Communist military operation in South Viet-Nam." The scope of the invasion, at least for American ground forces, was confined to a 21.7-mile strip of Cambodian territory along the border, and the invasion, again at least for American troops, was to be terminated by the end of June, 1970.<sup>7</sup> In reporting on the invasion, Mr. Nixon said on June 3 that

The success of these operations to date has guaranteed that the June 30 deadline I set for withdrawal of all American forces from Cambodia will be met. . . . This includes all American air support, logistics, and military advisory personnel.

<sup>6</sup> Mr. Nixon was asked how he could have announced on April 20th that Vietnamization was going so well that 150,000 Americans could be withdrawn by the spring of 1971 and then on April 30th that the Cambodian operation was necessary to protect the Vietnamization program from disruption. The President's response included these two sentences: "I found that the action that the enemy had taken in Cambodia would leave 240,000 Americans who would be there a year from now without many combat troops to help defend them, would leave them in an untenable position. That is why I had to act." 62 Department of State Bulletin 642 (1970).

<sup>7</sup> The failure by the Government to disclose additional American activity in Cambodia makes it difficult to describe the claim with accuracy. Only on June 21, 1970, was it reported that American air strikes were regularly penetrating far beyond the announced 21.7-mile limit. These raids were initiated at the same time as the invasion, but have not been officially acknowledged or defended as yet. The report also indicated doubt as to whether the raids would end with the June 30th pull-out of American troops. The purpose of these raids is to prevent the North Vietnamese from establishing a new supply route into South Viet-Nam. New York Times, June 22, 1970, pp. 1, 20. It has become subsequently clear, of course, that the United States regularly provides close air support to Cambodian ground operations.

The only remaining American activity in Cambodia after July 1 will be air missions to interdict the movement of enemy troops and material where I find that is necessary to protect the lives and security of our men in South Viet-Nam.

Initially the main official response to the legal challenges directed at the President's decision consisted of an effort to show that the Cambodian operation was a valid exercise of Mr. Nixon's powers as Commander-in-Chief of the armed forces.<sup>8</sup> At his May 8th news conference, Mr. Nixon said: "As Commander in Chief, I alone am responsible for the lives of 425 or 430,000 Americans in Viet-Nam. That's what I've been thinking about and the decision that I made on Cambodia will save those lives." Such an assertion of responsibility—presumably a responsibility shared in common with all Heads of State—is hardly relevant to a discussion of the status of the invasion in international law. Surely, the lives of the North Vietnamese armed forces are deeply endangered by the use of air fields in Thailand, Guam, and Okinawa. The point here is that such an explanation is at best responsive to the line of criticism that has contended that the initiation of the Cambodian invasion by Presidential decision amounted to an act of Executive usurpation in violation of the United States Constitution.<sup>9</sup>

Subsequently, as has already been indicated, the Legal Adviser did indeed develop a full-dress international law argument consisting of the following main elements: (1) a contention of clear and present danger to American and South Vietnamese troops arising out of the expansion of sanctuary activity in Cambodia by North Viet-Nam and the National Liberation Front; (2) a limited claim by the United States to use force in Cambodia proportional and responsive to this danger; (3) a claim that the inability of the Cambodian Government to prevent its neutral territory from being used as a sanctuary for armed forces engaged in the Viet-Nam War amounts to an abrogation, in part, at least, of Cambodia's neutral status, and justifies belligerent action of limited self-help; (4) a claim that Cambodia has been primarily invaded by North Viet-Nam and is a victim of North Vietnamese aggression; (5) the absence of any formal complaint by the Cambodian Government concerning the invasion suggests that there has been no victim of aggression and hence no aggression; and (6) the contention that North Viet-Nam is guilty of aggression against South Viet-Nam and that the United States and South Viet-Nam are entitled to take whatever steps are necessary to assure the success of their action in collective self-defense.

The Legal Adviser's argument deserves the most careful consideration

<sup>8</sup> The validity of such executive authority has been largely supported even in the U.S. Senate, which affirmed by a vote of 79-5 the power of the President as Commander-in-Chief to take military action in Cambodia to protect the welfare of American troops in South Viet-Nam. The vote was taken in relation to an amendment offered to modify the Cooper-Church amendment. *New York Times*, June 23, 1970, pp. 1, 3.

<sup>9</sup> See W. D. Rogers, "The Constitutionality of the Cambodian Incursion," below, at p. 26; *New Yorker*, May 16, 1970, pp. 31-33.



so far as an analysis of the facts, rules of law, and legal expectations is concerned. As Mr. Stevenson himself says,

It is important for the United States to explain the legal basis for its actions not merely to pay proper respect to the law but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale.<sup>10</sup>

However, even if this line of argument is persuasive, which I do not believe it is, nevertheless the President's failure to reconcile a national decision to invade a foreign country with the rules of international law constitutes a major negative precedent that cannot be undone by any subsequent legal explanation. There are, in essence, two separate precedents both of which, in my judgment, violate international law: (1) the manner in which the claim was put forward; and (2) the substance of the claim. These are both serious world-order issues. Issue (1) bears upon the rôle of international law as providing a basis for governments to communicate claims and counterclaims in situations of conflict, while issue (2) concerns the framework of restraint that should be operative in the conduct of international relations. My argument is that the timing and location of Mr. Stevenson's legal presentation makes it virtually irrelevant to issue (1), but important to an assessment of issue (2).

## II. SOME DIFFICULTIES OF LEGAL ANALYSIS

There are several special factors complicating the analysis of the Cambodian operation:

(1) *The extent of United States responsibility for South Vietnamese actions in excess of limitations of space, time, and mission imposed by the United States Government.* The underlying claim of the United States Government rests on a theory of collective self-defense. From a legal point of view, it is the victim of attack, not its external ally, that defines the necessities of action in self-defense. Of course, the realities of United States control do not change the legal situation, except to give evidence of the non-independence and illegitimacy of the Saigon régime. With respect to the Cambodian operation, it does not seem legally acceptable to confine United States responsibility to the actions of its troops. The undertaking is a joint one, and the American claim is derivative from the alleged South Vietnamese right of self-defense; furthermore, American advisers are operating in conjunction with the Saigon régime at every level of military and political operations. Thieu and Ky have repeatedly stated their Cambodian objectives in broader terms than the United States, and South Vietnamese troops have penetrated Cambodian territory beyond the 21.7-mile limit. In my judgment, the United States, from a legal perspective, is a co-venturer, responsible for the full extent of claim being made by the Saigon régime. Indeed, Secretary of Defense Laird confirmed on June 23, 1970, that the armed forces of South Viet-Nam will have a free rein to act in Cambodia after the June 30th deadline, thereby

<sup>10</sup> Stevenson, p. 766.

making explicit American complicity with the wider and vaguer South Vietnamese invasion claim.<sup>11</sup>

When the United Kingdom, France, and Israel initiated the Suez War in 1956 as a joint venture, there was no effort to assess relative degrees of legal responsibility for the event. It seems reasonable, then, to resolve this initial complication by measuring United States responsibility by the full extent of the South Vietnamese claim and conduct in Cambodia.

(2) *The Cambodian operation represented only a battlefield decision to protect troops in the field and did not constitute an expansion of the United States rôle in Indochina.* The argument has been made by supporters of the Administration's decision that the Cambodian operation has only tactical significance in relation to the Viet-Nam War. In this spirit, the strike against the Cambodian sanctuaries is not different in legal character from the decision to attack and capture Hamburger Hill. Such matters of battlefield tactics may be criticized as ill-conceived or ill-executed, but they are not appropriately challenged on legal grounds.

This position is defective in a fundamental respect. If a battlefield tactic involves a separate issue of legality, then it is subject to legal scrutiny; sustained border-crossing by armies is always a separate legal event of first-order magnitude in international affairs. The main effort of modern international law is to moderate warfare, and this effort depends greatly on maintaining respect for boundaries. Besides, since July 1, 1970, the United States has engaged in a series of air strikes inside Cambodian territory that are designed to provide close support for troops of the Lon Nol régime.<sup>12</sup>

(3) *The failure of the United Nations to pass judgment.* The political organs of the United Nations system have been singularly ineffective throughout the long course of the Viet-Nam War. This ineffectiveness is a result of several factors. First, the United States possesses sufficient political influence within the Organization to prevent an adverse judgment against it. Second, the non-membership of China and North Viet-Nam in the Organization makes these governments opposed to any United Nations rôle; in their eyes, the United Nations, at least as presently constituted—with Formosa continuing to represent China in the Security Council—is itself an illegitimate actor and is in no position to act on behalf of the world community. Third, the United Nations has been totally ineffective whenever the two super-Powers were deeply and directly involved in a political conflict. Fourth, the Lon Nol Government has not complained to the United Nations about the invasion of its territory or the destruction of its villages either by United States and South Vietnamese forces or by North Vietnamese and NLF forces.

In these circumstances, it is impossible for the United Nations to play any positive rôle, even to the extent of interpreting the requirements of its

<sup>11</sup> For an extensive account, see New York Times, June 24, 1970, pp. 1, 7.

<sup>12</sup> See Serba, "Cambodia: Fact and Fable of U.S. Air Missions," *ibid.*, Aug. 16, 1970, §4, ¶. 6.

own Charter.<sup>13</sup> The Secretary General, U Thant, has tried to undertake peace initiatives at various points during the long course of the war, but his efforts have been resented by the governments of both sides, particularly by the United States during the Johnson Administration.

Although the United Nations has been unable to act as an Organization, the Charter continues to provide governing legal standards for a case like this one. The Charter is itself *declaratory* of prior legal standards embodied in the Kellogg-Briand Pact of 1928 and provides the most authoritative guidelines for identifying the outer limits of permissible state behavior. And surely the United States Government has not yet claimed the discretion to act in violation of the Charter. Indeed, the Charter is a treaty that has been ratified with the advice and consent of the Senate, and is, according to the U. S. Constitution, part of "the supreme law of the land."

(4) *The failure of the Cambodian Government to condemn the invasion.* The Cambodian operation has an ambiguous character. The claim to eliminate the sanctuaries was explicitly linked by President Nixon in his April 30th speech with the struggle for political control of Cambodia. The United States, South Viet-Nam, and North Viet-Nam have intervened in this struggle in a variety of ways. The overthrow on March 18, 1970, of Prince Sihanouk as Head of State, and his subsequent efforts to organize a counter-movement to regain power, have been deeply destabilizing occurrences for Cambodia.<sup>14</sup> The Lon Nol régime almost immediately, and somewhat inexplicably, unleashed a campaign against ethnic Vietnamese who were living in Cambodia, resulting in several reported massacres, large-scale forced resettlement, and the creation of a large number of refugees.<sup>15</sup>

This régime was evidently unable to rule its population without strong external support. The campaign against ethnic Vietnamese, and the insistence that North Viet-Nam abandon its Cambodian base areas were part of a larger effort by a weak régime to create a political climate appropriate for foreign help.

Cambodia has now become the scene of increasing foreign intervention. The Thieu-Ky régime of South Viet-Nam, despite Lon Nol's anti-Vietnamese policies, is seeking to maintain Lon Nol in power. Thailand has mobilized forces along the Western boundary of Cambodia and is reported to have sent contingents of ethnic Khmers to Cambodia to fight on behalf of the Lon Nol régime. The United States tried to persuade Thailand to send 5,000 troops to Cambodia by agreeing to finance the entire military operation.<sup>16</sup>

<sup>13</sup> Mr. Stevenson came close to acknowledging that an American complaint before the invasion about North Vietnamese violations of Cambodian neutrality would not have resulted in a positive response: "Soundings in the Security Council indicated very little interest in taking up the North Vietnamese violations of Cambodian territorial integrity and neutrality." Stevenson, p. 770.

<sup>14</sup> For background see Leifer, *Cambodia: The Search for Security* (1967).

<sup>15</sup> New York Times, April 19, 1970, §1, p. 28, §4, p. 3.

<sup>16</sup> *Ibid.*, pp. 1, 9; April 26, 1970, p. 1; Christian Science Monitor, April 23, 1970, p. 2.

Under these circumstances it is difficult to accord any serious respect to the Lon Nol régime as a government of Cambodia. This régime does not seem able to represent the interests of its people. Its failure to protest the invasion, pillage, and occupation of its territory bears witness to its own illegitimacy, just as the willingness of the Saigon régime to enter into a friendship pact with a governing group that had so recently initiated ruthless anti-Vietnamese policies, exhibits its illegitimacy in relation to the Vietnamese people. These régimes are struggling at all costs to maintain power in the face of a highly unfavorable domestic balance of power. In this setting, their invitations to foreign governments to send in armies are of only slight legal consequence.<sup>17</sup> The failure of the Cambodian Government to protest the invasion of its territory by foreign forces does not, under these circumstances, amount to a valid legal authorization. Cambodia may be the victim of aggression even if its governing élite does not choose to regard it as such, especially if, as is the case, a counter-government exists that has protested the invasion. Unless such a position is taken, outside forces could intervene to place a régime in power and then use its invitation to validate its later plans of domination. There is a need to move beyond a pretense of legitimacy whenever a government demonstrates both its dependence on foreign sources of authority for its own existence and its willingness to jeopardize the independence of its country, the welfare of its people, and the inviolability of its territory on behalf of some foreign Power whose support is needed to keep the régime in control.

George McT. Kahin, an outstanding specialist on Asian affairs, pointed out the following defects of the argument that the decision to invade Cambodia did not provoke protest from the Lon Nol régime:

It must be noted that Cambodia renounced the SEATO protocol providing protection for the former Indochina states. In point of fact, Sihanouk formally requested SEATO powers in May 1965 to amend Article IV to *exclude* Cambodia from SEATO's perimeter of intervention. His request was ignored but he was advised that the language of the treaty provided that intervention would not be undertaken without the request and consent of the Cambodian government.<sup>18</sup>

It is clearly evident that, whatever took place *subsequent* to the invasion, there is no evidence or even claim that the Cambodian Government re-

<sup>17</sup> The German reliance during the Nazi period upon Fifth-Column tactics to undermine the governing process in countries which were the targets of aggression should be recalled in the Cambodian context. A "Quisling" régime is one that operates in the name of a nation, but serves as agent of its dismemberment and destruction. Vidkun Quisling was the head of the Nationalist Party of Norway, a pro-Nazi group with no parliamentary representatives and little popular following. In April, 1940, when Hitler invaded Norway, Quisling welcomed the German occupation of Norway and eventually obtained dictatorial powers in Norway from the Germans. The Quisling experience is an extreme case, but it usefully illustrates the undesirability of accepting a constituted regime as automatically empowered to act as the legitimate government of a country.

<sup>18</sup> The Congressional Record, memorandum prepared by George McT. Kahin, "Cambodia: The Administration's Version and the Historical Record," pp. 57428-57431, at p. 57431.

requested or authorized the invasion, or participated in any way to define its limits.<sup>19</sup> In the post-invasion context, a weak, tottering régime could not be expected to protest an invasion of its territory by its principal "friend." Without American support, the Lon Nol régime would have no prospect whatsoever of maintaining power.

### III. THE FUNDAMENTAL LEGAL ANALYSIS: AGGRESSION OR COLLECTIVE SELF-DEFENSE

Under modern international law an invasion of a foreign country that is not authorized by a competent international institution is either an act of aggression or an exercise of self-defense. Under most circumstances, states that initiate large-scale, overt violence across an international boundary have been identified as "the aggressor." It is almost impossible for the invading government to make out a persuasive case of self-defense. Possibly the only recent counter-example was the Israeli initiation of the June War in 1967 under conditions of evident and imminent provocation and danger.

In reporting the invasion to the Security Council, the United States seemed to rest its legal case on a claim of collective self-defense. This case was later developed into a serious legal argument in Mr. Stevenson's address at the Hammarskjöld Forum.<sup>20</sup> The obligations of international law can be divided into two categories: *substantive norms that restrain behavior of governments*, and *procedural norms applicable to situations of alleged violation of substantive norms*. In the area of war and peace, the procedural norms are as important as the substantive norms.

*Substantive Norms.* The United Nations Charter provides a convenient starting point for an analysis of the norms governing recourse to force in international affairs. Article 2 of the Charter has the following key paragraph:

<sup>19</sup> For Administration interpretation on this point see Stevenson, p. 766, especially note 9.

<sup>20</sup> There is a curious inconsistency in Mr. Stevenson's presentation. At the outset of his address he refers to the legal controversy over whether South Viet-Nam and the United States had a good legal basis for asserting a claim of collective self-defense, and contends that "Many of the differences rested on disputed questions of fact which could not be proved conclusively." He goes on to say that "this administration, however, has no desire to reargue those issues or the legality of those actions, which are now history." (P. 765.) But, then, throughout the address, he asserts the position of the prior Administration; for instance: "Since 1965 we and the Republic of Viet-Nam have been engaged in collective measures of self-defense against an armed attack from North Viet-Nam." (P. 770.) The Cambodian invasion is justified as a temporary extension of the underlying claim to be exercising rights of collective self-defense. By forswearing argument on whether a case for self-defense exists in Viet-Nam, Mr. Stevenson must be understood as saying either that it makes no difference or that, once troops are engaged in battle, then, whether their cause is legal or illegal, it is proper to carry out their mission. The extension of such reasoning to other settings exposes its absurdity. Should the burglar be exonerated merely because he has persisted? Or should the notion of burglary be abandoned once the burglar finds himself engaged in an encounter with the homeowner or the police?

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51 qualifies this prohibition upon force by its limited authorization of self-defense:

Nothing in the present Charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . .

The prohibition and the exception have not been defined, despite numerous international efforts, in any more specific way.

The Charter law is fairly clear: it is not permissible to use force against a foreign territory except in response to an armed attack.<sup>21</sup> This Charter conception expresses general international law, except that a literal reading of its language might be taken to prevent non-Members of the United Nations from claiming self-defense. North Viet-Nam and South Viet-Nam are not Members of the Organization, but this analysis will proceed on the assumption that any *state* is legally entitled to act in self-defense, whether or not a Member of the United Nations. Although there are some difficulties associated with treating South Viet-Nam as a *state*, given the language and proclaimed intentions of the Geneva Accords of 1954 to create a unified Viet-Nam no later than July, 1956, nevertheless, for purposes of this article, South Viet-Nam will be treated as a sovereign state entitled to exercise rights of self-defense.<sup>22</sup>

Especially, so far as the United States is concerned, the invasion of Cambodia rests on a claim of *collective* self-defense. Such a claim places a heavier burden of demonstration on the claimant, as its own territory and political independence are not at stake. Some experts even argue that under no circumstances can a state satisfy the requirements of self-defense merely by associating its action with a state that is acting in valid individual self-defense: *alliance relations* are not sufficient to vindicate the claim of the non-attacked state to participate in the exercise of rights of collective self-defense. The infringement of some more direct legal interest must serve as the basis of the claim to join in the defense of an attacked state.<sup>23</sup> The United States has no such distinct legal interest in relation to the defense of South Viet-Nam—neither regional, cultural, historical, nor even ideological—such as would justify its participation in the Cambodian invasion, even if South Viet-Nam could validly claim to be acting in self-defense. Dr. Bowett, who argues in favor of this restrictive view of col-

<sup>21</sup> For one persuasive analysis along these lines see Louis Henkin, "Force, Intervention, and Neutrality in Contemporary International Law," 1963 Proceedings, American Society of International Law 147-162.

<sup>22</sup> But see Vietnam and International Law, Legal Memorandum prepared by the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam 34-41 (2nd rev. ed., 1967).

<sup>23</sup> D. W. Bowett, Self-Defence in International Law 206, 216-217 (1958).

lective self-defense, emphasizes the distinction between self-defense and the enforcement of international law:

... our contention is simply that a state resorting to force not in defence of its own rights, but in the defence of another state, must justify its action as being in the nature of a sanction and not as self-defence, individual or collective. The aim is to redress the violation of international law, not to protect its own rights.<sup>24</sup>

Such a view takes seriously the idea of "self" embodied in the concept of self-defense. Bowett concludes that

The requirements of the right of collective self-defence are two in number; firstly that each participating state has an individual right of self-defence, and secondly that there exists an agreement between the participating states to exercise their rights collectively.<sup>25</sup>

In the context of the Cambodian operation it is clear that the first requirement of collective self-defense has not been met. Since the Charter fails to authorize states to uphold international law as a separate justification for the use of force, then it seems clear that the United States could not, under any circumstances, associate itself with a South Vietnamese claim of self-defense unless the exercise of the right of self-defense were converted into a United Nations action, as happened, of course, in relation to the defense of South Korea in 1950.

Such a conception of self-defense has been criticized as unduly restrictive and unrealistic, given the evolution of collective security arrangements. For instance, Myres S. McDougal and Florentino P. Feliciano, in a major work on the modern international law of force, contend that collective self-defense can be validly claimed "whenever a number of traditional bodies-politic asserting certain common demands for security as well as common expectations that such security can be achieved only by larger cooperative efforts . . . present themselves to the rest of the general community as one unified group or collectivity for purposes of security and defense."<sup>26</sup> This broader conception of collective self-defense underlies the various regional security pacts that the United States organized during the Dulles era as part of its containment policy directed at what was conceived to be a monolithic Communist movement intent upon world conquest.<sup>27</sup> Under this broader view of collective self-defense, which is probably more descriptive of practice and is generally accepted as being compatible with modern international law, the United States would be entitled to join in the Cambodian operation *provided* the facts validated

<sup>24</sup> *Ibid.* 207.

<sup>25</sup> *Ibid.*; see also J. Stone, *Legal Controls of International Conflict* 245 (1954), especially the assertion that "under general international law, a State has no right of 'self-defence' in respect of an armed attack upon a third State."

<sup>26</sup> McDougal and Feliciano, *Law and Minimum World Public Order* 248 and, generally, 244-253 (1962).

<sup>27</sup> Stanley Hoffmann has recently written that "Professor McDougal's theory . . . will remain an astounding testimony to the grip of the Cold War on American thought and practice." "Henkin and Falk: Mild Reformist and Mild Revolutionary," 24 *Journal of International Affairs* 118-126, at 120 (1970).

the underlying claim by South Viet-Nam. Even McDougal and Feliciano place a *higher* burden of demonstration for claims of collective than for individual self-defense:

. . . it may be appropriate to require a higher imminence of attack and more exacting evidence of compelling necessity for coercive response by the group as such than would be reasonably demanded if the responding participant were a single state.<sup>28</sup>

As it is, "the traditional requirements imposed upon resort to self-defense" are most exacting: ". . . a realistic expectation of instant, imminent military attack and carefully calculated proportionality in response."<sup>29</sup> There was nothing about the events in Cambodia that could qualify as establishing "a realistic expectation" of "instant, imminent military attack" such as could justify a claim of individual self-defense under these circumstances. Since it is more difficult to establish a claim of collective self-defense than individual self-defense, the demonstration that no basis for individual self-defense exists entails a rejection of the official United States argument.

Prior to May 1, 1970, the invasion date, there was no report of increased fighting along the border, and there were no indications of increased South Vietnamese or American casualties as a result of harassment from across the Cambodian border. Mr. Nixon never claimed more than that the expansion of the Cambodian base area might place American troops in great jeopardy by April, 1971 (or almost a year after the invasion). Such a contention overlooks the prospects for interim changes either by way of negotiated settlement or successful Vietnamization of the war. The Cambodian base areas were sanctuaries used to provide logistic support to the anti-régime side in the war to control South Viet-Nam.<sup>30</sup> In this sense, and to a far greater extent, the United States has relied upon external base areas in Japan, South Korea, Thailand, Okinawa, Guam, and elsewhere, to conduct its belligerent operations in South Viet-Nam. Would the United States regard a Soviet air strike against these base areas as a legitimate exercise of the right of collective self-defense by North Viet-Nam or by the Provisional Revolutionary Government of South Viet-Nam? Consideration of a hypothetical reciprocal claim helps to expose the unreasonableness of the United States position and the utter absurdity of the Administration contention that expanding the combat area across the Cambodian border is not a major escalation of the war. Note also that this same unreasonable-

<sup>28</sup> McDougal and Feliciano, *op. cit.* 251.

<sup>29</sup> *Ibid.* 67; the most widely relied-upon description of conditions appropriate for a claim of self-defense was given by Daniel Webster on April 24, 1841, in a diplomatic note to Canada. Mr. Webster, in his capacity as U.S. Secretary of State, wrote that there must be shown by the claimant government a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." 29 British and Foreign State Papers 1129, 1138 (1840-1841).

<sup>30</sup> A learned and instructive discussion of the status of sanctuaries in international law is present in Fried, "United States Military Intervention in Cambodia in the Light of International Law," paper presented to the International Conference of Lawyers on Vietnam, Laos, and Cambodia, Toronto, Canada (May 22-24, 1970) 7-25 (hereinafter cited as Fried).



ness pertains to the South Vietnamese claim of self-defense which is put forward in more extravagant terms, relating itself to the internal Cambodian struggle for control, to the treatment of Vietnamese inhabitants by the Cambodian régime, and to the presence of North Vietnamese military personnel in any part of Cambodia. Any objective reading of the facts amply demonstrates that there was no *instant necessity* that might lend legal support to the Cambodian operation as an exercise of the right of individual or collective self-defense.

There is, in addition, no relationship of proportionality between the claim to invade Cambodia and the alleged impact on the struggle taking place in South Viet-Nam. Indeed, it was the build-up of pressure by the Lon Nol régime to alter the long persisting *status quo* in the base areas that appeared to be the initial unsettling force. The Lon Nol régime insisted that the North Vietnamese cease to use these base areas altogether, and, as we have already mentioned, also brought provocative pressure to bear on Vietnamese residents living in Cambodia. Such tactics, presumably a dual consequence of the weakness and reactionary orientation of the régime and the strength of American pressure, were part of the effort by the Lon Nol régime to mobilize support in the building struggle against the forces supporting the deposed Prince Sihanouk, who has in recent months joined dynastic with revolutionary legitimacy, a potent political linkage in any developing country. Therefore, the main precipitating event seems to be the consequence of changes in the political situation in Cambodia, rather than any *imminent* threat to South Viet-Nam; these changes were supported, not resisted, by American action. The American claim to destroy base area camps within the 21.7-mile border strip had the predictable consequence of pushing North Vietnamese and NFL troops back toward the center of Cambodia, intensifying the struggle for political control of Cambodia, and utterly destroying any prospect for the resumption of the delicate, if stable, condition of relative neutrality that Cambodia had managed to maintain under Sihanouk's rule. Therefore, the Cambodian operation seemed ill-conceived in relation to the principal alleged danger, the collapse of a pro-Western régime in Phnom Penh and its replacement by a radical anti-Western régime.

Mr. Nixon's report to the nation on June 3, 1970, stated that "all of our major military objectives have been achieved" in the Cambodian operation.<sup>81</sup> These objectives were described on that occasion mainly in terms of the capture of war matériel. Reports from military officers in the field indicated that probably no more than half of the war matériel stored in the base areas was discovered and captured by the withdrawal date of June 30, 1970.<sup>82</sup> In that event, the alleged success of the operation would seem vir-

<sup>81</sup> 62 Department of State Bulletin 762 (1970). The legal status of the invasion is not, of course, determined by the military success or failure of the operation. However, the reasonableness of a limited claim of self-defense depends on the proportionality of means and ends, and an assessment of military success or failure may give some insight into whether the force used was proportional to the end sought.

<sup>82</sup> New York Times, June 9, 1970, pp. 1, 5. Vice President Agnew described American objectives in more grandiose (and possibly more criminal) terms in the following

tually unrelated to the level of future military activity in South Viet-Nam. There is no evidence that equipment shortages are likely to result for North Viet-Nam or the NLF if as much as one half or more of the war matériel captured will still remain in the Cambodian base areas. In addition, the North Vietnamese, especially during the heavy bombardment of North Viet-Nam between February, 1965, and October, 1968, demonstrated great resourcefulness in circumventing efforts to interdict their supply routes.

The element of proportionality seems absent from the claim of self-defense, whether the claim is considered from the angle of the United States or from the perspective of the Saigon régime. Indeed, the invasion seems to have aggravated the very conditions it was designed to cure. Even long-time supporters of American military action have criticized the invasion as lacking any rational relationship to its proclaimed goals.<sup>33</sup> Certainly, Mr. Nixon's assertion that the Cambodian operation would shorten the war seems without any foundation. The arena of violence has been widened, a new country has become a theater of military operations and its people a victim of invasion,<sup>34</sup> and, taken in conjunction with the stepped-up American military operations in Laos, an all-Indochina war has emerged in place of the Viet-Nam War. Such an enlargement of the arena of violence and an expansion of principal actors involved in combat appear greatly to complicate the search for a negotiated settlement, which remains the proclaimed end of United States policy.

The Cambodian operation is properly compared to the earlier American extension of the war to North Viet-Nam, and much of the legal analysis of self-defense claims in the earlier setting fits the Cambodian operation as well.<sup>35</sup> From the point of view of legal doctrine, the assertion of a claim of self-defense against Cambodia has even less merit than did the earlier

---

statement: "The purpose of the strikes into the sanctuaries is not to go into Cambodia but to take and reduce these supply depots, *the hospital complexes*, the command network, the communications, the weapons and munitions factories and maintenance facilities that are there." (Emphasis added.) Hospitals as a military objective of the invasion were mentioned a second time in Mr. Agnew's remarks. See transcript of CBS TV broadcast "Face the Nation," May 3, 1970, p. 3; the second reference is to be found on p. 6.

<sup>33</sup> See Letter to the Editor, New York Times, May 25, 1970, p. 32, signed by five men, including Bernard Brodie, Morton H. Halperin, and Thomas Schelling, who write of themselves and of the Cambodian operation as follows: "We, the undersigned, have spent our professional lives in the study of strategy and American foreign policy . . . the move into Cambodia simply does not make sense." See also Les Gelb and Morton H. Halperin, "Only a Timetable Can Extricate Nixon," Washington Post, May 24, 1970, pp. B1-B2.

<sup>34</sup> After the South Vietnamese armed forces captured the Cambodian city of Kompong Speu, extensive pillage took place. One of the Cambodian military officers on the scene, Major Soering Kimsea, reacted by saying that "the population now has more fear of the South Vietnamese than of the Vietcong. They took everything—furniture, radios, money. . . . What they didn't take, they broke. . . . Monks were robbed too." New York Times, June 23, 1970, p. 2.

<sup>35</sup> I have written a legal analysis of this earlier phase of the conflict. See I Falk, ed., *The Vietnam War and International Law* 362-400, 445-508 (1968); see Vols. I and II for main legal positions in relation to the war.

assertion against North Viet-Nam. To cross the Cambodian boundary with large armies and supporting air-force bombardments is to make a unilateral decision to attack the territory of a foreign country under circumstances where an armed attack on South Viet-Nam was neither imminent nor probable. The most that can be said is that political changes taking place in Cambodia were jeopardizing its neutrality from both sides. This kind of circumstance may involve competing claims of limited intervention, but it certainly does not support a claim of self-defense.

Such a conclusion must be understood in relation to the entire effort of international law to remove from national governments the discretion to initiate or expand warfare across boundaries on the basis of a calculation of national advantage. Central to this endeavor is the restriction of occasions upon which it is permissible to cross openly the boundary of a foreign country with armed force. The United States, until the Viet-Nam War, had played a central rôle in using international law to build slowly an external framework of restraint based on widely shared normative conceptions.<sup>36</sup> Although it is true that no agreed definitions of self-defense exist, there has been a general acknowledgment that the core meaning of self-defense relates to responses against either an *actual armed attack* or a credible impression of *imminent armed attack*.<sup>37</sup> The diplomatic practice of the United States Government lends support to this interpretation—the United States Government has condemned as aggression the attacks by North Korea on South Korea in 1950, by Israel on Egypt in 1956, and by Belgium on the Congo in 1960, in which instances there was considerable provocation by the target countries. Egypt, for instance, was being used as a base area for persistent and *officially sanctioned* attacks by paramilitary forces upon Israeli territory, with the scale and frequency of attacks mounting in the months before the invasion. Nevertheless, the United States interpreted the Suez operation as a violation of the Charter and of general international law. In other words, the mere use of foreign territory as a base area has not been previously claimed by the United States to constitute such a violation of rights as to validate a claim of self-defense.<sup>38</sup> Under these circumstances the assertion of such a claim is

<sup>36</sup> There has been a steady erosion of this rôle under the pressure of geo-political and ideological considerations. Among the instances where this pressure has been resolved at the expense of legal restraints are Guatemala (1954), Lebanon (1958), Bay of Pigs (1961), the Stanleyville operation (1964), Dominican Republic (1965), as well as a number of less visible interventions in the affairs of foreign countries through the activities of the CIA. See note 2 above.

<sup>37</sup> There are certain special circumstances of imminence, especially in relation to nuclear weapons, that make it unreasonable to limit the right of self-defense to the victim of the first act of violence. The Cuban missile crisis of 1962 and the Middle East War of 1967 are cases where it is plausible to argue that the "victim" state was also the one that struck first.

<sup>38</sup> The precedents relied upon by Mr. Stevenson to establish a basis for the invasion are not very convincing, as they consisted either of brief "incidents" or involved extensions of claims of "hot pursuit." Stevenson, pp. 768-769. The United States has, indeed, denied such precedents to other countries claiming the right to strike across boundaries against external base areas. Such strikes, because of their short duration,

itself an illegal act of aggression that may amount, if on a sufficient scale, to an armed attack upon Cambodia giving rise to a right of self-defense on the part of the state of Cambodia (even if this right is not claimed by the presently constituted regime).

In summary, then, the American contention that the Cambodia operation is a valid exercise of the right of collective self-defense seems without foundation in international law for reasons of *doctrine*, *diplomatic practice*, and *public policy*.

*A Special Limited Claim.* The American legal position has also been asserted in the form of a special limited claim to eliminate the base areas on Cambodian territory. This position has not been developed in a serious fashion by the United States Government. The Deputy Secretary of Defense, David Packard, did allude to this line of justification in the course of a virtually unreported speech given to the Rotary Club in Fort Worth, Texas. On that occasion Mr. Packard did say:

Under international law we had every right to strike the enemy in areas put to such uses. The inability of Cambodia over a period of years to live up to its legal obligations as a neutral state freed us from the obligation to stay out of these areas. They were not under Cambodian control. They were not neutral.

Interestingly, Mr. Packard attributed the timing of the invasion to the changed political situation: "Our failure to disrupt the Cambodian bases earlier was dictated by political considerations which, as long as Prince Sihanouk remained in power, it was felt overrode military considerations." Mr. Packard went on to say: "With the downfall of Sihanouk, there was no longer any reason to believe that the action by South Vietnam or the United States in the occupied border areas would be objectionable to the government of Cambodia."<sup>39</sup> Note that Mr. Packard does not rest the case on any imminent threat to the security of American forces or on any building up of North Vietnamese capabilities. He did, in passing, mention the expansion of base area operations by "occupying enemy forces" as increasing "the potential danger faced by American forces." What is important here is that, in the context of arguing on behalf of the alternate theory of enforcing Cambodia's neutral duties, Mr. Packard undercuts any assertion that conditions of imminent attack created an emergency justifying recourse to self-defense.

On its own grounds, however, the claimed right to make a limited use of force to remedy the failure by Cambodia to uphold its neutral duties vis-à-vis North Viet-Nam faces formidable difficulties.<sup>40</sup> First of all, the South Vietnamese claim is clearly not limited to the enforcement of neutral

---

small magnitude, and generally light casualties, represent a far less serious use of force than the Cambodian invasion.

<sup>39</sup> Address by David Packard, Department of Defense News Release, May 15, 1970, p. 5.

<sup>40</sup> See Note from Columbia Law Review, "International Law and Military Operations against Insurgents in Neutral Territory," reprinted in 2 Falk, ed., *The Vietnam War and International Law* 572-593.

duties; it takes precedence over the American definition of the mission and provides the primary legal measure of what is being claimed. Secondly, sustained uses of overt force against foreign territory by governments for purposes other than self-defense are not compatible with the language of the Charter or the practice of the United Nations.<sup>41</sup> Thirdly, the United States has consistently condemned as illegal much more modest claims to use force against base areas across boundaries.

During the Algerian war of independence, French forces in 1957 attacked Sakret-Sidi-Yousseff, a town in Tunisia being used as a sanctuary and staging area by Algerian insurgents. The United States rejected the French claim that it was permissible to destroy external base areas and supply depots on the Tunisian side of the Algerian border and expressed its public displeasure, even though France was an American ally at the time. Similarly, Adlai Stevenson, as United States Representative in the Security Council, condemned in 1964 a British raid against Habir in Yemen, which was in reprisal for the use of the town as a base for operations against the British colonial occupation of the Protectorate of Aden. Finally the United States has on numerous occasions joined in criticizing and censuring Israel for attacking external base areas. The expansion of the theater of violent acts across a boundary by overt and official action has been consistently regarded as illegal under modern international law.

Mr. Packard's assertion that the Lon Nol Government would probably not find an invasion objectionable is also a very fragile basis upon which to launch a large-scale invasion that caused the death and displacement of many Cambodians, subjected the country to civil war conditions, and has entailed widespread destruction of Cambodian villages, forests, and croplands. No United States official even contends that Cambodia requested or even authorized the invasion, nor was there evident any attempt to secure consent in advance.<sup>42</sup>

Furthermore, contrary to Mr. Nixon's contention on April 30th that "American policy" since 1954 has been "to scrupulously respect the neutrality of the Cambodian people," the number of border-crossing and airspace violations has been extensive ever since the intensification of the Viet-Nam War in 1964.<sup>43</sup> Prince Sihanouk complained frequently about American violations of Cambodian neutrality, prominently displayed in Phnom Penh captured American equipment, complained to the International

<sup>41</sup> For an analysis of the compatibility between special claims to use force and international law (including the U.N. Charter), see Falk, "The Beirut Raid and the International Law of Retaliation," 63 A.J.I.L. 415 (1969). Note that the Beirut raid conducted by Israeli military units on Dec. 28, 1968, was far more limited in scope, duration, and effects than has been the Cambodian operation. It seems questionable whether a use of armed forces on the scale of the Cambodian operation can be ever considered as a special claim falling outside of the Charter, but must be justified, if at all, as an exercise of the right of self-defense. Cf. Stevenson, pp. 768-769.

<sup>42</sup> See text above, p. 10 and note 19.

<sup>43</sup> For summary of U. S. and South Vietnamese violations of Cambodian neutrality prior to April 30, 1970, see Kahin, note 18 above, p. 57429; cf. also Chomsky, "Cambodia," New York Review of Books 39-50, at 40 (June 4, 1970); Fried, Appendix 1, "Protests by Cambodia about Violations of its Territory," pp. 1-9.

Control Commission, and invited American citizens to visit Cambodia and inspect for themselves evidence of U. S. raids against border areas. These American incursions, although more disruptive for Cambodians than the North Vietnamese use of Cambodian territory as a sanctuary, did not draw Cambodia into the war, and were generally consistent with the maintenance of Cambodian peace and security and the confinement of the war to the territory of South Viet-Nam.

Furthermore, there seems to be something peculiarly perverse about widening the war at a time when the official claim is that American involvement is being diminished. Casualties have been far lower during the withdrawal process initiated by Nixon than at other times during the war. If these base areas could be tolerated for so many years—even when American objectives were being set forth in more ambitious terms—then what was the reason to assert suddenly a claim based on Cambodia's failure to uphold neutral duties? The only partially satisfactory explanation of the timing of the Cambodian operation has to do with the fear that the Lon Nol régime was on the verge of collapse.<sup>44</sup> Such explanation lacks much plausibility because the invasion has had the primary effect of pushing the régime closer to either foreign dependence or collapse and may encourage the virtual partition of the country between South Viet-Nam, North Viet-Nam, Laos, and Thailand. Such an outcome has nothing to do with the enforcement of neutral rights, or, for that matter, with self-defense.

As with the claim of self-defense, there is no support in doctrine, practice or policy to vindicate an American claim of the proportions of the Cambodian operation. In the past, the organs of the world community have consistently condemned *lesser* claims—single raids lasting a few hours—to attack or destroy external base areas relied upon by the insurgent side in an internal war. Here, the limits are not narrow—a 21.7-mile territorial belt and a period of two months, besides less restrictive time and space zones for air attacks.<sup>45</sup> Mr. Packard reports that even these limits were imposed on the operation by the President “because he wants the American people to understand that this is a temporary and limited operation.”<sup>46</sup> What about respect for norms prohibiting border-crossing uses of force? What about the welfare and autonomy of the Cambodian people who are the most permanent victims of the claim? Again, we are left with an *imperial* impression, the President giving an *internal* account,

<sup>44</sup> For speculation on motivation see Schurmann, “Cambodia: Nixon's Trap,” *Nation* 651-656 (June 1, 1970); Scott, “Cambodia: Why the Generals Won,” *New York Review of Books* 28-34 (June 18, 1970).

<sup>45</sup> The air strikes have continued on a regular basis since the July 1 withdrawal deadline. President Nixon has made no effort to change his earlier pledge on this point. It also is clear that these air strikes are intended to influence the military struggle in Cambodia, as well as to interdict supplies and troops that might be used against Americans in South Viet-Nam. A new “credibility gap” has arisen as a result of the discrepancy between the actual bombing patterns in Cambodia and the official statements on the subject. A useful summary of this situation is to be found in a newspaper article by Sterba, note 12 above.

<sup>46</sup> Packard, *loc. cit.* 6.

without any sense of obligation to respect world standards. Such a peremptory claim to enforce neutral rights is the essence of unilateralism which it has been the overriding purpose of modern international law to discourage and moderate in the area of war and peace.

*Procedural Norms.* One of the most disturbing features of the American rôle in the Cambodian operation is the evidence that the U. S. Government has acted without any sense of respect for the rules and procedures of law and order on an international level. The minimum legal burden imposed on a Head of State is to provide a legal justification to the international community for undertaking action that raises fundamental issues of international law as manifestly as does the invasion of a foreign country.

Yet the American claim to undertake the Cambodian operation was made in peremptory form. American policy was put forward as an exhibition of sovereign discretion, moderated by some sense of limits, but not subject to review or challenge. In this spirit it is necessary to recall Mr. Nixon's assertion forewarning foreign governments that any effort to regard our invasion of Cambodia as a serious breach of international order—or as a flagrant violation of the Charter—would be entirely unacceptable to us. Even the outrageous invasion of Czechoslovakia in 1968 was accompanied by some Soviet effort to give an international accounting, admittedly a flimsy one. I am comparing the American assertions vis-à-vis Cambodia with a sub-legal standard of comparison by citing the Czech occupation, and not in any sense intimating that the Soviet contention was consistent with the obligations of international law just because there was some effort to provide an international justification for the action. The provision of an explanation in such a setting is a necessary, but hardly *sufficient* condition of legality.

The United States did make certain gestures of compliance with Charter norms after the Cambodian operation was under way. Ambassador Yost made a short report on behalf of the United States to the President of the Security Council on May 5, 1970, explaining that the Cambodian operation was an exercise of the right of collective self-defense.<sup>47</sup> Administration officials have subsequently developed a variety of legal arguments in response to objections raised in the domestic arena. To put forward legal arguments is not, of course, to be confused with the over-all persuasiveness of a legal position which must depend on weighing an argument against the facts, norms, and policies at stake, as well as against

<sup>47</sup> U.N. Doc. S/9781, *loc. cit.* note 3 above. Ambassador Yost's legal position was developed as follows: "The measures of collective self-defense being taken by U. S. and South Vietnamese forces are restricted in extent, purpose and time. They are confined to the border areas over which the Cambodian Government has ceased to exercise any effective control and which has been completely occupied by North Vietnamese and Viet Cong forces. Their purpose is to destroy the stocks and communications equipment that are being used in aggression against the Republic of Viet-Nam. When that is accomplished, our forces and those of the Republic of Viet-Nam will promptly withdraw. These measures are limited and proportionate to the aggressive military operations of the North Vietnamese forces and the threat they pose."

16715

arguments developed in support of contrary legal positions. For reasons already discussed, the United Nations cannot provide a suitable forum for legal appraisal in the Indochina context. In any event, the United States since the beginning of its involvement in the Viet-Nam War has displayed only a nominal willingness to operate within a Charter context.<sup>48</sup>

Beyond the obligation to justify recourse to international force to the Security Council is the obligation to seek a peaceful settlement of an international dispute. Articles 2(3) and 33 of the Charter express this obligation in clear form. The Cambodian operation is only the latest instance of a continuing American refusal to seek a peaceful settlement of the conflicts that exist in Indochina. It is not possible here to make a detailed analysis of the failure by the United States to respond to the NLF proposal of May, 1969, for a settlement of the Viet-Nam War, the American failure to offer any counter-proposal, and the failure to appoint a negotiator of prestige and stature from November, 1969, when Henry Cabot Lodge resigned, until June, 1970, when David Bruce was designated as his successor. The Thieu-Ky Government has never made a secret of its opposition to a negotiated end to the war; its presence in Paris is a result of American pressure. Indeed, President Nixon's initial appointment of Mr. Lodge, known as an ardent supporter of the Saigon régime, and his subsequent non-replacement of a chief delegate for more than seven months after Mr. Lodge's resignation seemed designed to *reassure* the Thieu-Ky group that the United States has no intention of encouraging serious negotiations in Paris, rather than to convince North Viet-Nam and the Provisional Revolutionary Government of South Viet-Nam that we are interested in serious negotiations.<sup>49</sup> Such an American posture is made even more cynical by the frequent reiteration to the American public of our eagerness for serious negotiations, and by the allegation that negotiations are being blocked by the stubborn refusal of the other side to discuss anything other than the terms of its "victory." The effort to convey contradictory messages to the Saigon régime and to the American public places an overwhelming burden upon the credibility and sincerity of our negotiating posture and represents a serious failure to carry out the procedural norms relating to peaceful settlement.

The Cambodian operation, then, illustrates a refusal on the part of the United States to comply with minimum procedural norms of international law:

(1) There has been no indication of any willingness to submit to community review the claim to attack a foreign state.

<sup>48</sup> For more detailed appraisals of the U.N. rôle in relation to the Viet-Nam War, see articles by Bloomfield and Gordon in 2 Falk, ed., *The Vietnam War and International Law* 281-357.

<sup>49</sup> For the text of the ten-point proposal setting that was supported by North Viet-Nam and the National Liberation Front and put forward in the Paris negotiations, see Kolko (ed.), *Three Documents of the National Liberation Front* 15-23 (1970). This proposal represents a serious basis for negotiations. It has never drawn either a response or a counter-proposal of comparable detail from the U. S.-South Vietnamese Delegations.



(2) There has been no official effort to reconcile the invasion with the requirements of international law beyond the nominal letter of report to the Security Council. This failure to provide an external explanation of recourse to force against a foreign country violates Charter norms, at least as these norms have been interpreted on past occasions by the United States in relation to foreign states.

(3) There has been a failure to comply with the legal duty to seek a peaceful solution to the conflicts taking place in Indochina.

(4) South Viet-Nam has also provided no accounting for its more extensive claims to occupy Cambodian territory, and the United States seems legally responsible to the full extent of these wider claims—claims which even its own legal arguments, developed since April 30th, have not tried to justify.

#### IV. SOME CONCLUDING WORLD-ORDER COMMENTS

The development of international law is very much a consequence of the effective assertion of claims by principal states. Such claims create legal precedents that can be relied upon on subsequent occasions by other states. The Cambodian operation, in this sense, represents both a violation of existing procedural and substantive rules of international law and a very unfortunate legislative claim for the future. It will now be possible for states to rely on the Cambodian operation in carrying out raids against external base areas or even when invading a foreign country allegedly being used as a sanctuary. It will no longer be possible for the United States Government to make credible objections to such claims. The consequences of such a precedent for the Middle East and southern Africa seem to be highly destabilizing.

In this case, the precedent was established without any effort to justify the claim from the point of view of international public policy. One of the important thresholds of restraint had involved respect for international boundaries, especially with regard to the initiation of full-scale armed attacks. International law has relied on second-order restraints to limit the combat area, even when the wider prohibition on recourse to violence has failed. The precedent set by the Cambodian operation seriously erodes this second-order restraint and appears to increase the discretion of national governments as to the permissible limits of force in international affairs.

Covert and sporadic uses of force across international boundaries have been part of the way in which a balance has been reached between the use of external sanctuaries by insurgent groups and the security of the target state. Peremptory strikes against these external base areas have been generally condemned, but the short duration of these claims and the direct response to provocative actions by groups operating from the target state have usually meant that such retaliatory force has not greatly nor indefinitely expanded the theater of combat operations. The Cambodian operation was a campaign that included at its height more than 74,000 men (31,000 Americans, 43,000 South Vietnamese), heavy air support, the occupation of a large area of foreign territory for a long period of time,

and the prospect of future incursions by land and air. As such, it widens considerably the prior understanding of the limits of retaliatory force. Such widening is of serious consequence for at least three reasons:

(1) There are many conflict situations in which one or both contending factions can claim the need to attack external base areas.

(2) The claim to destroy the external base areas of the insurgent will undoubtedly generate counter-claims to destroy the external base areas of incumbent factions.

(3) The unilateral character of a determination as to when it is appropriate to attack external base areas is very subjective, tends to be self-serving, and is difficult to appraise.

In essence, then, the Cambodian operation represents a step backward in the struggle to impose restraints on the use of force in the conduct of foreign relations. In the specific setting of the Viet-Nam War, the Cambodian operation is a further extension of the United States' illegal involvement in Indochina. It has widened the theater of combat, complicated the task of negotiating a settlement, brought additional governments into positions of active co-belligerency, and has been convincingly justified by neither a demonstration of military necessity nor a claim of legal prerogative.

The Cambodian operation is, perhaps, the most blatant violation of international law by the United States Government since World War II, but it represents only the most recent instance in a series of illegal uses of force to intervene in the internal affairs of a sovereign society. Until Cambodia, the United States Government either disguised its interventions, as in Guatemala in 1954, or made a serious effort to justify them, as in relation to the Dominican intervention of 1965. The Cambodian operation represents a peremptory claim to take military action; such action violates the letter and spirit of general international law and the Charter of the United Nations, and seems to vindicate the allegation that the United States is acting in Southeast Asia with imperial pretensions rather than as one among many states subject to a common framework of minimum restraint in its international conduct.

Within the present world setting, the United States is contributing to the deterioration of the quality of international order rather than to its improvement. Such a rôle is particularly tragic at this juncture of world history, a crossroads in human destiny at which the converging dangers of population pressure, ecological decay, and the possibility of nuclear war create the first crisis of world order that threatens the survival of man as a species and the habitability of the planet.<sup>50</sup> The prospects for creative response are vitally linked with the orientations toward issues of international order that prevail in the principal national centers of power and authority in the world. Unless constructive changes are sought by national governments, there is no way to meet the threats posed, in part, by

<sup>50</sup> A depiction of this crisis and some proposals for overcoming it are the subject of my forthcoming book: *This Endangered Planet: Prospects and Proposals for Human Survival*, to be published in 1971 by Random House.

the present fragmented political organization of world society. One precondition for change is a greater reluctance by powerful governments to rely on military capabilities to promote their foreign policy goals. Recent actions by the Soviet Union and by the United States have displayed, above all, a return to the political consciousness associated with pre-World War I attitudes of sovereign prerogative and *raison d'état*, and a total abandonment of the serious search for a new system of world order responsive to the needs of our time, except to be prudent about provocative acts in a crisis situation in which the nuclear contingency appears relevant. It is in this sense that the Cambodian operation bears witness to the persistence of the war system and to the strength and vitality of the most destructive attitudes and forces active in our world.

There is, perhaps, some reason for encouragement in the report that the Secretary of State, William P. Rogers, circulated a memorandum addressed to the Assistant Secretary of State, dated June 13, 1970, in which the following language appears:

When crises occur in any area of the world those in the department who are most directly involved should be careful to insure that the legal implications are not overlooked.<sup>61</sup>

Imagine, if such sentiments began to shape the choice of policy, as well as to influence the process of its rationalization!

<sup>61</sup> New York Times, June 24, 1970, p. 3.

# THE CONSTITUTIONALITY OF THE CAMBODIAN INCURSION

*By William D. Rogers \**

## I

Rarely, if ever, has the relationship between the President's authority as Commander-in-Chief and Congress's power to declare war been thrown into such sharp relief as by the Cambodian incursion. The issue is quite simple: Was the President within his power under Article II, Section 2, of the Constitution in ordering United States ground troops into Cambodia on April 30, 1970?<sup>1</sup> The Constitutional question stands alone, in this instance freed of the other issues which tended to divert debate over United States involvement in South Viet-Nam and recent Presidential actions elsewhere.

The initial commitment of ground forces to Viet-Nam was defended in major part by reference to the SEATO Treaty.<sup>2</sup> The argument was then that the United States had undertaken a commitment in SEATO to meet a common danger in the event of an armed attack against a member or a protocol state. The Senate, in consenting to the ratification of the treaty, it was said, had made a formal determination that a Communist armed attack on South Viet-Nam endangered the United States. All else was for the Executive. The President was thus forearmed with the power and responsibility to determine whether such an armed attack had occurred and how the United States should thereupon execute its solemn treaty obligations to respond, even if no other party to the treaty requested us to do so. Whatever one may say about the force of this argument—and there is a good deal to be said<sup>3</sup>—the Cambodian incursion has not been

\* Of the District of Columbia Bar.

<sup>1</sup> This is an issue different from that of the Constitutionality of the Cooper-Church Amendment, H.R. 15628, 91st Cong., 2d Sess. (1970), or the McGovern-Hatfield Amendment, H.R. 17123, 91st Cong., 2d Sess. (1970). The former restricts the use of appropriated funds in Cambodia after June 30, 1970; it therefore neither judges the Constitutionality of the incursion nor purports to restrict the President in the exercise of his authority as Commander-in-Chief in the future. In this fashion, Cooper-Church avoided the Constitutional conflict. McGovern-Hatfield is also an assertion of the Congress's power over the purse. It would force a withdrawal—absent a declaration of war—from Indochina by June 30, 1971. Like Cooper-Church, it does not seek to judge the Constitutionality of either the initial commitment of force to Viet-Nam or the April 30 incursion into Cambodia.

<sup>2</sup> Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S. Treaties 81, T.I.A.S., No. 3170; 60 A.J.I.L. 646 (1966). See U. S. Dept. of State, *The Legality of United States Participation in the Defense of Viet-Nam*, Part IV, B, 54 Dept. of State Bulletin 474 (March 4, 1966), 60 A.J.I.L. 565 (1966); reprinted in 1 *The Vietnam War and International Law* 583 *et seq.* (R. Falk ed., 1968) (hereinafter cited as *Memorandum*).

<sup>3</sup> See Wormuth, "The Vietnam War: the President versus the Constitution," in 2 *The Vietnam War and International Law* 711, 767-780 (R. Falk ed., 1969).

explained by the SEATO Treaty for the purpose of determining the scope of the President's and the Congress's war powers.

Cambodia is of course a "protocol" state, and thus declared to be within the scope of the treaty by its parties. But the President's explanation of the reasons for his action foreclosed any reliance on SEATO in this instance. The challenge he was meeting was not, he said, an armed attack against Cambodia. The challenge was the sanctuaries along the border containing headquarters, storage, and regroupment facilities which threatened the allied armed forces in South Viet-Nam. To have relied upon SEATO would not have squared with this statement of purpose. A SEATO justification would have meant that the incursion was for the purpose of defending the Government of Cambodia, and the Administration has taken great pains to deny that this was its purpose.<sup>4</sup> In short, the justification for the incursion is not to be found in SEATO, and the Administration does not rely on SEATO.

Nor was the justification to be found in the Tonkin Gulf Resolution<sup>5</sup> (although Tonkin Gulf sheds some interesting light on the domestic legal question, as to which more hereafter). Again, the question in the Cambodia case is simpler than it was in the case of our original Indochinese involvement. As to South Viet-Nam, the Administration contended that the President was justified by the Gulf of Tonkin Congressional authority to take "all necessary measures . . . to prevent further aggression." The 1966 State Department Memorandum put the matter thus:

[T]he legality of United States participation in the defense of South Viet-Nam does not rest only on the constitutional power of the President under article II. . . . In addition, the Congress has acted in unmistakable fashion [by the Gulf of Tonkin Resolution] to approve and authorize United States actions in Viet-Nam.<sup>6</sup>

The effect of the Gulf of Tonkin authorization, it was then said, was that of an exercise of the Article I Constitutional functions; it remained only for the President to determine what measures were necessary under the resolution, "including the use of armed force," to defend freedom in Southeast Asia. Similar contentions have been advanced with respect to the delegations implied in the Cuba, Formosa and Middle East resolutions.<sup>7</sup>

<sup>4</sup> In this respect, see the Legal Adviser's statement at the Hammarskjöld Forum of the Association of the Bar of the City of New York on May 28, 1970, 62 Dept. of State Bulletin 765 (1970). It makes no mention of SEATO. Instead, Mr. Stevenson said:

"As the President has made clear, the purpose of our armed forces in Cambodia is not to help defend the Government of Cambodia, but rather to help defend South Viet Nam and the United States troops in South Viet Nam from the continuing North Vietnamese armed attack." (Footnote omitted.)

<sup>5</sup> Public Law 88-408, Aug. 10, 1964, 78 Stat. 384.

<sup>6</sup> Memorandum, cited note 2 above, Part IV, C.

<sup>7</sup> Respectively, S. J. Res. of Oct. 3, 1962, 76 Stat. 697; Ch. 4, Public Law No. 4 (H. J. Res. 159), approved Jan. 29, 1959, 69 Stat. 7, and H. J. Res. of March 9, 1957, 71 Stat. 5. See 2 Falk, note 3 above, at 790; Moore, "The National Executive and the Use of the Armed Forces Abroad," in 2 *The Vietnam War and International Law* 808, 817 (R. Falk ed., 1969).

Both the Middle East and the Cuban resolutions were cited as underpinning the Executive power to deploy United States armed forces in potentially explosive situations, in the one case in the 1958 landing in Beirut,<sup>8</sup> in the second, in connection with the United States quarantine of Cuba in the 1962 missile crisis.<sup>9</sup>

But the Gulf of Tonkin Resolution did not support the Constitutionality of the incursion into Cambodia. Section 1, which relates to the attack on United States surface vessels which triggered the resolution, authorizes the President to take measures "to repel any armed attack." But armed attack from these sanctuaries was not asserted as the reason for the incursion.

Section 2 states in declarative terms that the nation is prepared to use, "as the President determines," "all necessary steps, including the use of armed force" in aid of a SEATO member or protocol state "requesting assistance in defense of its freedom. . . ." Cambodia did not request the assistance of United States forces. It did ask for arms, but the Administration has not claimed that the request for arms constituted the kind of request that the President, under the resolution, should meet with several divisions of United States ground troops. Thus, whatever one may say about the intent and legislative history of the Gulf of Tonkin resolution—and again there is something to say<sup>10</sup>—it is clear that the resolution did not support the incursion into Cambodia in this instance. And the resolution has, of course, since been repealed.<sup>11</sup>

In short, two of the three pillars to the South Viet-Nam Constitutional argument were not available for Cambodia. The Cambodia incursion balanced on one. It was a shaky balance.

## II

The single point on which the President's power was said to rest in this instance is his power as Commander-in-Chief. A fair summary of what was said by the President on April 30 and on June 3, by Secretary Rogers in his CBS interview on May 3,<sup>12</sup> and by Mr. Stevenson in his Hammar-skjöld Forum statement, is this: The Viet Cong and North Vietnamese had

<sup>8</sup> As to the Constitutional effect of the Middle East resolution, Secretary Dulles had this to say at his news conference of May 20, 1958, a few days before the landing at Beirut:

"All I say is that, when the Congress by an overwhelming vote declares that the independence and integrity of a certain country is vital to the peace and national interest of the United States, that is certainly a meaningful declaration, and it places upon the President a greater responsibility to protect, in that area, the peace and interests of the United States than would have been the case had there not been such a declaration." Doc. 316, 1958 American Foreign Policy, Current Documents 938-939 (May 20, 1958).

<sup>9</sup> Presidential Proclamation No. 3504, Oct. 23, 1962, 27 Fed. Reg. 10,401; 57 A.J.I.L. 512 (1963).

<sup>10</sup> See Wormuth, note 3 above, at 780-799; Velvel, "The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable," in 2 *The Vietnam War and International Law* 651, 674-681 (R. Falk ed., 1969).

<sup>11</sup> 116 Cong. Rec. S 9670 (June 24, 1970).

<sup>12</sup> 62 Dept. of State Bulletin 646 (May 25, 1970).

established "privileged sanctuaries" across the Vietnamese border in Cambodia, which were being used for supply, training, regroupment, test and recreation, communications, and headquarters in the war in South Viet-Nam. These sanctuary areas were a threat to the allied forces in South Viet-Nam, particularly during the period of reducing the United States armed presence in South Viet-Nam. So, to eliminate the threat to United States and allied forces and to insure observance of the timetable of withdrawal, the United States attacked the sanctuaries.

The attack was large. Upwards of 50,000 men were involved, together with heavy bombing and artillery fire. The incursion was to be for sixty days, with even longer-term air bombardment for "interdiction" and for support to Cambodian and Vietnamese ground forces. And the incursion was made without notice to, or consultation with, the Congress, to say nothing of the Cambodian authorities. The President acted on his own.

Was he within his authority as Commander-in-Chief in ordering the attack? The Constitution speaks in maddening generalities. With Congress is lodged the responsibility to "declare" war, to raise and support the armies with two-year appropriations and to take other measures of national war power.<sup>13</sup> The President is to be Commander-in-Chief of such armies as the Congress determines to raise and support,<sup>14</sup> presumably in such wars as the Congress may declare and for other purposes as well, although the Constitution is silent as to what these purposes beyond declared wars may be. And, to return full circle, the Congress is to make all "necessary and proper" laws for the execution of "all . . . powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>15</sup>

The experience in England would suggest that the Founders brought to the debate in Philadelphia a determination to insure civilian command of the armed forces and to permit the Congress, as the heir to Parliament, a voice in the determination to resort to armed conflict. And the contemporary practice of the Founders after Independence, through the French Naval War in 1798, the War of the Barbary Pirates, and the War of 1812 reflects no little concern with the limits to Executive authority.<sup>16</sup>

In his report to Congress of December 8, 1801, for example, Jefferson referred to the spectacular victory of the schooner *Enterprise* over an armed cruiser from Tripoli during the War of the Barbary Pirates. The American vessel was acting under strict orders not to attack, only to protect commerce from attack. Jefferson reported laconically that:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [enemy] vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the

<sup>13</sup> U. S. Constitution, Art. I, § 8, cl. 10, 11, 12, 13, and 14.

<sup>14</sup> *Ibid.*, Art. II, § 2, cl. 1.

<sup>15</sup> *Ibid.*, Art. I, § 8, cl. 18.

<sup>16</sup> See, generally, Wormuth, note 3 above, at 718-726.

Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.<sup>17</sup>

Hamilton took a stronger position. The President, he argued, should fight "Till the Congress should assemble and declare war. . . ." <sup>18</sup> The difference between the two is of no moment for present purposes. Both counseled a resort to the Congress, the one beforehand, the other as soon after the fact as possible.

The record since, however, is both rich and ambiguous. Scholars have attempted to count the number of instances in which United States armed forces have been deployed abroad.<sup>19</sup> The Department of State prefers the figure of 125 such instances.<sup>20</sup>

A wide number of these were ones in which the President alone had sent United States forces into foreign lands. In a number of instances, the President was reacting as Commander-in-Chief against a sudden and severe attack on the United States or its territories, people or armed forces. These cases may be set to one side. The Founders were clear that self-defense and response to armed attack on the United States were well within the unilateral power and responsibility of the President as Commander-in-Chief, at least "Till the Congress should assemble and declare war. . . ." To throw the full military might of the United States back at an aggressor was not to usurp the Congressional power to declare war. As Hamilton made clear, in that instance war was declared, not by the United States, but by the attacker.<sup>21</sup> So, as in the case of Pearl Harbor, the President may and must respond, and even move over to the attack, although he also may profitably request Congress to ratify his action at the earliest moment by a formal declaration of war, as Roosevelt did on December 8, 1941.

The great bulk of the rest of the cases, not involving sudden attack, have been fairly inconsequential in terms of the security, blood and treasure of the United States. Hostilities have been infrequent; most instances of unilateral Presidential deployment abroad did not involve war or the risk of war, whatever the Constitutional term may mean, and are certainly not precedents for Cambodia. The examples are varied, but they fall into recurring patterns. Force has often been employed abroad—sometimes under orders from Washington, sometimes on the initiative, usually wise, occasionally foolish, of the local commander—in quasi-police actions. The Army and the Navy have pursued outlaws, smugglers, pirates and Indians into foreign territory. In other cases the military has been

<sup>17</sup> *Ibid.* at 724.

<sup>18</sup> *Ibid.* at 725.

<sup>19</sup> G. Rogers, *World Policing and the Constitution* 92-123 (1945) (lists 149 instances of the use of U. S. forces abroad); M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* 1 (1928) (estimates that "United States [forces] have been landed on foreign soil . . . on more than one hundred occasions during the past hundred and fifteen years."); J. Clark, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Rev. ed., 1912) (appendix lists forty-one instances of landing United States forces).

<sup>20</sup> Memorandum, p. 597.

<sup>21</sup> See Wormuth, note 3 above, at 725.



deployed, usually in small parties, most notoriously and consistently in China, to protect American lives or property when local civil government has broken down.

Occasionally, United States forces have landed for this purpose in the midst of a local revolution or political change, and their presence has had a greater effect than the mere protection of the United States citizens who happen to be resident there, most recently, for example, in the Dominican Republic. And finally the armed forces have been deployed for frankly national security purposes to occupy areas of particular strategic interest to the United States preclusively, typically in the Caribbean during the days of coal-burning navies, usually without effective opposition and always under a claimed right of intervention which the United States has since solemnly forsworn in O.A.S. treaties and the United Nations Charter.

A hundred-odd such miscellaneous instances, together with Korea and Viet-Nam, constitute the record of unilateral Executive dispatch of United States troops to foreign soil in the past. Many commentators and most Executive spokesmen have read into that record a descending curve of Congressional responsibility, and a rapidly rising line of Presidential authority. It is even suggested that the one has canceled the other out and that the Congressional war-declaring responsibility, and whatever duties are inherent in the Constitutional command that Congress review its military appropriations every two years, are eighteenth-century curiosities of no practical relevance to the harsh realities of today.

This is too dour and too simple a reading of history. First, the curve of experience is not smooth. Korea was followed by Lebanon, and in the latter instance Dulles, who apparently had learned something from Acheson's troubles, at least made passing obeisance to Congress by requesting the Middle East resolution. Furthermore, if the cases are carefully examined, it will be seen that even those presidents whom history has called strong have displayed a rather more refined sense of the overlapping nature of the war power than some commentators have lately made out. In the paradigm example of the use of the powers of Commander-in-Chief, Lincoln called for 75,000 volunteers in April. But he asked for legislative ratification when Congress came back into session.<sup>22</sup> The record of experience does not show that there are no outer limits to the President's power, only that those limits are in some sectors unclear; and that there is no practical way yet devised for putting those limits to the conventional judicial tests.

The Cambodian incursion, however, goes beyond the past experience. There is no precedent for it—no precedent in either the sudden attack cases, or in the instances of hot pursuit of pirates or bandits, or in the landings to protect United States interests in the face of the disarray of local governments, or in the Latin American interventions.

Nor is there any precedent for Cambodia in the Korean War. Korea

<sup>22</sup> He received ratification in the Act of Aug. 6, 1861, Ch. 63, § 3, 12 Stat. 326 (confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861).

is said to be the high-water mark of unilateral Executive warmaking by those who would defend Cambodia. Why did the Executive not seek Congressional ratification of President Truman's decision to resist the attack from the north with American ground troops? Why did he not seek a declaration of war? The matter was considered. Acheson advances two reasons for avoiding the parliamentary path. The first was that Congressional hearings would have opened "the possibility of endless criticism . . . hardly . . . calculated to support the shaken morale of the troops or the unity that, for the moment, prevailed at home." The second was that Truman proposed to pass on the Presidency "unimpaired by the slightest loss of power or prestige."<sup>23</sup>

The list has the ring of the universal about it. These, doubtless, are the reasons why in any instance parliamentary consideration of war has its drawbacks. It is interesting to note that in that case the Republican Senate leader, Robert Taft, attacked President Truman for acting in defiance of the Constitutional scheme. On June 18, 1950, Taft rose to contend that the Senate might at least have approved a joint resolution authorizing intervention and that, in the absence of authority of that sort, the President's unilateral action was of doubtful Constitutionality.<sup>24</sup>

But, even assuming the President was within his Constitutional authority in the Korean instance, Korea is not a convincing precedent for Cambodia. As stated, the Cambodian incursion is based squarely on the President's powers as Commander-in-Chief. It finds no support in either treaty or Congressional resolution. In Korea, on the other hand, the United Nations Charter and the far-reaching concept of collective self-defense against armed attack gave international validity as well as a Constitutional cachet to the President's action. There was no flavor of local grievance or internal revolution. The action was taken in response to a clear case of an armed attack constituting a "breach of the peace." The Security Council so branded it, and recommended that all U.N. Members render assistance to the Republic of Korea. Here was a clear case of the expression of the conscience of the community of nations, acting through the United Nations, whose Charter, condemning aggression and authorizing collective self-defense on the substantive side, arming the Security Council with certain procedural powers, had received the most solemn Senatorial ratification.

No such justification was available in the Cambodia case.

### III

It is also interesting to compare Cambodia once again to the Viet-Nam action itself. By the very standards and rationale which the Executive set forth to explain South Viet-Nam, Cambodia fares badly.

<sup>23</sup> D. Acheson, *Present at the Creation* 415 (1969).

<sup>24</sup> "If the incident [a complete usurpation by the President of authority to use the Armed Forces of this country] is permitted to go by without protest, at least from this body [the Senate], we would have finally terminated for all time the right of Congress to declare war, which is granted to Congress alone by the Constitution of the United States." 96 Cong. Rec. 9323 (1950).

Whatever may now be said of the Administration's argument at the time the Gulf of Tonkin resolution was brought to the Congress and of its later significance and meaning, in point of fact the Administration did request that resolution and the Congress did pass it. Under Secretary of State Katzenbach called it—presumably together with the SEATO Treaty—the “functional equivalent” of a Congressional declaration of war.<sup>25</sup> The fact that the Administration thought the resolution desirable and appropriate in the earlier instance may say something about Cambodia.

The question becomes even more pointed because the Tonkin Gulf resolution was triggered by a sudden actual attack on United States Naval units. Its enactment was said to be urgent. The Cambodian incursion is explained, not by actual attacks from the sanctuaries, but by the desire to destroy war matériel stored there.

The Gulf of Tonkin resolution casts another light on the Cambodian incursion as well: Whatever the resolution may be interpreted to say, there are certain actions it excludes by omission. The crucial Section 2 sets forth that the United States is prepared to use armed force to assist any protocol state “requesting assistance in defense of its freedom.” Cambodia had not requested United States Armed Forces. The resolution does not say that the United States is prepared to use force in any case which the President, on his own, deems to be threatening, whether or not the threatened state requests assistance. Congress did not go—and presumably would not have gone—that far. The Cambodian incursion, then, is not only not authorized by the resolution; it may be in conflict with its intent.

Finally, the failure to involve Congress in the Cambodian incursion brushed aside contemporary understandings and assurances given at the time of the Gulf of Tonkin resolution and failed to comport with the Executive's notions of shared power and responsibility which underlay our original commitment in strength to Viet-Nam itself. As Secretary of State Rusk said at the time:

Therefore, as the southeast Asia situation develops, and if it develops, in ways which we cannot now anticipate, of course there will be close and continuous consultation between the President and the leaders of the Congress.<sup>26</sup>

#### IV

In short, the President's action as Commander-in-Chief in Cambodia would not appear to be supported by the historical record of unilateral Executive dispatch of troops abroad. It is not supported by the Korean

<sup>25</sup> Hearings on S. Res. 151 relating to United States Commitments to Foreign Powers before the Committee on Foreign Relations, 90th Cong., 1st Sess., at 82 (1967). Furthermore, the Gulf of Tonkin debates were studded with assurances that the resolution was not intended to justify a widening of the war. And, indeed, the geographic boundaries of the ground war were not expanded until Cambodia. 2 *The Vietnam War and International Law* 678–681 (R. Falk ed., 1969).

<sup>26</sup> Southeast Asia Resolution, Joint Hearing before the Committee on Foreign Relations and the Committee on Armed Services of the United States Senate, 88th Cong., 2d Sess. 3.

precedent. And it is not supported by Viet-Nam. The President's action here must be weighed on new scales.

The new scales constructed for Cambodia are the scales of purported military necessity. Cambodia, it is said, was a valid exercise of the President's duties because, by attacking across the border into neutral territory, he could save American lives and shorten the war in Viet-Nam. Cambodia was a tactical decision, like all the other tactical decisions made by field commanders. And it was made to protect United States troops.

At first blush, a more appealing argument for the prerogatives of a Commander-in-Chief is hard to imagine. The central principle of military command is the conservation of one's forces. Without troops, nothing is possible. But the doctrine of troop protection raises serious questions in these circumstances:

1. In the first place, the doctrine—that the President by himself may launch an attack if its avowed purpose is preclusive defense of his and his nation's ally's forces—appears to be a new one. Research has disclosed no instance in the past in which a President has purported to defend a major military effort across a national boundary into another nation, and a neutral at that, on the ground that the attack was necessary to defend United States troops.

It is possible to imagine narrow instances in which such a justification of a preclusive self-defense might be entirely convincing. For example, in this case, if the incursion had been limited to squads or platoons, and if it had been explicitly directed at enemy forces fresh from attack in South Viet-Nam, then something might be said for unilateral Presidential action.

But even then, the new doctrine should be restricted to the narrowest possible terms. The President's authority to launch an offensive against another country's territory to protect United States forces ought to be confined to those cases where, to borrow an international principle, there is a palpable "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>27</sup> And, even in circumstances of undeniable immediate necessity, the Executive license should expire within the shortest possible time. The President's authority should extend for only so long as may be necessary to place the matter before the Congress and to allow the Congress an opportunity to resolve it.

For the new doctrine of unilateral Executive power, if not confined, implies some awesome possibilities. What is necessary to protect the armed forces is, of course, a peculiarly military determination, and it is therefore awkward for any deliberative body of civilians to make such a determination. On the other hand, to protect troops *anything* may be justified as a matter of pure logic—bombing across the Yalu in the Korean War, for example; or, in the present case, resumed bombing or even a land invasion across the DMZ into North Viet-Nam; an incursion into Laos, to cut the Ho Chi Minh trail or interdict a North Vietnamese movement into

<sup>27</sup> Mr. Webster, Secretary of State, to Mr. Fox, British Minister to the United States, April 24, 1841, 29 British and Foreign State Papers 1129, 1138 (1840-1841).

the Plaine de Jarres; an attack into Northern Thailand; or an atomic challenge to the supply lines in China or Russia. All could be said to be necessary because, as the President said on April 30, "The lives of American men are involved." In each case, one could argue that a pre-emptive attack would snuff out the challenge, shorten the hostilities, and enhance "the possibility of winning a just peace in Vietnam and the Pacific. . . ."

In fact, the justification for all first strikes comes down to defense of one's warmaking capability. The doctrine can go far. It should be confined to its narrowest possible Constitutional limits, for it could otherwise constitute a rationalization for anything a President chooses. The Constitution does not go that far, nor does the experience under the Constitution.

2. Furthermore, although tactics were important, it is hard to think that the Cambodian incursion was purely a tactical field decision. Its purpose and effect were neither so limited nor so innocent of larger consequences. It was not a quick reaction to an immediate tactical threat to United States troops—not the hot pursuit of raiding Indians. It was a new war, or at least such a change in the basic quality and character of the old that, if the Constitutional term means anything, Congressional responsibility should for that reason have been engaged under Article I.

For purposes of Constitutional analysis, the character of a deployment of United States forces abroad must be determined by all its circumstances, not merely by its proclaimed purpose. In this case, the sanctuaries had evidently been there for some years. It seems clear that there have been substantial quantities of weapons, ammunition, and communications equipment in Cambodia for a long time. This was no sudden military build-up. The events which triggered the incursion were the coup in Phnom Penh, the change in government, and the ouster of Sihanouk—political events, in short, rather than military ones.

Furthermore, there is a strong case for the proposition that this was "war," however one may construe the Constitutional term. It was not just a protective reaction, because it was an integral part of a far larger political-military picture. The incursion of United States ground troops into the sanctuaries was in sequence, and staged to co-ordinate with broader events: longer-term South Vietnamese operations in Cambodia, American air and logistical support for both Cambodian and South Vietnamese military operations, growing Thai involvement, and a continuing possibility of re-invasion by United States forces if matters did not go well. One purpose and effect of the President's decision may have been protection of United States ground forces, but there was much more. The United States move was one element in a new pattern of violent change in Cambodia itself.

This pattern, of which the United States is a part, has momentous potentialities. It could stimulate the development of something quite new in Southeast Asian hostilities: a defensive linking of South Viet-Nam and Thailand to shore up or perhaps replace or supplant the shaky Lon Nol Government in a new anti-Communist alliance. If there is in the making a multinational Southeast Asian anti-Communist front, "consisting of Cam-

bodia, Thailand, Laos and South Vietnam," as Ky has proposed, then it is hard to see how one can separate our actions in Cambodia from that new coalition.

But it is not necessary to go so far in order to suggest that the effect of the Cambodian incursion is far broader than the protection of United States troops. The United States is in South Viet-Nam as an act of collective self-defense with the Government of South Viet-Nam. We are associated with Saigon. South Viet-Nam has now thrown large numbers of troops into the hazard of events in Cambodia.<sup>28</sup> South Viet-Nam is at war in Cambodia. Its purpose is broader than the protection of United States or South Vietnamese troops. It is defending the Phnom Penh Government. Its ability to meet this new commitment will have large consequences for the United States' withdrawal. The self-defense of our ally rationalizes our presence in Indochina in the first place. Our ally is engaged in war in Cambodia. Is that fact irrelevant in the Constitutional analysis? Can it yet be said that in the eyes of domestic law our purposes are more limited and our actions more innocent?

One would think not. Cambodia may be explained on one level as a move to protect United States troops. But the events which set the incursion in motion were political. And the purposes and effect of the United States act are matters of grand strategy affecting the entire Southeast Asia balance. In matters so freighted with significance, the Commander-in-Chief should look to other counsels than his own. This was war. It is the Congress's responsibility to declare it so.<sup>29</sup>

## V

Ultimately, to explain the dispatch of impressive United States ground forces into Cambodia as just another tactical field decision is to expand the scope of the President's unilateral authority by a quantum jump. The new doctrine suggests that his command authority embraces the use of force in the territory of another nation which he may consider appropriate for the protection of the military might of the United States. In a stroke, this makes the war-declaring power a prerogative of the Presidency.

Such an escalation of the Presidency's powers is not only inconsistent with the intent of the Founders; it is also bad policy and bad politics.

Executive monopolization of the war power would mean that the President and the President alone would bear the terrifying responsibility of determining whether to reply to supposed threats to our interests. No matter how long the period for deliberation, no matter how far removed the threat, no matter how minuscule, it would be the President whose prestige would be challenged and whose political fate would be at issue. The President belongs to one party; the Congress, several. Thus, to remit the

<sup>28</sup> New York Times, June 19, 1970, at p. 7, col. 1 (City ed.).

<sup>29</sup> We may leave to one side the techniques by which Congress could act. It would seem, in any event, that there are a variety of ways, in addition to more formalistic war declarations, by which Congress could exercise its Article I, Section 8, war powers. The point is not form, but the substance of shared responsibility.

war-peace issue to the Executive exclusively is to make the war-peace decision a partisan issue. The politicization of the Korean conflict and the impact of Viet-Nam on President Johnson are the consequences. It is too much to sacrifice the Presidency on the altar of war.

Furthermore, the warmaking decision must be shared because it is in the Congress that decisions are openly made and it is the Congress which is representative, particularly through the biennial elections in the House of Representatives. War is the most fateful of national decisions. To embark on it ought to be peculiarly a responsibility of the national Congress.

It is often said that the eighteenth century could allow itself the luxury of Congressional declarations of war but that the pace of events today does not tolerate deliberation. To the contrary; a century and a half ago Congress and the courts might well have indulged a patriotic President and his subordinate captains who, acting in hot pursuit or anger, gave chase to pirates, bombed towns in Nicaragua, or called for 75,000 volunteers. They had no alternative. But that was a time when the procedures of government took time. The convening of Congress could be a matter of weeks. The dispatch of a formal declaration of war to our embassies and consular posts around the world might require a month.

Not so now. Emergencies can be made known to the President within moments. Congressmen may be brought to Washington by air in hours. There is less reason now for Executive monopolization, not more. The emergencies which truly demand a reaction so immediate as to make Congressional involvement intolerable are fewer. (Atomic attack may be the only real item on such a list.)

In cases of real emergency, the President must act, of course. But he should, while acting, move also to invoke Congress' responsibility as speedily as possible. Debate may take time. The President surely may continue to discharge his emergency responsibilities until the parliamentary issue is resolved. But he should not preclude Congress' involvement or seek to turn his emergency duty into a right to make war at his discretion anywhere in the world.

The question is one of accommodation, of the sharing of responsibility, of consultation and imaginative joint lawmaking by the Congress and President when opportunity provides, as it certainly did in the case of Cambodia. Justice Jackson put the matter tidily in *Youngstown Sheet and Tube Co. v. Sawyer*:

[I] have no illusion that any decision by this Court can keep power in the hands of Congress. . . . [P]ower to legislate for emergencies belongs in the hands of Congress. . . .

. . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.<sup>30</sup>

<sup>30</sup> 343 U. S. 579, 654-655 (1952).

## LEGAL DIMENSIONS OF THE DECISION TO INTERCEDE IN CAMBODIA

*By John Norton Moore \**

In appraising national security decisions, such as the recent decision to send United States combat forces into the North Vietnamese and Viet Cong border sanctuaries in Cambodia, it is useful to focus on three interrelated questions. First, is the decision consistent with national and international law? Second, is the decision consistent with the national interest? And third, are there other alternatives which are likely to be more satisfactory in implementing the national interest? Each of these questions represents an important perspective for appraisal. Although the answer to the first question is important for answering the second and third questions, international lawyers should resist the temptation to regard an affirmative answer to the legal question as equivalent to proof that a decision is the best option for national action. Conversely, international lawyers should also avoid the temptation to regard personal doubts about the efficacy of a particular option as equivalent to proof of the illegality of the option. An international legal perspective is a critical input in national security decisions and should have a major rôle in defining the national interest and in introducing and delimiting options for national action.<sup>1</sup> On the other hand, efforts to overuse international law, whether by way of support or criticism of national action, serve only to obscure the vital rôle that an international legal perspective should play.

### I. THE INTERNATIONAL LAW ISSUES

#### A. *A Brief Background of the Cambodian Conflict*

Cambodia emerged from the Geneva Conference of 1954, which ended the first Indochina War, as a fully autonomous state. Article 12 of the Final Declaration by the Conference provided that "each member of the Geneva Conference undertakes to respect the sovereignty, the independence, the unity and the territorial integrity. . . . [of Cambodia, Laos and Viet Nam], and to refrain from any interference in their internal affairs."<sup>2</sup>

\* Professor of Law and Director of the Graduate Program, the University of Virginia School of Law.

<sup>1</sup> See Falk, "Law, Lawyers, and the Conduct of American Foreign Relations," 78 Yale Law J. 919 (1969); Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Virginia J. Int. Law 205, 310-314 (1969).

<sup>2</sup> The Final Declaration, signed July 21, 1954; the Agreement on the Cessation of Hostilities in Cambodia, signed July 20, 1954; and the Declaration by the Royal Government of Cambodia of July 21, 1954, are reproduced in Further Documents relating to the discussion of Indo-China at the Geneva Conference, Misc. No. 20 (1954), Cmd. No. 9239, at 9, 11, 40 (1954). The text of the Final Declaration is also reprinted in 60 A.J.I.L. 643 (1966). See, generally, R. Randle, "The Settlement for Cambodia," in Geneva 1954: The Settlement of the Indochinese War 482-503 (1969).



In addition, Articles 4, 13, and 21 of the Agreement on the Cessation of Hostilities in Cambodia, which was signed by the Vice Minister of National Defense of North Viet-Nam, made clear that foreign military forces were to be withdrawn from Cambodia.

At the Conference, the Chinese Premier, Chou En-lai, sought an agreement to prevent Cambodia from joining military alliances such as SEATO. Although there was general Conference agreement on the neutralization of Cambodia, the Cambodian Delegation successfully held out for an agreement permitting Cambodia to request foreign military assistance in the event its security was threatened.<sup>3</sup> Robert Randle's description of the Geneva negotiations is quite specific on this point.

Sam Sary [a member of the Cambodian Delegation] said he would not sign the agreements because they limited the freedom of the Cambodian government to decide whether or not it would join an alliance; moreover, the agreements limited Cambodia's right to request military assistance from the United States or any other country. Limitations such as these, Sam Sary said, were unacceptable restrictions upon Cambodia's newly won independence. The Cambodian minister also expressed concern for the future of his country, which he said might become an object of Communist expansionism, and he wanted to reserve the right to ask the United States to establish bases on Cambodian territory.

The great-power ministers argued with Sam Sary to no avail. The American diplomat assured him the SEATO pact, then being prepared, would give Cambodia some assurance against Communist aggression, but Sam Sary persisted. Mendès-France's midnight deadline passed; and shortly after 2 a.m. the Cambodian minister announced that he had seventeen other demands! Molotov thereupon announced that he would acquiesce in the first demand: Cambodia would be permitted to request foreign military assistance in the event its security was threatened.<sup>4</sup>

This understanding was embodied in a unilateral declaration by the Cambodian Delegation at Geneva which stated:

The Royal Government of Cambodia is resolved never to take part in an aggressive policy and never to permit the territory of Cambodia to be utilized in the service of such a policy.

The Royal Government of Cambodia will not join in any agreement with other States, if this agreement carries for Cambodia the obligation to enter into a military alliance not in conformity with the principles of the Charter of the United Nations, or, as long as its security is not threatened, the obligation to establish bases on Cambodian territory for the military forces of foreign Powers.

The Royal Government of Cambodia is resolved to settle its international disputes by peaceful means, in such a manner as not to endanger peace, international security and justice.

During the period which will elapse between the date of the cessation of hostilities in Viet-Nam and that of the final settlement of political problems in this country, the Royal Government of Cambodia

<sup>3</sup> R. Randle, *op. cit.* at 339-341, 486. See also M. Field, *The Prevailing Wind: Witness in Indo-China* 169-170 (1965).

<sup>4</sup> R. Randle, *op. cit.* at 340.

will not solicit foreign aid in war material, personnel or instructors except for the purpose of the effective defence of the territory.<sup>5</sup>

The second and fourth paragraphs of this declaration were incorporated in Article 7 of the Agreement on the Cessation of Hostilities in Cambodia. The declaration was also adverted to in Article 4 of the Final Declaration of the Conference, in which the Conference took note of Cambodia's declaration "not to request foreign aid, whether in war material, in personnel or in instructors, except for the purpose of the effective defence of . . . [its] territory . . .," and in Article 5 of the Final Declaration in which the Conference took note of the Cambodian declaration:

that . . . [it] will not join in any agreement with other States if . . . [the] agreement includes the obligation to participate in a military alliance not in conformity with the principles of the Charter of the United Nations . . . or, so long as . . . [its] security is not threatened, the obligation to establish bases on Cambodian . . . territory for the military forces of foreign Powers.

In short, the Conference provided that Cambodia was to remain neutral but would have the right to obtain the full range of foreign assistance when necessary for the effective defense of Cambodia. In the absence of such a threat to Cambodian security, foreign military bases were to be prohibited on Cambodian territory even if Cambodia consented to their presence.

After the Geneva Conference Prince Norodom Sihanouk moved rapidly to establish Cambodian neutrality. Though from time to time he was accused by both Communist and non-Communist states as being pro-Western or pro-Communist, the mercurial Prince seems to have been genuinely preoccupied throughout most of the interim years with preservation of Cambodian neutrality as the best way to preserve the existence of Cambodia.<sup>6</sup> In May, 1955, Sihanouk did enter into a military aid agreement with the United States, but the defensive nature of the agreement and the limited quantities of military supplies were unanimously declared by the International Commission for Supervision and Control in Cambodia as "not in excess of . . . [Cambodia's] effective defence requirements."<sup>7</sup> In November, 1957, Cambodia's neutral status was enacted into law by the National Assembly of Cambodia. The neutrality law stipulated that Cambodia was to be "a neutral country." Consistently with the earlier Geneva understanding, it also provided that in case of aggression Cambodia reserved the rights to: "(1) self-defence by arms; (2) call on the United Nations; and (3) call on a friendly country."<sup>8</sup> In its Sixth Interim Report the International Commission for Supervision and Control in Cambodia took note of this Cambodian law after stating that Cambodia "has continued

<sup>5</sup> Cited note 2 above.

<sup>6</sup> See M. Field, note 3 above, at 161-251.

<sup>7</sup> R. Randle, note 2 above, at 501. In its Sixth Interim Report the International Commission for Supervision and Control in Cambodia reiterated that "the imports of war materials by the Royal Government were not in excess of requirements for its effective defence." Cambodia No. 1 [1958], Cmnd. No. 526, at 8 (1958).

<sup>8</sup> See Sixth Interim Report, cited above, at 9. See also M. Field, note 3 above, at 232.

to fulfil most satisfactorily its responsibility under Articles 7 and 13(c) of the Geneva Agreement.”<sup>9</sup>

During the early sixties Sihanouk began to take a progressively harsher line toward the United States, culminating in renunciation of American aid in 1963 and termination of diplomatic relations in 1965. Apparently, from 1965 until the recent Cambodian crisis, the United States has not provided Cambodia with significant military or economic assistance. In contrast, as the Viet-Nam War heated up, the Viet Cong and North Vietnamese military presence and influence in Cambodia grew progressively. By March and April of this year the *New York Times* reported estimates ranging from forty to fifty thousand Viet Cong and North Vietnamese troops in Cambodia.<sup>10</sup> It seems to be generally accepted that at least during the last several years sizeable Viet Cong and North Vietnamese forces have used Cambodian territory for infiltration into South Viet-Nam, for supply, command, communications and training functions in support of belligerent activities in South Viet-Nam, and as staging areas and sanctuaries for repeated attacks on targets in South Viet-Nam.<sup>11</sup>

Perhaps because he suspected a Communist victory in Indochina, during the last few years Sihanouk seemed increasingly reluctant to challenge the substantial North Vietnamese and Viet Cong forces operating on Cambodian territory. In February of this year, however, Cambodian forces began engaging North Vietnamese forces and by March domestic opposition to the sizeable Vietnamese forces in Cambodia led to a Cambodian demand that the North Vietnamese leave Cambodian territory.<sup>12</sup> At the same time,

<sup>9</sup> See Sixth Interim Report, note 7 above, at 9. Art. 13(c) of the Agreement on the Cessation of Hostilities in Cambodia provides that the International Supervisory Commission shall: “Supervise, at ports and airfields and along all the frontiers of Cambodia, the application of the Cambodian declaration concerning the introduction into Cambodia of military personnel and war materials on grounds of foreign assistance.”

<sup>10</sup> *New York Times*, March 17, 1970, at 1, col. 8 (City ed.); April 4, 1970, at 3, col. 1 (City ed.); April 23, 1970, at 4, col. 4 (City ed.). See also the Staff Report, “Cambodia: May 1970” prepared for the Senate Committee on Foreign Relations, 91st Cong., 2d Sess. 6 (Comm. Print June 7, 1970), reprinted in 9 Int. Legal Materials 858, 864 (1970).

<sup>11</sup> According to John Stevenson, the Legal Adviser of the Department of State:

“In the past 5 years 150,000 enemy troops have been infiltrated into South Viet-Nam through Cambodia. In 1969 alone, 60,000 of their military forces moved in from Cambodia. The trails inside Cambodia are used not only for the infiltration of troops but also for the movement of supplies. A significant quantity of the military supplies that support these forces came through Cambodian ports. . . .

“During 1968 and 1969 the Cambodian bases adjacent to the South Vietnamese Provinces of Tay Ninh, Pleiku, and Kontum have served as staging areas for regimental-size Communist forces for at least three series of major engagements—the 1968 Tet offensive, the May 1968 offensive and the post-Tet 1969 offensive.” Stevenson, “United States Military Actions in Cambodia: Questions of International Law,” 62 Dept. of State Bulletin 765, 767 (1970); reprinted in 64 A.J.I.L. 933 and in 9 Int. Legal Materials 840, 846-847 (1970).

<sup>12</sup> See *New York Times*, March 16, 1970, at 1, col. 5 (City ed.); March 17, 1970, at 1, col. 8 (City ed.). “Cambodia had sent notes to the Vietcong and Hanoi Governments demanding that the troops leave by yesterday, but the deadline passed with no apparent exodus of troops.” *Ibid.*

Prince Sihanouk traveled to Moscow and Peking, apparently to persuade the Soviets and Chinese to assist in removing the Vietnamese presence.<sup>13</sup> During his absence on March 18, Prime Minister Lon Nol and Deputy Prime Minister Sirik Matak formally deposed Prince Sihanouk as Chief of State. The coup, if it can be accurately called that, was limited. Since the summer of 1969 Lon Nol had been Prime Minister, a position he had also held once before in 1966-1967, and Sirik Matak, a cousin of Sihanouk's, had been First Deputy Prime Minister. Apparently Sihanouk's personal power, which, according to Jean Lacouture, had been eroding since 1966,<sup>14</sup> had been slipping faster during the last year as a result of economic problems, more active political opposition, and the increased presence of North Vietnamese in Cambodia. Perhaps as a reflection of this reduction in personal power, in the summer of 1969 Sihanouk requested Lon Nol to form a new government to replace that of Pen Nouth, who resigned after a long illness. Lon Nol seems to have accepted only on the condition that he be named Prime Minister and empowered to appoint his own ministers and have them report to him instead of to Sihanouk.<sup>15</sup> Apparently Sihanouk accepted Lon Nol's conditions. Lon Nol was the overwhelming choice of a special session of Congress called by Sihanouk to name a new government, and he took office on August 12, 1969.<sup>16</sup> During the next few months the Lon Nol Government took a number of actions over the opposition of Sihanouk, including closing the Phnom Penh Casino and diverting taxes to the Government which had previously been paid to Sihanouk personally.<sup>17</sup> After January 6, when Sihanouk left for France on vacation, Lon Nol and Sirik Matak were in control of the Cambodian Government. According to an account by Robert Shaplen, Lon Nol and Sirik Matak sent word to Sihanouk in Paris that he could return as Chief of State "if he accepted what had already been implied as early as the previous summer and was now made explicit—that he would no longer run things single-handed in his old manner."<sup>18</sup> When Sihanouk refused to receive the emissaries, the coup was formally approved by the Cambodian National Assembly. On March 18 the Assembly unanimously voted to dismiss Sihanouk as Chief of State and named Cheng Heng, the head of the Assembly, as Acting Chief of State.<sup>19</sup> On March 21, Cheng Heng was sworn in as Chief of State. According to the *New York Times*, there was no evidence of foreknowledge of the Lon Nol takeover among

<sup>13</sup> See *ibid.*, March 16, 1970, at 11, col. 1 (City ed.). Staff Report, note 10 above, at 1; 9 Int. Legal Materials at 860 (1970).

<sup>14</sup> J. Lacouture, "From the Vietnam War to an Indochina War," 48 Foreign Affairs 617, 624-625 (1970).

<sup>15</sup> See *New York Times*, March 19, 1970, at 16, cols. 8-9.

<sup>16</sup> *Ibid.*, col. 9.

<sup>17</sup> *Ibid.*; R. Shaplen, "Letter From Indo-China," *The New Yorker*, May 9, 1970, at 130, 135.

<sup>18</sup> R. Shaplen, *loc. cit.* at 136.

<sup>19</sup> *Ibid.*, at 139. According to the Staff Report prepared for the Senate Committee on Foreign Relations: "On March 18, Sihanouk was removed as Chief of State by unanimous vote of the Cambodian Parliament." Staff Report, note 10 above, at 2; *loc. cit.*, at 860.

senior United States officials.<sup>20</sup> Robert Shaplen is even more explicit on this point. He writes that "there is no evidence that the Americans participated in the coup or that they were even apprised of it until a few hours before it took place, although they were undoubtedly aware of what might happen and did nothing to try to prevent it."<sup>21</sup> For the most part, the new government did not seem to have serious recognition problems, foreign governments simply assuming that the Lon Nol Government was the legitimate successor Government of Cambodia. In fact, even Peking, North Viet-Nam and North Korea did not formally break diplomatic relations until as late as May 5.<sup>22</sup>

The more conservative Lon Nol Government continued to seek North Vietnamese and Viet Cong withdrawal and intensified the military effort to dislodge them from border sanctuaries. There were also several small-scale cross-border operations conducted by the South Vietnamese forces against the border sanctuaries, some in collaboration with Cambodian forces.<sup>23</sup> The North Vietnamese and Viet Cong reacted with military initiatives apparently directed at widening the sanctuaries, restoring supply routes to the Cambodian port of Sihanoukville, and threatening the viability of the new government.<sup>24</sup> Throughout the month of April the daily accounts of the Cambodian fighting indicate a steadily deteriorating military situation.<sup>25</sup> On April 20 Cambodia requested the use of units of ethnic Cambodians from Viet-Nam which had been associated with American-operated units in South Viet-Nam.<sup>26</sup> Two days later Cambodia appealed to the United Nations Security Council for assistance from all countries

<sup>20</sup> New York Times, May 6, 1970, at 17, col. 6 (City ed.).

<sup>21</sup> R. Shaplen, note 17 above, at 139.

<sup>22</sup> See New York Times, May 7, 1970, at 1, col. 5. North Viet-Nam and the Viet Cong, however, recalled their diplomats from Phnom Penh on March 25, 1970. See New York Times, March 26, 1970, at 17, col. 1.

The Staff Report prepared for the Senate Committee on Foreign Relations points out that: "On May 5, Sihanouk announced in Peking the formation of a Royal Government of National Union. It was recognized by Communist China the same day and by North Vietnam and the Provisional Revolutionary Government the following day." Staff Report, note 10 above, at 4; 9 Int. Legal Materials at 862. With respect to this government-in-exile, Robert Shaplen suggests that "Sihanouk is more a captive of Peking today than a spearhead of an independent government-in-exile. . . ." R. Shaplen, note 17 above, at 135. See also note 51 below.

<sup>23</sup> See Staff Report, note 10 above, at 1-4; 9 Int. Legal Materials at 859-862.

<sup>24</sup> The New York Times reported "an acceleration of the Communist invasion" following efforts by the new government "for negotiations on its demand for the withdrawal of Vietnamese Communist troops." New York Times, May 7, 1970, at 16, col. 1 (City ed.).

<sup>25</sup> See, e.g., *ibid.*, April 8, 1970, at 1, col. 8 (City ed.); April 9, 1970, at 1, col. 4 (City ed.); April 10, 1970, at 1, col. 4 (City ed.); April 13, 1970, at 1, col. 2 (City ed.); April 20, 1970, at 1, col. 8 (City ed.); April 21, 1970, at 1, col. 6 (City ed.); April 23, 1970, at 1, col. 8 (City ed.); April 25, 1970, at 3, col. 4 (City ed.); April 27, 1970, at 1, col. 8 (City ed.); April 27, 1970, at 5, col. 1 (City ed.).

<sup>26</sup> See New York Times, May 4, 1970, at 1, col. 6 (City ed.). Apparently about 2,000 ethnic Cambodians arrived in Phnom Penh on May 1 and 2. *Ibid.*

to help the new government fight "invading Vietcong and North Vietnamese forces."<sup>27</sup> On April 23 the *New York Times* reported that:

An atmosphere of heightening national emergency is overtaking Cambodia.

The emergency atmosphere is due to evidence that the Cambodian Army is unable to turn back the Vietnamese Communist forces, who at one point are within 15 miles of the capital, and to the lack of response from any nation except Indonesia to Premier Lon Nol's appeal to all nations for arms aid. . . .<sup>28</sup>

Military analysts said the 30,000-man Cambodian Army would be no match for the 40,000 to 50,000 North Vietnamese and Vietcong soldiers in Cambodia, if a determined assault were pressed by the Communist forces.<sup>29</sup>

On April 27, three days before the United States and South Viet-Nam interceded in Cambodia, the *New York Times* described the situation in Cambodia as "rapidly deteriorating."<sup>30</sup>

This brief account of the events leading up to the United States and South Vietnamese intercession in Cambodia on April 30 necessarily omits a number of important events, such as repeated United States protests against North Vietnamese and Viet Cong use of neutral Cambodian territory, Cambodian protests against sporadic allied incursions into Cambodian territory, Cambodian requests to the International Supervisory Commission for investigation of the activities of belligerents in both camps, the formation by Sihanouk of a Cambodian government-in-exile, and the apparent complicity of some Cambodian Army officers in the killing of substantial numbers of Vietnamese civilians living in Cambodia.<sup>31</sup>

### B. *The Rights and Duties of Cambodia*

Cambodian obligations with respect to the war in Viet-Nam stem from at least four sources: the United Nations Charter, the Geneva Accords, the customary international law of non-intervention, and the customary international law of neutrality.

Cambodia is, of course, bound by Article 2(4) of the United Nations Charter which prohibits "the threat or use of force against the territorial integrity or political independence of any state. . . ." To the extent that the North Vietnamese use of force against South Viet-Nam violates Article 2(4) of the Charter,<sup>32</sup> Cambodia would also be prohibited from providing assistance to the North Vietnamese forces.

<sup>27</sup> See *ibid.*, April 23, 1970, at 4, col. 5 (City ed.).

<sup>28</sup> *Ibid.*, at 1, col. 8 (City ed.).

<sup>29</sup> *Ibid.*, at 4, col. 4 (City ed.).

<sup>30</sup> *Ibid.*, April 27, 1970, at 5, col. 1 (City ed.).

<sup>31</sup> See *ibid.*, April 11, 1970, at 1, col. 4 (City ed.); April 14, 1970, at 1, col. 5 (City ed.); April 18, 1970, at 1, col. 1 (City ed.); April 25, 1970, at 3, col. 1 (City ed.); but see *ibid.*, April 23, 1970, at 5, col. 3 (City ed.), announcing the formation by the Cambodian Government of a "Commission responsible for the safety of all foreigners. . . ."

<sup>32</sup> For a discussion of the legal issues raised in the Viet-Nam War and whether the North Vietnamese use of force against South Viet-Nam violates Art. 2(4) of the Charter, see 1 and 2 Falk (ed.), *The Vietnam War and International Law* (1968 and 1969).

Secondly, "as long as its security is not threatened" Cambodia is obligated by Article 7 of the Agreement on the Cessation of Hostilities in Cambodia not to permit the establishment of "bases on Cambodian territory for the military forces of foreign Powers." Moreover, arguably it is bound by Article 12 of the Final Declaration of the Conference "to refrain from any interference in . . . [the] internal affairs [of Viet Nam]." <sup>33</sup> North Vietnamese and Viet Cong bases in Cambodia used to prosecute the Viet-Nam War would seem to violate these provisions of the Geneva Accords, at least to the extent that Cambodia is able to prevent their establishment in Cambodia.

Thirdly, Cambodia is bound by the customary law of non-intervention.<sup>34</sup> The General Assembly Declaration of 1965 on Inadmissibility of Intervention is representative of many authoritative pronouncements:

[N]o State shall organize, assist . . . or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State. . . . (Emphasis added.) <sup>35</sup>

Thus, to the extent that it is politically and militarily feasible, Cambodia is under an obligation to prevent the use of its territory for Viet Cong armed attacks directed against the Saigon Government.

Finally, Cambodia is bound by the customary international law of neutrality, which according to most commentators survived the United Nations Charter.<sup>36</sup> Application of the customary law of neutrality would seem particularly appropriate in view of the neutralization of Cambodia by the Geneva Accords as well as by Cambodian internal law, and the repeated declarations of Cambodian and non-Cambodian spokesmen recognizing Cambodian neutrality.<sup>37</sup> The duties of a neutral include obligations to prevent belligerents from transporting troops or supplies across neutral territory and to prevent neutral territory from being used for base camps, munitions factories, supply depots, training facilities, communications networks, or staging areas for attack. Belligerent troops seeking asylum must be disarmed and interned for the duration of the conflict.<sup>38</sup> These obligations do not require neutrals to engage in impossible political or military efforts but only to employ "due diligence" or the "means at their

<sup>33</sup> But see R. Randle, note 2 above, at 414-415.

<sup>34</sup> For a general discussion of the customary law of non-intervention, see Moore, note 1 above, at 242-246, 315-332.

<sup>35</sup> Res. 2131, U. N. General Assembly, 20th Sess., Official Records, Supp. 14, at 11-12 (U.N. Doc. A/6014) (1965); 60 A.J.I.L. 662 (1966).

<sup>36</sup> See G. Schwarzenberger, *A Manual of International Law* 218 (5th ed., 1967); J. Stone, *Legal Controls of International Conflict* 382 (1959). See also M. Greenspan, *The Modern Law of Land Warfare* 540 (1959); Note, "International Law and Military Operations against Insurgents in Neutral Territory," 68 Col. Law Rev. 1127, 1142-1146 (1968).

<sup>37</sup> See, e.g., the declaration of the Royal Government of Cambodia of May 29, 1955, in R. Randle, note 2 above, at 489.

<sup>38</sup> See, generally, on the duties of a neutral state, E. Castrén, *The Present Law of War and Neutrality* 459, 470-488 (1954); 2 Oppenheim, *International Law* 687-726 (7th ed., Lauterpacht, 1952); M. McDougal and F. Feliciano, *Law and Minimum World Public Order* 436-469 (1961); G. Schwarzenberger, note 36 above, at 219-226.

disposal" to prevent belligerent violations.<sup>39</sup> Though the Sihanouk Government seems sometimes to have co-operated with North Vietnamese and Viet Cong forces to the point of violating Cambodian neutrality, the extremely precarious military and political posture of Cambodia should be taken into account in assessing Sihanouk's actions.<sup>40</sup> In any event, at least since February of this year, the Cambodian Government seemed to be genuinely engaged in attempting to prevent North Vietnamese and Viet Cong violations of Cambodian neutrality.

With respect to Cambodian rights to defend its political and territorial integrity, Cambodia would seem to have the option pursuant to both Article 51 of the United Nations Charter and the Geneva Accords to request foreign assistance in defense against an armed attack. The sustained North Vietnamese and Viet Cong attacks on Cambodian forces during the last several months and the military occupation of sizeable areas of Cambodian territory from which Cambodian officials have been ousted certainly constitute an "armed attack" within the meaning of Article 51 of the Charter, and a "security threat" within the meaning of Article 7 of the Agreement on Cessation of Hostilities in Cambodia. Cambodia may consequently lawfully request external assistance for its defense.

It should also be pointed out that Cambodia has an obligation under international law to protect ethnic Vietnamese residing in Cambodia. A deliberate governmental policy aimed at killing ethnic Vietnamese civilians residing in Cambodia would violate the Convention on the Prevention and Punishment of the Crime of Genocide, in force since 1951.<sup>41</sup> There is some evidence that the deaths of Vietnamese civilians in Cambodia in April may have resulted from a Cambodian governmental policy, if not of commission at least of omission.<sup>42</sup> Subsequent actions by which the Cambodian Government has moved more vigorously to protect Vietnamese refugees suggest that the principal impetus to the earlier killings may have been traditional Cambodian-Vietnamese antagonisms inflamed by the North Vietnamese and Viet Cong attacks and coupled with a lack of effective

<sup>39</sup> See E. Castrén, cited above, at 442; M. Greenspan, note 36 above, at 537-538; 3 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 2344 (1945); L. Oppenheim, cited above, at 757-758; J. Stone, note 36 above, at 391. Greenspan says: "the practice of the two world wars appears to indicate that a small neutral state is not at fault for failure to offer resistance to the invasion of its territory, where such resistance would be hopeless." (P. 537.)

<sup>40</sup> One writer points out: "[I]t has been suggested by a student of Cambodian foreign policy that Prince Sihanouk believed that the continued independence of his state depended upon entering into a *modus vivendi* with the Chinese People's Republic and the Democratic Republic of Vietnam. At present, Cambodia is threatened by a Communist inspired insurgency; the consequence probably would have been far worse for the Cambodian government had impartiality been maintained throughout the war in Vietnam." Note, note 36 above, at 1145.

<sup>41</sup> 78 U.N. Treaty Series 277 (1951). See, generally, McDougal and Arens, "The Genocide Convention and the Constitution," 3 *Vanderbilt Law Rev.* 683 (1950).

<sup>42</sup> See the New York Times articles, note 31 above.



control over middle echelon Cambodian Army officers.<sup>43</sup> In any event, Cambodia has a continuing obligation for the protection of Vietnamese civilians in Cambodia.

*C. The Lawfulness of North Vietnamese and Viet Cong Activities in Cambodia*

Whether incident to operations in Viet-Nam or an internal conflict in Cambodia, North Vietnamese and Viet Cong military activities in Cambodia are unlawful.

If North Vietnamese and Viet Cong activities are sought to be justified as incidental to hostilities in South Viet-Nam, they violate both the Geneva Accords and the customary international law of neutrality, whether or not North Vietnamese claims of acting in defense in the Viet-Nam War are accepted. Thus, North Viet-Nam agreed, pursuant to Article 4 of the Cambodian Cease-fire Agreement and Article 12 of the Final Declaration, to withdraw her forces from Cambodia and to respect the sovereignty and territorial integrity of Cambodia. And pursuant to the customary law of neutrality, it is unlawful for a belligerent to violate neutral territory by using it for the transport of military forces or supplies, the establishment of staging areas for attack, or the establishment of training, command, communication, or supply facilities.<sup>44</sup> Such violations may amount to aggression against the neutral, giving rise to a corresponding right of defense. As McDougal and Feliciano put it:

By violating a neutral state, an aggressor-belligerent may compound its offense and commit a new and separate act of aggression. In such situations, the permission of self-defense becomes available to the target neutral and the whole panoply of sanctioning measures contemplated in the United Nations Charter becomes relevant.<sup>45</sup>

Some scholars support a right of a belligerent state to take preventive action to forestall an impending occupation of a neutral state by enemy belligerents.<sup>46</sup> In view of Sihanouk's jealous guarding of Cambodian neutrality, his lack of even formal diplomatic relations with the United States or South Viet-Nam, and the total lack of factual basis for the claim,

<sup>43</sup> In late April the Cambodian Government announced the formation of a "Commission responsible for the safety of all foreigners. . . ." New York Times, April 23, 1970, at 5, col. 3 (City ed.).

<sup>44</sup> See, generally, on the duties of a belligerent toward neutral states, E. Castrén, note 38 above, at 440-442; M. Greenspan, note 36 above, at 534; C. C. Hyde, note 39 above, at 2336-2344; L. Oppenheim, note 38 above, at 690.

Since France ratified in 1910 the Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310, Treaty Series No. 540, 1 Bevans 654, North Viet-Nam might be bound as a successor state. See J. B. Scott (ed.), *The Reports to the Hague Conferences of 1899 and 1907*, at 898 (1917). In any event, the general obligations of neutrality stemming from the Hague Conventions seem firmly established as customary international law.

<sup>45</sup> M. McDougal and F. Feliciano, note 38 above, at 404.

<sup>46</sup> See M. Greenspan, note 36 above, at 539-540; L. Oppenheim, note 38 above, at 698. But see C. C. Hyde, note 39 above, at 2341.

any North Vietnamese claim to this effect would seem considerably more far-fetched than the German claim rejected by the Nuremberg Tribunal that the German invasion of Norway was justifiable preventive action.<sup>47</sup>

It may also be urged that the law of neutrality has been modified by the Charter to permit belligerents which are acting in self-defense to violate neutral territory when such action is necessary for effective defense. Even aside from the difficulty in characterizing North Vietnamese activities in South Viet-Nam and Cambodia as lawful defense, however, any such theory would work dangerously to expand the permissible areas of conflict. At least in the absence of an authoritative community determination pursuant to Chapter VII of the Charter, such a theory would add yet another technique of conflict expansion through self-serving claims subject to little factual verification. Community policies for minimization of conflict suggest that it is important to preserve the requirement of prior or immediate threat of belligerent use of neutral territory as at least a minimum prerequisite for lawful belligerent activities in neutral territory. Although the Charter may increase the customary law requirements for lawful belligerent activities on neutral territory, it seems doubtful that it should decrease those requirements. For these reasons, most scholars seem to have rejected arguments that the Charter has eliminated the law of neutrality applicable to belligerent activities on neutral territory.<sup>48</sup>

If North Vietnamese and Viet Cong military activities are sought to be justified as participation in an internal conflict in Cambodia, such activities would violate both the Geneva Accords and the customary international law of non-intervention, even if the internal conflict characterization were accepted. Pursuant to Article 12 of the Final Declaration of the Geneva Conference North Viet-Nam undertook "to respect . . . the territorial integrity . . . [of Cambodia] and to refrain from any interference in . . . [its] internal affairs." The majority view today seems to support a rule of customary law prohibiting external intervention in civil strife, absent some prior foreign intervention on behalf of insurgents.<sup>49</sup> This rule is reflected in the General Assembly Declaration of 1965 on Inadmissibility of Intervention which provides that: ". . . [N]o State shall . . . assist . . . armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. . . ." <sup>50</sup> Thus, even if the claim were accepted that North Vietnamese and Viet Cong forces were assisting the Sihanouk government-in-exile at its invitation and that that government was the widely recognized government of Cambodia,<sup>51</sup>

<sup>47</sup> Nazi Conspiracy and Aggression, Opinion and Judgment 38 (1947).

<sup>48</sup> See authorities cited in note 36 above. One scholar writes: "The thesis that under the Pact and Charter the neutral state has a duty to assist the victim of aggression is tenable only if there exists a set of standards which members of an international tribunal can apply impartially, regardless of their ideological inclinations to determine which side has in fact struck the first blow." Note, note 36 above, at 1144.

<sup>49</sup> See Moore, note 1 above, at 316-320, 333-339.

<sup>50</sup> Res. 2131, note 35 above.

<sup>51</sup> A claim that the Sihanouk government-in-exile is a widely recognized government would seem far-fetched. According to the *New York Times*, even the Soviet Union issued a statement in which it "seemed . . . to indicate that it recognized the new

North Vietnamese and Viet Cong intervention in the internal strife between the Lon Nol and Sihanouk governments would be unlawful, absent prior external intervention on behalf of the Lon Nol Government. The reality seems to be, however, that the fighting in Cambodia is principally between Cambodians on the one hand and North Vietnamese-Viet Cong on the other. Even after four months of fighting, few Cambodians seem to be fighting with the North Vietnamese forces, and the situation seems more closely to resemble an external armed attack than intervention in an internal conflict. As such, North Vietnamese and Viet Cong military actions against the Lon Nol Government are a violation of Article 2(4) of the Charter.

It is also relevant in appraising the North Vietnamese-Viet Cong legal position in Cambodia that, far from pursuing peaceful settlement according to Article 33 of the Charter or reporting military measures to the Security Council pursuant to Article 51 of the Charter, they have consistently denied even the presence of any North Vietnamese or Viet Cong forces in Cambodia<sup>52</sup>—surely a monumental credibility gap!

#### *D. The Lawfulness of United States and South Vietnamese Activities in Cambodia*

United States and South Vietnamese activities in Cambodia reflect two major claims: (1) that military activities in Cambodia are lawful defensive measures incident to the defense of South Viet-Nam, and (2) that some such activities are lawful defensive measures incident to the defense of Cambodia. Some South Vietnamese activities in rescuing ethnic Vietnamese residing in Cambodia may, in view of the widespread killing of Vietnamese civilians by Cambodians, also justify humanitarian intervention.

##### *I. Activities incident to the defense of South Viet-Nam*

For at least two years North Vietnamese and Viet Cong military units have made major use of Cambodian border areas in support of their military operations in South Viet-Nam. According to Robert Shaplen:

By mid-1969 . . . [Sihanouk] was forced to acknowledge that between forty and fifty thousand Communist troops were spread out over eight or nine Cambodian provinces, about half of the troops in the usually deserted northeastern border areas and the rest farther south, particularly in the mountainous region of the Elephant Range, just north-east of Sihanoukville and across from Vietnam's Mekong Delta.<sup>53</sup>

government [Lon Nol Government] as legal—if not to the Soviet Union's liking." New York Times, April 25, 1970, at 4, col. 4 (City ed.). See also note 22 above.

<sup>52</sup> New York Times, March 17, 1970, at 14, col. 8 (City ed.).

<sup>53</sup> Shaplen, note 17 above, at 133-134. Shaplen continues: "[Sihanouk] . . . then denounced the Communist incursions and showed less hostility toward the Americans; in fact, he even called upon them to maintain "a presence in Southeast Asia" after the end of the Vietnam war. Secretly, he accepted American intelligence obtained in various ways . . . which enabled him to pinpoint Communist troops and installations, and he used this material in making diplomatic complaints to the Vietcong and to Hanoi. . . ." *Ibid.* at 134. In contrast to the forty to fifty thousand experienced North Vietnamese and Viet Cong troops in Cambodia, the Cambodian Army was inexperienced and poorly equipped and, at the beginning of serious clashes with North

The military activities of these troops in Cambodia have included transportation of combatants and supplies, construction of command, communication, training and supply facilities, and use of Cambodian territory for launching attacks on targets within South Viet-Nam. Such activities have been substantial and continued and are not mere isolated or sporadic occurrences. Prior to the United States and South Vietnamese intercession, the Government of Cambodia was unable effectively to prevent these North Vietnamese and Viet Cong activities in Cambodia. In fact, it is evident from *New York Times* accounts of Cambodian military efforts that, far from the use of the sanctuaries being hindered, the military situation throughout April was steadily deteriorating for the Cambodian Government.<sup>54</sup> By April 20 the Cambodian Army was fighting North Vietnamese within fifteen miles of Phnom Penh, the capital of Cambodia.<sup>55</sup> By the end of the month repeated Cambodian appeals to reconvene the International Supervisory Commission for Cambodia<sup>56</sup> and a Cambodian appeal to the Security Council had gone unanswered, and Peking, Hanoi and Moscow had rejected an Asian nation initiative for talks on preserving Cambodian neutrality.<sup>57</sup> The possibility of effective Cambodian control of North Vietnamese and Viet Cong use of Cambodian territory incident to activities in South Viet-Nam seemed by the end of April to be remote.

On April 30, large-scale United States and South Vietnamese military operations were begun in the border regions of Cambodia. The announced principal purpose of the operations was to clear out the North Vietnamese and Viet Cong border sanctuaries.<sup>58</sup> Although, according to the *Agence France-Presse*, an initial statement from a Cambodian spokesman was to the effect that "I do not think the Cambodian Government as a neutral government can approve foreign intervention,"<sup>59</sup> the over-all position of the Cambodian Government seems to have been one of tacit consent tinged with concern lest favoritism of one side lead to a loss of neutrality. Later statements of the Lon Nol Government have indicated at least non-opposition to the United States and South Vietnamese actions.<sup>60</sup> United States

Vietnamese troops, numbered only about 35,000. As such, the Cambodians seemed badly outmatched by the attacking forces. See Staff Report, note 10 above at 10; 9 Int. Legal Materials at 866.

<sup>54</sup> See the *New York Times* articles, note 25 above.

<sup>55</sup> *New York Times*, April 21, 1970, at 1, col. 6 (City ed.).

<sup>56</sup> See *ibid.*, March 22, 1970, at 16, col. 4; March 24, 1970, at 3, col. 2; March 26, 1970, at 17, col. 2; April 1, 1970, at 2, col. 4.

<sup>57</sup> See *ibid.*, April 27, 1970, at 3, col. 5 (City ed.) (Peking and Hanoi); April 28, 1970, at 1, col. 8 (City ed.) (Moscow).

<sup>58</sup> See President Nixon's address to the Nation, 62 Dept. of State Bulletin 617 (1970).

<sup>59</sup> *New York Times*, May 1, 1970, at 3, col. 7.

<sup>60</sup> On May 5 the Cambodian Government issued the following statement:

"In his message to the American nation of 30 April, 1970, the President of the United States, Richard Nixon, made public important measures that he has taken to oppose the growing military aggression of North Vietnam on the territory of Laos, Cambodia and South Vietnam. One of these measures concerned aid of the United States of America in the defense of the neutrality of Cambodia, violated by the North Vietnamese.

"The Salvation Government notes with satisfaction that the President of the United States of America has taken into account in his decision the legitimate aspirations of

ground combat operations in Cambodia seem for the most part to have been limited to a self-imposed 21-mile depth along the Cambodian border. Ground combat operations even within this region were announced to be subject to an eight-week deadline for withdrawal of American troops from Cambodia. Consistent with the announced deadline, by July 1 American units had been withdrawn. South Vietnamese operations have been more sweeping and have not been limited by the same deadline.

The principal legal issue presented by these United States and South Vietnamese military operations in Cambodian border regions is the scope of defensive rights under the Charter against belligerent operations in neutral territory. It is well established in customary international law that a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory and when the action is necessary and proportional to lawful defensive objectives.<sup>61</sup> Scholars endorsing this

the Cambodian people, which desires only to live in peace, in its territorial integrity, in its independence and in its strict neutrality. For that reason, the Government of Cambodia wishes to declare that it respects the sentiments of President Richard Nixon in his message of 30 April, 1970 and expresses its gratitude for them.

"It is high time now that other friendly nations understand the extremely grave situation in which Cambodia finds herself and come to the aid of the Cambodia people, victims of armed aggression. The Salvation Government renews on this occasion its appeal for help issued 14 April, 1970, and points out that it will accept all unconditional help from friendly countries in all forms (military, economic and diplomatic)." *New York Times*, May 5, 1970, at 16, col. 8.

The statement of John R. Stevenson, the Legal Adviser of the Department of State, contains a slightly different version of the declaration of the Cambodian Government of May 5. Perhaps the only difference worth noting is that the Department of State version contains the slightly stronger language "appreciates the views" rather than "respects the sentiments" of President Nixon. Stevenson also points out: "Later statements have indicated even more clearly the Cambodian Government's approval of our actions." See Stevenson, note 11 above, at 766, note 9; 64 A.J.I.L. 935; 9 Int. Legal Materials at 843-844, note 8 (1970).

On May 6 the High Command of the Cambodian Armed Forces released a communiqué that:

"[United States and South Vietnamese forces are] useful not only in fending off dangers for the American and South Vietnamese forces but also to drive these Vietcong and North Vietnamese aggressors from our territory.

"They are indispensable because these occupiers have solidly installed their military and subversive organizations in the zones that they, the Vietcong and North Vietnamese, are seeking to widen as far as possible in view of their future actions." *New York Times*, May 6, 1970, at 18, col. 2.

Though, in general, Cambodian Government statements prior to the May 1 incursion indicate a request for military supplies rather than foreign troops, there was some ambiguity in the requests. Thus, on April 15, Lon Nol said:

"The Salvation Government has the duty to inform the nation that in view of the gravity of the present situation, it finds it necessary to accept all unconditional foreign aid, wherever it may come from, for the salvation of the nation." *New York Times*, April 15, 1970, at 1, col. 3.

<sup>61</sup> One example of this principle in state practice is the German bombardment of Salonika in neutral Greece during World War I after it had been occupied by the Allied Powers. The Greco-German Mixed Arbitral Tribunal held that the occupation of Salonika by the Allies "entitled Germany to take even on Greek soil any acts of war necessary for her defense." See *Coenca Brothers v. German State*, 7 *Recueil des*

view include, among others, McDougal and Feliciano,<sup>62</sup> Greenspan,<sup>63</sup> Hyde,<sup>64</sup> Castrén<sup>65</sup> and Lauterpacht.<sup>66</sup> For the most part, the customary

Décisions des Tribunaux Arbitraux Mixtes 683, 687 (1927), discussed in McDougal and Feliciano, note 38 above, at 407, note 49. Other examples are the seizure of the Italian ship, the *Anna Maria*, in the neutral Tunisian port of Sousse by Allied Forces during World War II after a series of warlike acts by German and Italian forces on Tunisian territory, and the British entry into neutral Norwegian territorial waters in 1940 to liberate British prisoners held on the *Altmark*, a German auxiliary vessel which had entered Norwegian territorial waters to evade capture by the Royal Navy.

Professor Waldock after a study of the *Altmark* incident concluded that:

"A breach of the rules of maritime neutrality in favour of one belligerent commonly threatens the security if not the existence of the other belligerent. The breach is thus seldom really capable of being remedied in full by subsequent payment of compensation. Nothing but the immediate cessation of the breach will suffice. Accordingly, where material prejudice to a belligerent's interests will result from its continuance, the principle of self-preservation would appear fully to justify intervention in neutral waters. The disposition in the past of some neutral opinion to condemn any such action out of hand was therefore not consistent with general principles and in any case flowed from a view of the superior merits of neutral status which no longer obtains. *The right of a belligerent to intervene in a proper case to enforce neutrality is now generally recognized. . . .*" (Emphasis added.) Waldock, "The Release of the *Altmark's* Prisoners," 24 Brit. Yr. Bk. Int. Law 216, 235-236 (1947).

For a discussion of the *Anna Maria* incident, see McDougal and Feliciano, note 38 above, at 407, note 49.

The United States has also entered foreign territory on a number of occasions to suppress continuing raids launched from the foreign territory against the United States. The principal examples are General Jackson's incursion into Spanish West Florida in 1818 to check raids by Spanish Indians into American territory after the failure of the Spanish authorities to check the raids, and the incursion by an American military force into Mexico to check cross-border raids by the Mexican bandit Francisco Villa which the Mexican authorities had allowed to continue. See 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 240-244 (2d rev. ed., 1945).

<sup>62</sup> Thus Professors McDougal and Feliciano point out: "where a nonparticipant is unable or unwilling to prevent one belligerent from carrying on hostile activities within neutral territory, or from utilizing such territory as a 'base of operations,' the opposing belligerent, seriously disadvantaged by neutral failure or weakness, becomes authorized to enter neutral territory and there to take the necessary measures to counter and stop the hostile activities." *Op. cit.*, note 38 above, at 568. See also *ibid.* at 76, 406-407.

<sup>63</sup> Similarly, Greenspan states: "Should a violation of neutral territory occur through the complaisance of the neutral state, or because of its inability, through weakness or otherwise, to resist such violation, then a belligerent which is prejudiced by the violation is entitled to take measures to redress the situation, including, if necessary, attack on enemy forces in the neutral territory." *Op. cit.*, note 36 above, at 538.

<sup>64</sup> Charles Cheney Hyde writes: "The obligation resting upon the belligerent with respect to the neutral is not of unlimited scope. Circumstances may arise when the belligerent is excused from disregarding the prohibition. If a neutral possesses neither the power nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein." *Op. cit.* note 39 above, at 2337-2338. See also *ibid.* at 2338-2341.

<sup>65</sup> Professor Castrén says: "A belligerent may not violate the territorial integrity of a neutral State merely because the other belligerent side has done so. Nevertheless, the situation is different if the neutral State has not taken countermeasures, or if the enemy, in spite of the efforts of the neutral state, has succeeded in acquiring a

international law of neutrality seems as applicable after the United Nations Charter as before. In fact, the statements by McDougal-Feliciano, Green-span, and Castrén referred to were all written after the Charter. Although the Charter introduces additional restrictions on the use of force, nothing in the Charter would seem to cut against the strong community policies for isolating and minimizing coercion that are served by the law of neutrality, at least in the absence of a Security Council decision to take measures under Chapter VII of the Charter. The Charter, however, does introduce restrictions on the use of force, which to the extent that they were not already subsumed under customary international law, seem additionally applicable to the appraisal of rights of defense against belligerent operations in neutral territory. Under a restrictive view of such rights under the Charter, the Charter requires that the use of force must be a defensive response to an armed attack and must be necessary and proportional to lawful defensive objectives.<sup>67</sup> As applied to rights of defense against belligerent operations in neutral territory, this would seem to require that the use of force against belligerent operations in neutral territory should be necessary and proportional to lawful defense objectives. Although the consent of the neutral state may be one factor in appraising the exercise of rights of defense against belligerent operations in neutral territory, it does not seem required either by the customary international law of neutrality or by the additional Charter requirements, provided other applicable criteria are met.

Necessity and proportionality are shorthand for community policies restricting coercion to situations where there is no reasonable alternative to the use of force for protection of fundamental values and restricting the responding use of force to that reasonably necessary for defense of the threatened values.<sup>68</sup> In the somewhat overly restrictive language of the famous *Caroline* case, there must be shown a "necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."<sup>69</sup> And as McDougal and Feliciano indicate, responding coercion must "be limited in intensity and magnitude to what is reasonably

---

*permanent stronghold* in its territory, in which case the other belligerent side is entitled to drive off the violator from there. A belligerent is further not bound to tolerate the *continual* passage of enemy military transports through neutral territory." *Op. cit.* note 38 above, at 462-463. See also p. 442.

<sup>68</sup> L. Oppenheim (Lauterpacht ed.), note 38 above, at 695, note 1, 698. Lauterpacht adopts the view that: "Normally, diplomatic representations and a claim for compensation are the proper remedy for any disregard of neutral duties of this nature. However, circumstances may arise in which subsequent redress by the neutral must, in *natura rerum*, be wholly inadequate and in which the aggrieved belligerent must, therefore, be held to be justified in resorting to self-help."

<sup>67</sup> Some scholars would urge a less restrictive interpretation not limiting the right of self-defense to that of Art. 51. See, e.g., D. W. Bowett, *Self-Defence in International Law* 184-193 (1958); M. McDougal and F. Feliciano, note 38 above, at 233-241 (1961); J. Stone, *Aggression and World Order* 92-101 (1958).

<sup>68</sup> See M. McDougal and F. Feliciano, note 38 above, at 217-218, 229-244, 259.

<sup>69</sup> Mr. Webster to Mr. Fox, April 24, 1841, 29 *British and Foreign State Papers* 1129, 1138 (1840-1841).

necessary promptly to secure the permissible objectives of self-defense . . . by compelling the opposing participant to terminate the condition which necessitates responsive coercion."<sup>70</sup> As applied to the scope of defense rights against belligerent operations in neutral territory, necessity and proportionality would also seem to subsume community policies for isolating conflict by restricting permissible areas of belligerent operations as well as community policies permitting the use of force reasonably necessary for the defense of major values. As such, the level of belligerent activity on neutral territory, the seriousness of the threat posed by that activity for the protection of major values, the level of control of such activity by the neutral state, and the scope of the responding coercion are all important features in assessing the lawfulness of defensive rights against belligerent operations in neutral territory.

The United States and South Vietnamese military operations aimed at the North Vietnamese base complexes in Cambodian border areas complied with these standards. The level of North Vietnamese and Viet Cong activity on Cambodian territory was substantial and continuing. Activities in Cambodia included elaborate base camps, repeated use of staging areas for launching large-scale attacks on targets in South Viet-Nam, and a major logistics and communications network. At the time of the intercession, the number of North Vietnamese and Viet Cong personnel operating in Cambodia may have been 40,000 or more. In short, the level of belligerent activity in Cambodia was not occasional, low-level, or merely threatened, as was alleged in the German invasion of Norway, but was an existing major adjunct to North Vietnamese belligerent operations within South Viet-Nam. The existence of such large-scale operations in neighboring Cambodian border regions, which in some areas were as close as 35 or 40 miles from Saigon, posed a continuing threat to the effective defense of South Viet-Nam. Moreover, even though the security threat had existed for some time, if North Vietnamese and Viet Cong forces succeeded in military operations directed against the Cambodian Government—as in late April it looked as if they might—it could be expected that the security threat to South Viet-Nam would increase. As to the level of control of the neutral state, Cambodian officials had for the most part been driven out of the contested border areas, and by all accounts the Government forces were sorely pressed to defend Phnom Penh and the provincial capitals, much less to take effective action against the sanctuaries. In this context, the United States and South Vietnamese response seems of a scope reasonably related to the prompt achievement of permissible defensive objectives. The co-ordinated action was aimed at the North Vietnamese and Viet Cong base areas and was not a punitive reprisal raid directed at the host state, as has been true of some Israeli raids in reprisal against guerrilla activities emanating from Jordanian and Lebanese territory.<sup>71</sup>

<sup>70</sup> M. McLoughal and F. Feliciano, note 38 above, at 242.

<sup>71</sup> See, generally, Falk, "The Beirut Raid and the International Law of Retaliation," 63 A.J.I.L. 415 (1969); Blum, "The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk," 64 *ibid.* 73 (1970). See also the ex-



At least United States forces placed a self-imposed 21-mile geographical limit on the invasion of Cambodian territory and an eight-week time limit for the withdrawal of combat units. It also seems relevant in appraising the action that Cambodia did not formally protest the presence of United States or South Vietnamese troops, as on April 22 it had protested the presence of North Vietnamese and Viet Cong troops. Although there were some Cambodian statements critical of the joint operation, on balance it seems to have received at least the tacit consent of the Cambodian Government. This tacit consent is another factor which makes the case stronger than that for Israeli action against guerrilla complexes in Jordan, Lebanon and Syria, or French action in the Algerian War against Tunisian frontier areas.

Military operations within Cambodia, as within South Viet-Nam, must be carried out in a manner that is consistent with the laws of war. In fact, they should be carried out with a sensitivity which goes beyond the present inadequate protection accorded noncombatants and prisoners of war in internal conflicts. Past military operations within Viet-Nam have demonstrated that this is not always the case and that the military has a better job to do both in implementing existing regulations and in evaluating their adequacy for internal conflicts.<sup>72</sup>

## 2. Activities incident to the defense of Cambodia

The level of North Vietnamese attacks on Cambodian military forces and the virtual occupation of large areas of Cambodian territory over Cambodian objection seem at least by late April to have constituted an armed attack on Cambodia justifying individual and collective defense under Article 51 of the Charter.<sup>73</sup> To meet this situation, on April 14 Cambodia

---

change of correspondence between Professor Julius Stone and Professor Falk, *ibid.* 161-163.

<sup>72</sup> See, generally, Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Virginia J. Int. Law 205, 309-310 (1969); Rubin, "Legal Aspects of the My Lai Incident," 49 Oregon Law Rev. 260 (1970).

<sup>73</sup> It is firmly established that collective as well as individual defense is permitted pursuant to Art. 51 of the Charter. See, e.g., Kelsen, *The Law of the United Nations* 791-805 (1950); McDougal and Feliciano, *Law and Minimum World Public Order* 244-253 (1961); Stone, *Legal Controls of International Conflict* 245 (1959). In fact, Art. 51 was drafted largely to reassure the Latin American delegates that collective defense pursuant to regional arrangements would not be disturbed. See, generally, Jessup, *A Modern Law of Nations* 165 (1948); McDougal and Feliciano, *op. cit.* above, at 235; Russell and Muther, *A History of the United Nations Charter* 688-712 (1958); Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," 41 A.J.I.L. 872 (1947). The right of collective defense is also confirmed by a host of defense agreements representing a diversity of ideological groupings and including NATO, SEATO, the Rio Pact, the Warsaw Pact, and the Arab League.

One of the few scholars disagreeing with this almost universally accepted interpretation of Art. 51 has been Dr. Bowett. He argues that: "[T]he situation which the Charter envisages by the term is . . . a situation in which each participating state bases its participation in collective action on its own right of self-defence. It does not, therefore, generally extend the right of self-defence to any state which desires

made an appeal to the United States and other nations for arms and military supplies.<sup>74</sup> On April 20 Cambodia further requested assistance in the form of ethnic Cambodian mercenaries fighting in South Viet-Nam, and on April 22 Cambodia complained to the Security Council seeking assistance from all countries in fighting North Vietnamese and Viet Cong forces. Subsequent to the joint United States-South Vietnamese intercession in Cambodia on April 30, the Cambodian Government negotiated military aid agreements with Thailand<sup>75</sup> and South Viet-Nam.<sup>76</sup> The agreement with South Viet-Nam provides that South Vietnamese military forces "which had come with the agreement of the Cambodian Government to help Cambodian troops to drive out the Vietcong and North Vietnamese forces, will withdraw from Cambodia when their task is completed." Although prior to the April 30th intercession Cambodia had not requested United States combat troops to assist in meeting the North Vietnamese and Viet Cong attack, at least not openly, the worsening military position of the Cambodian forces seemed to have been one motivating factor in the United States action against the border sanctuaries. Thus, in his April 30th address to the nation President Nixon called attention to the North Vietnamese attacks on Cambodian forces and the Cambodian request to the United States and other nations for assistance. The general United States de-emphasis of objectives concerning the defense of Cambodia seemed to result primarily from a desire to disturb the neutrality of Cambodia as little as possible by the action and to re-emphasize the Nixon doctrine that the United States would provide assistance but not American combat forces for the long-range defense of Cambodia. In a statement on May 5 in which the Lon Nol Government at least tacitly accepted the United States action, Lon Nol seemed to take an intermediate view of the objectives of the United States action. The statement referred to the action as "aid . . . in the defense of the neutrality of Cambodia violated by the North Vietnamese." It also said that "the Government of Cambodia wishes to declare that it respects the sentiments of President Nixon in his message of 30 April, 1970 and expresses its gratitude for them."<sup>77</sup>

In view of the magnitude of the North Vietnamese and Viet Cong attacks on Cambodian forces and the Cambodian acceptance of the April 30th intercession, it would seem that the United States and South Vietnamese military actions in Cambodia could also be characterized as lawful measures of collective defense of Cambodia.

---

to associate itself in the defence of a state acting in self-defence." Self-Defence in International Law 216 (1958). Not only does Bowett's interpretation conflict with the history of Art. 51, the almost universal acceptance of the claim in state practice, and the writings of most international law scholars, but it would seem poor policy as well. See the discussion of his position in McDougal and Feliciano, *op. cit.* above, at 247-253.

<sup>74</sup> New York Times, April 23, 1970, at 1, col. 8, and 5, col. 3 (City ed.).

<sup>75</sup> See *ibid.*, June 2, 1970, at 1, col. 5 (City ed.); June 3, 1970, at 1, col. 5 (City ed.).

<sup>76</sup> See *ibid.*, May 28, 1970, at 1, col. 2 (City ed.).

<sup>77</sup> The full statement of May 5 is set out in note 60 above.

The minimal involvement of native Cambodians on the side of the North Vietnamese forces suggests that a characterization of the Cambodian conflict as "civil strife" is less appropriate than a characterization as "external armed attack." Even if the "civil strife" characterization were accepted, however, assistance to the Lon Nol Government to offset the prior massive foreign intervention on behalf of insurgent forces (the Sihanouk government-in-exile?) would, to the extent that the Lon Nol Government is the widely recognized Government of Cambodia, be lawful.

### 3. Activities incident to the rescue of ethnic Vietnamese in Cambodia

Because of the killings of ethnic Vietnamese civilians residing in Cambodia, some of the South Vietnamese military operations in Cambodia aimed at evacuating ethnic Vietnamese refugees may have constituted permissible humanitarian intervention. The justification for humanitarian intervention could only extend to operations principally concerned with evacuating refugees rather than those aimed at affecting authority structures in Cambodia. Since South Vietnamese military actions seem to be defensible on broader grounds, there seems little point in focusing on this possible claim other than to reassert that the killings of ethnic Vietnamese in Cambodia is another example of the need for an unambiguous right of humanitarian intervention.<sup>78</sup>

### 4. A closer look at context

When the United States and South Viet-Nam interceded in Cambodia on April 30, the factual basis seemed to be present for both the exercise of collective defense in defense of Cambodia and the exercise of defensive rights aimed at belligerent activities in a neutral state. Not surprisingly, objectives relating both to the defense of Cambodia and the destruction of North Vietnamese base areas in Cambodia seemed to have influenced the operation. In fact, Cambodian defense and the possibility of intensified belligerent activities directed against South Viet-Nam are so interrelated that it seems probable that the precarious military position of the Cambodian Government was a principal triggering event of the operation. Prior to the events of March, the Sihanouk Government had exercised some restraint on North Vietnamese and Viet Cong activities in Cambodia. The fall of Sihanouk followed by a North Vietnamese-Viet Cong armed attack on the Lon Nol Government threatened to lead to unrestrained North Vietnamese and Viet Cong belligerent use of Cambodian territory. This North Vietnamese armed attack on Cambodia, as well as North Vietnamese use of Cambodian territory as a base for belligerent operations, sets apart the Cambodian case as a much stronger case for action directed against belligerent operations in a third state than prior instances, such as the *Caroline* affair between Britain and the United States, French action against the Tunisian frontier village of Sakiet Sidi Youssef during the

<sup>78</sup> See, generally, Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 Iowa Law Rev. 325 (1967); Moore, note 72 above, at 261-264.

Algerian War,<sup>79</sup> or even Israeli raids against guerrilla bases in Jordan, Lebanon and Syria (which should be distinguished from Israeli reprisal raids directed against the Jordanian and Lebanese Governments.)

Other distinctions between the Cambodian case and these or other instances of actions directed against belligerent operations in a third state may also be relevant to legal appraisal. Such distinctions include the presence or absence of consent of the host state, the lawfulness of the defensive effort (the anti-colonial context of the Algerian War makes the French effort suspect), the scope and intensity of belligerent activities in the host state, and the proportionality of the coercive response.<sup>80</sup> It is instructive in this regard to compare the Cambodian situation with that of the *Caroline* affair, which spawned the most frequently quoted test of necessity. The *Caroline* affair took place during the Canadian rebellion of 1838. As William Edward Hall describes it in his treatise:

A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected, the *Caroline* was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara.<sup>81</sup>

British actions in the *Caroline* case were not in support of the defense of the United States against a major external armed attack, did not take place with the tacit consent of the United States Government, and were directed against sporadic actions of "several hundreds" of insurgents rather than the long-continued belligerent activities of as many as 40,000 combat troops of a foreign nation, all features present in the Cambodian case. Nevertheless, Professor Hall goes on to suggest that even the English

<sup>79</sup> See M. Clark, *Algeria in Turmoil—The Rebellion: Its Causes, Its Effects, Its Future* 363–366 (1960).

<sup>80</sup> The comparison suggested by Professor Richard A. Falk between the United States and South Vietnamese action against the North Vietnamese and Viet Cong base areas in Cambodia and a hypothetical Soviet air strike against U. S. base areas in Japan, South Korea, Thailand, Okinawa, and Guam is only superficially helpful. Among other differences, the governments of Japan, South Korea, Thailand, Okinawa and Guam have not requested assistance from the Soviet Union and would be unlikely to consent to Soviet air strikes on their territory; those host governments have not appealed to the U.N. Security Council for assistance in defense against an armed attack from U. S. forces; there are no treaty obligations prohibiting the United States and its host governments from establishing U. S. military bases on their territory; the United States utilizes the base areas with the consent of the host governments; and the strategic posture of the geographically remote U. S. base areas would make a Soviet air strike a far more provocative action than the Cambodian incursion. Perhaps more important, Professor Falk's seemingly neutral comparison disregards the basic Charter distinction between force used in extension of national values and force used in defense against an armed attack. There is no escape from the fundamental obligation to assess the lawfulness of the contending factions by this basic Charter principle.

<sup>81</sup> W. E. Hall, *A Treatise on International Law* 246 (2d ed., 1884).

response in the *Caroline* case met the "somewhat too emphatic language" of the *Caroline* test of necessity.<sup>82</sup> In assessing the lawfulness of all of these instances of action directed against belligerent activities emanating from the territory of a third state, a detailed examination of necessity and proportionality in context would seem the most reliable guide. The context of the Cambodian case, particularly the dual basis for the exercise of defensive rights in Cambodia, would seem a strong basis for lawfulness.<sup>83</sup>

##### 5. Additional obligations under the United Nations Charter

Measures taken by Members in the exercise of defensive rights must, pursuant to Article 51, be "immediately reported to the Security Council. . . ." The Cambodian operation with South Viet-Nam was reported by the United States to the Security Council on May 5.<sup>84</sup> This report, at least in substance if not in speed, complied with the Charter requirement. The Charter does not require that defensive action taken pursuant to Article 51 first be submitted to the Security Council for approval.<sup>85</sup> Nevertheless, for a number of reasons, it would have seemed desirable to have raised the North Vietnamese and Viet Cong attacks on Cambodia in the Security Council. Perhaps the most important reason is that every time the Security Council is shunted aside and not encouraged to assume responsibility for dealing with a threat to the peace, the erosion of United Nations utility and authority continues. From a *realpolitik* perspective, it seems unlikely that in the Cold War context of the Cambodian situation the Security Council would have been able to take effective action to preserve the neutrality of Cambodia. But the Security Council might have been effectively used as a forum to expose the blatant North Vietnamese and Viet Cong

<sup>82</sup> *Ibid.* at 246-247. Professor Hyde also writes that the facts of the *Caroline* case "seem to have satisfied" the *Caroline* test of necessity. See 1 Hyde, note 61 above, at 239-240.

<sup>83</sup> For statements critical of the lawfulness of the Cambodian intercession, see Edwards, "The Cambodian Invasion Violates International Law," Cong. Rec. E4551 (May 21, 1970); Brief of New York University Law Students, Cong. Rec. E4443 (May 19, 1970). The emphasis in the N.Y.U. law students' brief that North Vietnamese and Viet Cong activities did not constitute an "armed attack" within the meaning of Art. 51 of the U.N. Charter is wholly unpersuasive. Though fact selection is an inevitable task in appraising complex public order disputes, the mind boggles at a fact-selection process which virtually ignores the continuing North Vietnamese and Viet Cong attacks from the Cambodian sanctuaries on U. S. and South Vietnamese forces and the massive North Vietnamese and Viet Cong military attack on Cambodia.

<sup>84</sup> Letter from the U. S. Permanent Representative to the President of the Security Council, May 5, 1970. U.N. Doc. S/9781 (1970); 62 Dept. of State Bulletin 652 (1970); 64 A.J.I.L. 932; 9 Int. Legal Materials 838 (1970).

<sup>85</sup> See Bowett, *Self-Defence in International Law* 193, 195 (1958); Brierly, *The Law of Nations* 319, 320 (5th ed., 1955); Jessup, *A Modern Law of Nations* 164-165, 202 (1948); Kelsen, *The Law of the United Nations* 800, 804, 804, note 5 (1964); *idem*, "Collective Security under International Law," 49 Int. Legal Studies 61-62 (1956); "Collective Security and Collective Self-Defense under the Charter of the United Nations," 42 A.J.I.L. 783, 791-795 (1948); McDougal and F. Feliciano, *Law and Minimum World Public Order* 218-219 (1961); Stone, *Legal Controls of International Conflict* 244 (1954); Thomas and Thomas, *Non-Intervention* 171 (1956).

activities in Cambodia, much as it was used during the *Pueblo* crisis. The importance of such appeals to authority, both in terms of international and domestic audiences, should not be underestimated. Possible drawbacks from raising the Cambodian issue in the Security Council, such as the possibility of a challenge to the credentials of the Lon Nol Government, the possibility of forcing a more militant Soviet stand, or the possibility of forcing a confrontation on the Indochina War which would be detrimental to the United Nations are real, and may have been taken into account in the decision (or non-decision) not to go to the Security Council. In the context of events in Cambodia during April, however, it is questionable whether they outweigh the costs involved in not objecting in the Security Council to the stepped-up North Vietnamese-Viet Cong activities in Cambodia.

#### 6. Obligations under the SEATO Treaty

It is probably fair to say that the initial understanding of the signatories to the Southeast Asia Collective Defense Treaty was that in the event of a request from the Cambodian Government for assistance to meet a North Vietnamese armed attack, each signatory would "act to meet the common danger in accordance with its constitutional processes." Article IV, paragraph 1, of the treaty provides:

Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.<sup>86</sup>

By a Protocol to the SEATO Treaty concluded the same day, Cambodia was unanimously designated by the parties as a protocol state "for the purposes of Article IV of the Treaty."<sup>87</sup> Cambodia did not sign the SEATO Treaty or the Protocol, however, and under Sihanouk Cambodia sought to withdraw from SEATO protection as a protocol state.<sup>88</sup> The action of Sihanouk and the general political collapse of SEATO make it pointless to consider whether the United States and other signatories were "obligated" under the terms of Article IV of the SEATO Treaty to respond to a Cambodian request for assistance. Article IV, paragraph 3, of the treaty, however, may contain some lingering relevance for the Cambodian incursion. It provides:

It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any

<sup>86</sup> Southeast Asia Collective Defense Treaty, signed at Manila, Sept. 8, 1954, 6 U. S. Treaties 81, T.I.A.S., No. 3170; 60 A.J.I.L. 646 (1966).

<sup>87</sup> Protocol to the Southeast Asia Collective Defense Treaty, signed at Manila, Sept. 8, 1954, *loc. cit.* above.

<sup>88</sup> See New York Times, April 30, 1965, at 2, col. 6.

territory so designated shall be taken except at the invitation or with the consent of the government concerned.

The purpose of paragraph 3 seemed to be to reassure the protocol states, none of which were signatories to the SEATO Treaty, that action pursuant to Article IV would not be taken against their will. Quite apart from the issue of whether the treaty has any continuing validity, it is unlikely that paragraph 3 was intended to alter the existing international law of neutral rights and duties, by which a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory—whether or not the neutral consents to the action. Since the action against the sanctuaries was largely based on the international law of neutral rights and duties and did not invoke the collective defense provisions of the SEATO Treaty, paragraph 3 would seem to have only minimal relevance. In any event, the subsequent consent of the Cambodian Government makes the issue largely moot. The broad language of paragraph 3, however, is an additional reason suggesting that it would have been preferable to secure the unambiguous prior consent of the Cambodian Government to the United States and South Vietnamese actions.

## II. THE CONSTITUTIONAL ISSUES

President Nixon's decision to intercede in Cambodia and Congressional reactions to it present two principal Constitutional issues. First, the Constitutional authority for the President's decision to intercede in Cambodia and, second, the Constitutional authority for a range of proposed Congressional restraints on military operations in Indochina. For the most part, discussion of these issues has been subject to a degree of confusion even greater than that attributable to the vagueness of the Constitutional structure or polemical argument about the Indochina War. A principal cause of the additional confusion seems to be the failure to focus on the full range of Constitutional issues in the use of the armed forces abroad. These principal issues include:

### A. *The Initial Commitment of the Armed Forces to Combat Abroad*

1. What authority does the President have, acting on his own, to commit the armed forces to combat abroad?
2. When Congressional authorization is necessary, what form should it take?
3. What authority does Congress have to limit Presidential authority to commit the armed forces to combat abroad?

### B. *The Conduct of Hostilities*

1. What authority does the President have, acting on his own, to make command decisions incident to the conduct of a Constitutionally authorized conflict?
2. What authority does Congress have to limit command options incident to the conduct of a Constitutionally authorized conflict?

### C. *The Termination of Hostilities*

1. What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?
2. What authority does Congress have to require termination of hostilities?
3. When Congress terminates hostilities, what form should the termination take?

Elsewhere I have sought to shed modest light on each of these issues.<sup>89</sup> At the risk of some oversimplification, in general, Constitutional structure and practice require Congressional authorization of major initial commitments to combat abroad, and accord Congress the authority to terminate hostilities abroad. On the other hand, the President seems to have some independent authority initially to commit the armed forces to "minor" hostilities abroad. Though the parameters of this independent authority are unclear, Constitutional history and policy support a test of "the commitment of regular combat units to sustained hostilities" as the threshold for requiring Congressional authorization. The President also has unquestioned authority as Commander-in-Chief to make command decisions incident to the conduct of a Constitutionally authorized conflict and any Congressional authority to limit such command options is subject to a severe burden of Constitutional justification. Moreover, though Congressional authorization or termination of conflict does not require any particular formality such as a formal declaration of war, Congressional action should be based on careful analysis of the context giving rise to authorization or termination and should clearly advert to the scope of the authority granted or the Congressional intent to terminate hostilities. With this necessarily simplified overview of the Congressional and Presidential rôles,<sup>90</sup> resolution of the Constitutional issues surrounding the Cambodian incursion depends on characterization of those issues in the context of the full range of Con-

<sup>89</sup> See Moore, "The Constitution and the Use of the Armed Forces Abroad," Testimony before the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, June 25, 1970; *idem*, "The National Executive and the Use of the Armed Forces Abroad," 21 *Naval War College Review* 28 (1969).

<sup>90</sup> See, generally, on the merits of the war power controversy, Kurland, "The Impotence of Reticence," 1968 *Duke Law J.* 619; Moore, "The Constitution and the Use of the Armed Forces Abroad"; "The National Executive and the Use of the Armed Forces Abroad," *loc. cit.* above; Reveley, "Presidential War-Making: Constitutional Prerogative or Usurpation?" 55 *Virginia Law Rev.* 1243 (1969); Velvel, "The War in Viet Nam: Unconstitutional, Justiciable and Jurisdictionally Attackable," 16 *Kansas Law Rev.* 449 (1968); Francis D. Wormuth, "The Vietnam War: The President v. the Constitution" (An Occasional Paper of the Center for the Study of Democratic Institutions, 1968); Note, "Congress, The President, and the Power to Commit Forces to Combat," 81 *Harvard Law Rev.* 1771 (1968). See also the memoranda prepared by Yale law students and professors: "Indochina: The Constitutional Crisis," 116 *Cong. Rec.* (No. 76, May 13, 1970), and "Indochina: The Constitutional Crisis—Part II," 116 *Cong. Rec.* (No. 82, May 21, 1970); and the proceedings of the Symposium on "The Constitution and the Use of Military Force Abroad" held at the University of Virginia Feb. 28–March 1, 1969, reprinted in 10 *Virginia Journal Int. Law* 32 (1969).



stitutional issues and a more detailed look at the Constitutional authority on each relevant issue.

*A. The Constitutional Authority for the President's Decision to Intercede in Cambodia*

The Constitution provides that "the President shall be Commander-in-Chief of the Army and Navy of the United States. . . ." Hamilton wrote in *The Federalist* that this provision means that the President has "the supreme command and direction of the military and naval forces. . . ." <sup>91</sup> It seems never to have been questioned that this power includes broad authority to make strategic and tactical decisions incident to the conduct of a Constitutionally authorized conflict. Constitutional practice includes a range of Presidential command decisions unquestionably taken on Presidential authority. Examples include President Roosevelt's decision in World War II to give priority to the Atlantic rather than the Pacific theater, Roosevelt's decisions committing American forces to landings in French North Africa (at the time neutral territory), Italy, and the Pacific Islands, and President Truman's decision to use the atomic bomb against Japan.

The limited nature of the Cambodian action both geographically and temporally and its close relation to the Vietnamization effort in support of American withdrawal strongly suggest that the action is most appropriately characterized as a command decision incident to the conduct of the Viet-Nam War. For the most part the actions of United States military forces were directed against North Vietnamese and Viet Cong sanctuaries in Cambodian border regions rather than in direct support of the Cambodian Government. The cautious United States response to Cambodian Government requests for assistance during April also suggests that the action was aimed largely at what was perceived as an increased threat to the United States position in Viet-Nam, even though the increased threat was in large measure attributable to fear of the effects of a collapse of the Cambodian Government in the face of increased North Vietnamese attacks. The Sihanouk Government had exerted some restraint on North Vietnamese and Viet Cong belligerent activities in Cambodia and the Lon Nol Government was vigorously but precariously seeking to reassert the neutrality of Cambodia. Had the Cambodian Government fallen to one controlled by the North Vietnamese, it seemed likely that belligerent activities in Cambodia in support of the struggle in South Viet-Nam would increase, perhaps endangering the program of phased United States withdrawal which was a cornerstone of President Nixon's policy. There is reasonable basis for saying, then, that even a decision to commit United States forces in direct support of the Lon Nol Government would have been under the circumstances a command decision incident to the Viet-Nam War. In any event, the more limited decision to intercede against the border base areas seems most appropriately characterized as a command decision incident to the

<sup>91</sup> *The Federalist*, Number 69, at p. 463 (Heritage Press, 1945).

conduct of the Viet-Nam War. As such, there is little doubt that President Nixon was acting within his Constitutional authority as Commander-in-Chief.

Although the Cambodian incursion seems more accurately characterized as a decision concerning the conduct of hostilities incident to the Viet-Nam War rather than an initial commitment to new hostilities, the Southeast Asia Resolution lends substantial support to Presidential authority. The Southeast Asia Resolution, which is the principal Constitutional authorization for the Viet-Nam War, provides that:

[Sec. 1. . . .] Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression. . . .

Sec. 2. . . . the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.<sup>92</sup>

In view of the continued use of Cambodian border sanctuaries in support of armed attacks launched against South Vietnamese and United States forces, the President would seem to have Congressional authorization under Section 1 of the Southeast Asia Resolution for limited actions directed against the sanctuaries. Apparently the sanctuaries have served as staging areas for the 1968 Tet offensive, the May, 1968, offensive and the post-Tet 1969 offensive, among others, and these continued armed attacks on United States forces would seem to qualify under Section 1 of the resolution. It should be emphasized that the issue is not merely one of anticipated attacks from the sanctuaries or a remote threat of attack but a continuing pattern of armed attack on United States and South Vietnamese forces substantially aided by the existence of the sanctuaries.

Since Cambodia, like Viet-Nam, is a protocol state of SEATO, the language of Section 2 of the resolution would, in the event of a request for assistance from Cambodia, also seem to authorize a Presidential decision to take military action necessary to the defense of Cambodia. There is some evidence from its legislative history that the resolution was understood at the time of its passage to include action in defense of Cambodia. Thus, in his address to Congress on August 5, 1964, requesting the Southeast Asia Resolution, President Johnson specifically asked for a resolution broad enough to "assist nations covered by the SEATO treaty."<sup>93</sup> In an exchange between Senators Cooper and Fulbright on the floor of the Senate during the discussion of the resolution it was said:

*Mr. Cooper.* . . . Does the Senator consider that in enacting this resolution we are satisfying that requirement [the Constitutional processes requirement] of Article IV of the Southeast Asia Collective De-

<sup>92</sup> 78 Stat. 384 (Approved Aug. 10, 1964).

<sup>93</sup> President's Message to Congress, Aug. 5, 1964, in Background Information Relating to Southeast Asia and Vietnam, Senate Committee on Foreign Relations 122, at 124 (Rev. ed., Comm. Print, June 16, 1965).

fense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, *or with respect to the defense of any other country included in the treaty?* [Emphasis added.]

*Mr. Fulbright.* I think that is correct.

*Mr. Cooper.* Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

*Mr. Fulbright.* That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.<sup>94</sup>

Moreover, the resolution is entitled the "Southeast Asia Resolution," not the "Viet-Nam Resolution." As such, Section 2 of the resolution would seem to lend substantial authority to President Nixon's decisions to provide military support requested by the Cambodian Government, such as the military equipment or Khmer mercenary forces requested by the Cambodian Government in April. And though the action against the sanctuaries was apparently not requested in advance, subsequent Cambodian Government approval of the action and further Cambodian requests for assistance raise the possibility that this action may also be brought within the authority of Section 2 of the resolution.

The Southeast Asia Resolution has been criticized as hurriedly rushed through Congress and as predicated on an exaggerated attack on American destroyers in the Gulf of Tonkin.<sup>95</sup> Although the abbreviated debate preceding the passage of the resolution was a sorry exercise of Congressional responsibility, the resolution is nevertheless a valid exercise of the Congressional war power.<sup>96</sup> It is also relevant in considering Congressional involvement that an amendment introduced by Senator Wayne Morse in March, 1966, to repeal the resolution was tabled in the Senate by a vote of 92 to 5.<sup>97</sup> In fact, according to the *New York Times*, a resolution to reaffirm it would have easily passed.<sup>98</sup> Prior to the Cambodian decision a new effort to repeal the resolution had begun, but at the time of the action the resolution to repeal had cleared only the Senate Foreign Relations Committee.<sup>99</sup>

In summary, quite apart from whatever independent authority the

<sup>94</sup> 110 Cong. Rec. 18409-18410 (1964).

<sup>95</sup> See "The Gulf of Tonkin, The 1964 Incidents," Hearings before the Senate Committee on Foreign Relations, 90th Cong., 2d Sess. (Comm. Print, Feb. 20, 1968), and Part II, Supplementary Documents (Comm. Print, Dec. 16, 1968). There seems to be no doubt that the first attack on Aug. 2 occurred.

<sup>96</sup> For a review of the Congressional debates on the Southeast Asia Resolution and the Constitutional issues concerning authority for the Viet-Nam War, see Moore and Underwood, "The Lawfulness of United States Assistance to the Republic of Vietnam," 112 Cong. Rec. 14943, 14960-14967, 14983-14989 (daily ed., July 14, 1966).

<sup>97</sup> 112 Cong. Rec. 4226 (daily ed., March 1, 1966).

<sup>98</sup> New York Times, March 2, 1966, at 1, col. 8 (City ed.).

<sup>99</sup> See "Fulbright Panel Votes to Repeal Tonkin Measure," New York Times, April 11, 1970, at 1, col. 5 (City ed.).

President may have initially to commit the armed forces to combat abroad,<sup>100</sup> the President had Constitutional authority for the actions directed against the sanctuaries under his power as Commander-in-Chief to take command decisions incident to a conflict in progress and under Section 1 of the Southeast Asia Resolution to repel armed attacks against United States forces. Under Section 2 of the resolution and possibly under his power as Commander-in-Chief to take command decisions incident to a conflict, the President also had Constitutional authority to provide military assistance at the request of the Cambodian Government.

*B. The Constitutional Authority for Congressional Restraints on Military Operations in Indochina*

The decision to intercede in Cambodia has given rise to or accelerated a number of Congressional initiatives intended to confine belligerent operations to Viet-Nam or to require termination of the American combat presence after a particular date.<sup>101</sup> These initiatives raise issues concerning the authority of Congress to terminate hostilities, the form of Congressional termination of hostilities, and the authority of Congress to limit Presidential command options incident to the conduct of a Constitutionally authorized conflict.

The Constitution does not specifically address the issue of Congressional authority to terminate hostilities. Moreover, apparently there is no instance in the Constitutional history of the United States in which Congress has terminated a war over the objection of the President. Nevertheless, it seems a fair inference from the power to declare war, the power to raise and maintain an Army and a Navy, and the power to authorize appropriations, as well as the absence of any evident Constitutional scheme for entrusting the power to terminate hostilities exclusively to the President, that Congress has authority to terminate hostilities abroad. Congress is also the most broadly based and democratically responsive branch of government, and unless there is a strong functional reason such as secrecy, speed, or decisiveness which would suggest entrusting the power exclusively to the President, which seems not to be the case, Congress probably ought

<sup>100</sup> The President has only limited power initially to commit the armed forces to combat abroad. Nevertheless that power probably includes the power to take at least limited action in defense against attacks made on U. S. military forces stationed abroad and the power to provide military assistance short of the commitment of regular combat units to sustained hostilities. Although the Cambodian incursion seems more appropriately characterized as a decision relating to the conduct of hostilities rather than initial commitment, even if it were an initial commitment decision, the President probably has independent Constitutional authority to take limited action to defend U. S. forces stationed in South Viet-Nam and to provide low-level military assistance to the Cambodian Government. See Moore, note 89 above.

<sup>101</sup> See, e.g., the resolutions appended to the "Report on the Termination of the Southeast Asia Resolution," the Senate Foreign Relations Committee, Report No. 91-872 (Comm. Print, May 15, 1970); S. 3964 (introduced by Senators Dole and Javits on June 15, 1970); H. J. Res. 1151 (introduced by Representative Findley on March 26, 1970); H. R. 17598 (introduced by Representative Fascell).

to be able to terminate as well as commence hostilities.<sup>102</sup> The complete absence of instances in which Congress has terminated hostilities against the wishes of the President despite numerous highly unpopular conflicts, however, suggests that the exercise of a Congressional policy for termination of hostilities which conflicts with a Presidential policy should be adopted only with the greatest reluctance. The President is the chief representative of the Nation for negotiation of an end to hostilities, has an almost exclusive responsibility to make command decisions concerning the conduct of hostilities, and in many instances has better information concerning the over-all strategic situation than individual members of Congress. As such, Congress should be particularly cautious in undercutting a Presidential policy.

Should Congress choose to terminate hostilities, termination, like authorization, should clearly advert to the context and meaning of the Congressional action. Just as the Southeast Asia Resolution has been criticized as being hurried through Congress without adequate debate, so, too, Congressional action seeking to terminate hostilities in Indochina should be based on adequate debate and should be clearly understood as to meaning and scope. Congressional termination must also allow adequate protection of United States forces during withdrawal from hostilities, as fairly appraised under all the circumstances. Though termination would not seem to require any particular magic formula, it is unclear whether it would have to be in the form of a bill vetoable by the President or whether a concurrent resolution of Congress would be sufficient. The language of Section 3 of the Southeast Asia Resolution indicating that the resolution can be terminated "by concurrent resolution of the Congress" suggests that, at least with respect to the Indochina conflict, a concurrent resolution would be adequate.

The third issue presented by the Congressional initiatives surrounding the Cambodian crisis is the authority of Congress to limit Presidential command options incident to a war. The Constitution makes the President Commander-in-Chief. There is no parallel in the powers entrusted to Congress. Professors Egger and Harris in their study of *The President and Congress* conclude that this means that "the President has the . . . exclusive power . . . of exercising military command in time of peace and in time of war; this command power, moreover, involves as an absolute minimum, upon which the Congress is powerless to encroach, the direction of military forces in combat. . . ." <sup>103</sup> Corwin points out that "Congress has never adopted any legislation that would seriously cramp the style of a President attempting to break the resistance of an enemy or seeking

<sup>102</sup> See the "Legal Memorandum on the Constitutionality of the Amendment to End the War," prepared under the supervision of Professors Abram Chayes and Frank Michelman and introduced in the record of the Hearings before the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, June 25, 1970.

<sup>103</sup> R. Egger and J. Harris, *The President and Congress* 35 (1963). See also 2 Watson, *The Constitution* 913-917 (1910).

to assure the safety of the national forces.”<sup>104</sup> In fact, Roland Young reports that during World War II “No method was worked out by which Congress as a whole was informed on the developments of the war, and, in the aggregate, members of Congress had no more intimate knowledge of how the war was going than the average reader of a metropolitan newspaper.”<sup>105</sup> In *Ex Parte Milligan*, a famous case arising out of the Civil War, Chief Justice Chase pointed out that Congressional authority did not extend to interference with command decisions. According to the Chief Justice, Congressional authority

necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.<sup>106</sup>

In addition to the textual grant of power to the President as Commander-in-Chief and the uninterrupted Constitutional practice supporting an exclusively Presidential command power, there are strong policy reasons inherent in the nature of Congress and the Presidency that support the exclusive nature of the Presidential power. Tactical decisions incident to a conflict are frequently decisions in which speed, secrecy, superior sources of information and military expertise are at a premium. In general the Presidency seems better suited to such decisions than Congress.<sup>107</sup> To give one example, Roland Young reports that the one attempt at a secret session of the Senate during World War II resulted in a garbled version of the session being leaked to the press.<sup>108</sup> More recently, the report on Cambodia prepared by the Staff of the Senate Foreign Relations Committee dramatically details the difficulties encountered by an important Congressional committee in seeking to inform itself as to the conduct of the war.<sup>109</sup> Perhaps for these reasons Hamilton wrote in *The Federalist*: “Of all the cases or concerns of government, the direction of war most

<sup>104</sup> E. M. Corwin, *The President: Office and Powers 1787-1957*, p. 259 (1957).

<sup>105</sup> R. Young, *Congressional Politics in the Second World War* 145 (1956).

<sup>106</sup> 71 U. S. (4 Wall.) 2 at 139 (1866) (Opinion of the Chief Justice and Justices Wayne, Swaine, and Miller). See also *Swain v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff'd*, *Swain v. United States*, 165 U. S. 553 (1897).

<sup>107</sup> Professor Watson points out that the provision making the President Commander-in-Chief may have resulted from the difficulties Washington experienced with the Continental Congress in the conduct of hostilities during the War for Independence. He writes: “[D]uring the Revolution Washington experienced great trouble and embarrassment resulting from the failure of Congress to support him with firmness and dispatch. There was a want of directness in the management of affairs during that period which was attributable to the absence of centralized authority to command. The members of the Convention knew this and probably thought they could prevent its recurrence by making the President Commander-in-Chief of the Army and Navy.” D. Watson, note 103 above, at 912.

<sup>108</sup> R. Young, note 105 above, at 145.

<sup>109</sup> See the Staff Report, “Cambodia: May 1970,” prepared for the Senate Committee on Foreign Relations, 91st Cong., 2d Sess. (Comm. Print, June 7, 1970), reprinted in 9 Int. Legal Materials 858 (1970).

peculiarly demands those qualities which distinguish the exercise of power by a single hand."<sup>110</sup>

Despite the strong case for denying Congressional authority to limit Presidential command options incident to a Constitutionally authorized conflict, it seems unwise to take an absolutist position. That the reasons for exclusive Presidential authority are strong does not necessarily mean that all Congressional decisions limiting command options would be unconstitutional in an era of limited war. One example of a permissible limitation might be a Congressional prohibition on the use of internationally prohibited chemical or biological weapons. Though reasons suggesting Executive authority are still relevant to such decisions, the profound effects for international relations and the grave risk of escalation and unnecessary suffering suggest a strong Congressional competence in such decisions. In any event, the command of the armed forces during a Constitutionally authorized conflict is a core area of Presidential authority and apparently has never been limited by Congressional action. Congressional limitation of such command options would usually be most unwise and would in every case bear a heavy burden of Constitutional justification. That limitations on Presidential command authority are pursued indirectly by limitations on appropriations would not seem significantly to alter Congressional power. Appropriations measures, like any other Congressional measures, must conform to the limits of the Constitution.

Applying these Constitutional principles to the proposed legislation inspired by the Cambodian action, it would seem that Congress would have authority to terminate United States participation in hostilities in the Indochina War. Thus measures such as the McGovern-Hatfield Amendment,<sup>111</sup> which would prohibit the expenditure of military appropriations anywhere in Indochina after June 30, 1971, would seem to be Constitutional if at the time of enactment there were sufficient time allowed for a safe withdrawal of United States forces.<sup>112</sup> The wisdom of setting a deadline for unilateral withdrawal is another matter and one which seems highly dubious in view of the complete absence of historical precedent and the certainty of undercutting the Presidential negotiating position.

As to form of termination, the double vote by the Senate to repeal the Southeast Asia Resolution<sup>113</sup> is precisely the kind of ambiguous and unclear Congressional action which should be avoided. In fact, by a strange quirk of partisan Senatorial warfare it was unclear whether a vote to repeal the Southeast Asia Resolution was a vote to terminate Presidential authority

<sup>110</sup> The Federalist, Number 74, p. 497 (Heritage Press, 1945).

<sup>111</sup> An Amendment to the Defense Authorization Bill, H.R. 17123, 91st Cong., 2d Sess. (1970).

<sup>112</sup> See, generally, the "Legal Memorandum on the Constitutionality of the Amendment to End the War," note 102 above.

<sup>113</sup> See New York Times, June 25, 1970, at 1, col. 1; July 11, 1970, at 7, col. 4. The first vote to repeal was on June 24, 1970, and took the form of an amendment to the Foreign Military Sales Act, H. R. 15628, 91st Cong., 2d Sess. (1970). The second vote to repeal was on July 10, 1970, and took the form of a concurrent resolution, S. Con. Res. 64, S. Rept. 91-872, 91st Cong., 2d Sess. (1970).

or to affirm a Constitutional interpretation that the President would have Constitutional authority even if the Southeast Asia Resolution had never existed. Neither camp seems to have clearly adverted to whether the vote on repeal of the resolution was directed at revoking authority for future actions in Southeast Asia on the authority of the resolution or whether it was intended to be an exercise of the Congressional authority to terminate the Indochina War as of the date of repeal. In the absence of clear Congressional intent to terminate hostilities, the President would certainly be justified in interpreting any repeal to mean only the former. Again, the wisdom of repeal of the principal Constitutional authority for a major war while that war continues seems highly suspect. Repeal, of course, would also require action by the House of Representatives.

Perhaps the legislation most directly related to the Cambodian incursion is the Cooper-Church Amendment<sup>114</sup> which passed the Senate by a vote of 58 to 37 on June 30, 1970.<sup>115</sup> The Amendment provides that:

In concert with the declared objectives of the President of the United States. . . . no funds authorized or appropriated pursuant to this act or any other law may be expended after July 1, 1970, for the purposes of—

- (1) Retaining United States forces in Cambodia;
- (2) Paying the compensation or allowances of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnish military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;
- (3) Entering into or carrying out any contract or agreement to provide military instruction in Cambodia, or to provide persons to engage in any combat activity in support of Cambodian forces;
- or
- (4) Conducting any combat activity in the air above Cambodia in direct support of Cambodian forces.

Nothing contained in this section shall be deemed to impugn the constitutional power of the President as Commander in Chief, including the exercise of that constitutional power which may be necessary to protect the lives of United States armed forces wherever deployed. . . .<sup>116</sup>

The principal Constitutional issue in appraising the Cooper-Church Amendment is whether it should be characterized as within the Congressional authority to withdraw authorization for assistance to the Cambodian Government and termination of such assistance or whether it encroaches on the Presidential authority to take command decisions incident to the Viet-Nam War. To the extent that the Amendment prohibits actions directed against the sanctuaries in direct support of the military effort in Viet-Nam (the extent to which the Amendment would prohibit future actions directed against the sanctuaries is unclear), it would seem to be dealing with command options. On the other hand, if it only seeks to limit the United States involvement in Southeast Asia by proscribing military support of the Cambodian Government, a stronger case can be made that it is within the Congressional authority to terminate hostilities. Never-

<sup>114</sup> An Amendment to the Foreign Military Sales Act, cited above.

<sup>115</sup> New York Times, July 1, 1970, at 13, col. 1 (City ed.).

<sup>116</sup> *Ibid.*, cols. 5-6.



theless, the interrelation between the survival of the Cambodian Government and the military effort in Viet-Nam lends some support to the proposition that even direct military assistance in support of the Cambodian Government is within the Commander-in-Chief's power. The ambiguity as to the conduct proscribed by the Cooper-Church Amendment, the difficulty in characterizing the Constitutional effect of the Amendment, and the uncertainty of the limits of Congressional authority to proscribe Presidential command options suggest that the Amendment is in a Constitutional twilight zone likely to precipitate a clash between Congress and the President and that resolution of the Constitutional issue will depend largely on the actions of each branch of government rather than any analytically discoverable *a priori* Constitutional hypothesis. With respect to form, since Congressional termination of hostilities, whether in whole or in part, should, like Congressional authorization, be carefully considered and debated on its own merits by both Houses of Congress, it seems a poor precedent that the Cooper-Church Amendment took the form of an amendment to the Foreign Military Sales Act, which will be linked with the broader bill rather than considered individually by the House as well as the Senate.<sup>117</sup>

### *C. The Need for Congressional-Executive Co-operation on War-Peace Issues*

The uncertainty of the division of the war powers between Congress and the President suggests a need for co-operation rather than conflict. The Constitutional structure is inescapably one of interdependency. Though Congress has the major power over decisions to commit or withdraw forces from combat, the President can by design of foreign policy sometimes dictate the Congressional action. Moreover, Congress seems to be largely dependent on the methods to wage or to withdraw from conflict which the President chooses. And for his part, although the President has great power to commit the nation diplomatically and to control the course of Constitutionally authorized hostilities, Congress has the power of the purse and great power to mobilize public opinion against a course pursued by the President.

This interdependency suggests that the President should candidly inform Congress of developments affecting national security and that Congressional leaders should be consulted prior to major military decisions, even if they fall within the President's authority as Commander-in-Chief. Failure to inform Congressional leaders prior to the Cambodian intercession involved a high cost in the authority of the action and in Congressional disaffection from Presidential initiatives. Constitutional authority is not an adequate substitute for full co-operation with Congress.

The interdependency between Congress and the President also suggests that Congress should be sensitive to the need for co-operation with the President. Under the pressures of global defense needs and the continuing

<sup>117</sup> Spokesmen for the Senate have implied that, if the House wants the Foreign Military Sales Bill, it also will have to accept the Cooper-Church Amendment.

Cold War, Congress in this century may have relinquished too much of its Constitutional rôle in war-peace issues. Though it is a Constitutional option open to Congress, that body should be hesitant to cede blanket advance authority to the President in resolutions such as the 1955 Formosa Resolution, the 1957 Middle East Resolution and the 1964 Southeast Asia Resolution. Such resolutions run the dual risk of precluding meaningful Congressional participation when events change and of proving an unreliable basis for Congressional support when a President needs it. This is not to suggest that Congress should use only formal declarations of war, a suggestion which seems largely a red herring. Nor is it to suggest that, in authorizing the commitment of forces abroad, Congress should limit the needed flexibility of the President. But it is to suggest that Congress should exercise its power to commit American blood and resources to hostilities abroad with careful deliberation and awareness of context.

In its understandable interest in reassuming a greater rôle in war-peace decisions, Congress should not lose sight of the need to protect legitimate Presidential authority. In the wake of the Cambodian action there are a number of general bills in both Houses of Congress aimed at reasserting the Congressional rôle.<sup>118</sup> Most of those which seek to delimit Presidential authority in advance run the dual risk of unconstitutional encroachment on Presidential authority and of irrelevance as conditions change. The real need seems to be for more careful consideration of Congressional measures authorizing and terminating hostilities and for greater liaison between the President and Congress during the course of major hostilities. For example, a regular meeting at least once every sixty days between the President and key Congressional leaders during the course of major hostilities might assist in avoiding unnecessary friction between the two branches.<sup>119</sup> In the long run, a policy of co-operation rather than conflict seems better calculated to promote the national interest in the successful conduct and termination of hostilities abroad.

### III. INTERNATIONAL LAW AND THE FUNCTIONING OF THE NATIONAL SECURITY PROCESS

In the last few years a great deal of attention has been focused on the rôle *actually* played by international law in national security decisions.<sup>120</sup>

<sup>118</sup> See S. 3964 (introduced by Senators Dole and Javits on June 15, 1970); H. J. Res. 1151 (introduced by Representative Findley on March 26, 1970); H. R. 17598 (introduced by Representative Fascell).

<sup>119</sup> Representative Paul Findley of Illinois has modified his original proposal defining in advance the authority of the President to use the armed forces abroad, and has instead proposed a requirement for a Presidential report when the armed forces are committed abroad and a regular meeting between the President and the Senate and House Foreign Relations Committees during the course of sustained hostilities. As modified, the proposal is a constructive step for increasing the co-operation between Congress and the President.

<sup>120</sup> See, e.g., Scheinman and Wilkinson, *International Law and Political Crisis* (1968). The American Society of International Law currently has a Panel on the Rôle of International Law in Government Decision-Making in War-Peace Crises, which has a number of thoughtful studies in process.

The results are frequently discouraging. It is surprising, then, that so little attention has been devoted to the rôle that international law *ought* to play in such decisions and how the national security process might be better structured to take it into account more systematically. In a recent article in the *Virginia Journal of International Law* this writer has urged that an international legal perspective is an important perspective in national security decisions and that the present structure of the process is inadequate for reliably bringing such perspectives to the attention of national decision-makers.<sup>121</sup> The Cambodian decision dramatically illustrates the continuing high cost of failing to structure an international legal perspective into the national security process. Although the United States intercession in Cambodia was lawful, the ambiguity surrounding certain features of the operation (for example, the consent of the Cambodian Government) contributed unnecessarily to domestic and international misunderstanding of the action. There were at least two options which were likely to be persuasively presented by someone focused on an international legal perspective which might have strengthened the United States response. First, North Vietnamese and Viet Cong attacks on and from Cambodia might have been vigorously protested by the United States in the Security Council during March or April. The Cambodian complaint to the Security Council on April 22 would have seemed a particularly opportune time to press a complaint in the Security Council. The North Vietnamese belligerent use of neutral Cambodian territory and attacks on the Cambodian Government presented about as clear a case of impermissible action as is ever possible in complex world order disputes. To ignore the North Vietnamese actions when there was no longer room for doubt as to their armed attack on Cambodia was unnecessarily to undercut both the United Nations and the United States authority positions. Second, a prior understanding with Cambodia might have been obtained for public release at the time of the operation. In view of the consent requirement of Article IV, paragraph 3, of the SEATO Treaty, such an advance agreement would have seemed particularly advisable. Though concern has been expressed that such an agreement might have undercut the neutrality of Cambodia, it should have been possible to word it in such a way that neutrality was supported rather than compromised. Thus, Cambodia might have "recognized the right of the United States and South Viet-Nam to take defensive action against the unlawful belligerent activities of the North Vietnamese and Viet Cong forces on neutral Cambodian territory." The agreement might also have emphasized that under international law it is not a breach of neutrality for a neutral state to use force against unlawful belligerent activities on its territory,<sup>122</sup> that Cambodia had no intention of relinquishing its neutrality, and that the action was geographically and temporally limited. Though such

<sup>121</sup> Moore, note 72 above, at 310-314.

<sup>122</sup> See M. Greenspan *The Modern Law of Land Warfare* 536-537, 584 (1959). Similarly, lawful actions by one belligerent directed against violations of neutral territory by another belligerent do not constitute hostilities against the neutral. See 2 Oppenheim, *International Law* 685 (7th ed., Lauterpacht, 1952).

an advance agreement was not strictly required by international law, it would have both materially strengthened the United States position and the continuing neutrality of Cambodia. As a minor third point, the United States should have immediately reported its action to the Security Council instead of waiting five days. Finally, President Nixon's speech to the Nation on April 30 and other public pronouncements on Cambodia might have been more focused and carried greater impact had they emphasized the international legal right of a belligerent to take action to end serious continued violations of neutral territory by an opposing belligerent. These suggestions are not put forth as grand new solutions to the tensions which produced the Cambodian crisis but only to illustrate how an international legal perspective might have been sensitive to a range of issues and options which could have improved the United States response to the situation. Had the proposed Cambodian intercession been illegal, of course, then an international legal perspective might have been even more important in counseling restraint.<sup>123</sup>

The Constitutional debate surrounding the Cambodian situation also illustrates a need more systematically to structure a Constitutional-legal perspective into the foreign policy process. The rhetoric of both the Executive and the Congress was frequently overly broad, contributing to a potentially costly confusion. For example, President Nixon failed to make clear that the Southeast Asia Resolution was a principal Constitutional basis for the Viet-Nam War. Partly as a result of this failure clearly to support retention of the resolution, the Senate voted twice to repeal the resolution amid great confusion as to the meaning of the vote. And in its eagerness to reassert a stronger Congressional rôle, Congress sometimes seemed unrealistically to downgrade the independent authority of the President as Commander-in-Chief, as, for example, in the resolutions introduced in both Houses of Congress seeking narrowly to define in advance the limits of Presidential authority to commit the armed forces to combat abroad.

There is no real remedy to the lack of an international legal perspective in the national security process other than increasing the awareness of the importance of such a perspective. Institutional changes may help significantly, however, and the writer is more than ever convinced of the soundness of his earlier recommendation to upgrade the office of Legal Adviser of the Department of State to Under Secretary of State for International Legal Affairs and to make the new Under Secretary a permanent *ex officio* member of the National Security Council. Perhaps, in addition, the President should add to his staff an Assistant to the President for International Legal Affairs. It might also be helpful for the Senate Foreign Relations Committee and the House Foreign Affairs Committee to add similar positions to their staffs.<sup>124</sup>

<sup>123</sup> In the sense that non-compliance with international law subjects a state to all the sanctions of the global community, however imperfect those sanctions may be in particular instances, states do not have a genuine option whether or not to comply with international law.

<sup>124</sup> See Moore, note 72 above, at 310-314, 340-342.

### CONCLUSION

Though the decision to intercede in Cambodia was lawful both under international law and the United States Constitution, the functioning of the national security process in the Cambodian crisis indicates a need for greater sensitivity to the legal dimensions of security decisions. Several options which could have been pursued, particularly referral to the United Nations Security Council and advance agreement with the Cambodian Government, do not seem to have been adequately considered. Similarly, failure to inform Congressional leaders of the pending decision may have unnecessarily weakened the authority of the action. For international lawyers, the principal lesson of the Cambodian crisis may be that they have failed to convince national decision-makers that an international legal perspective should be heard. If so, soul-searching among international lawyers might more sensibly give way to a concerted effort to ensure that others practice what the lawyers preach.

## COMMENTS ON THE ARTICLES ON THE LEGALITY OF THE UNITED STATES ACTION IN CAMBODIA

*George H. Aldrich \**

I appreciate this opportunity to offer a few comments on points made in the preceding papers. Space does not permit any full statement of the legal basis for the action taken in Cambodia by the United States, and I will merely refer readers to the statements made by the Legal Adviser at the Hammarskjöld Forum on May 28, 1970.<sup>1</sup>

In the first place, I fail to understand Professor Falk's allegation that there had been no armed attack from Cambodia prior to the American and South Viet-Nam operations. The facts are generally accepted, I believe, that North Vietnamese and Viet Cong forces have used Cambodian territory for years in pursuit of their continuing armed attack against South Viet-Nam. They have used it as a base area, as a safe haven for the storage of supplies, and for the rest and regroupment of their troops, and as an area from which many armed attacks had been launched across the border. On many occasions our troops and those of South Viet-Nam have been fired on from across the border.

As for Professor Moore's criticism that the United States should have tried to obtain some statement of Cambodian consent prior to beginning operations in Cambodia, I think it fairly can be said that the United States Government considered that possibility. Such a statement of consent might very well have been obtainable, but the decision was taken not to seek it in order to avoid any consequent impairment of Cambodia's neutrality.

I note Mr. Rogers stated concern about the Constitutional argument that the President has the power to protect United States troops. Mr. Rogers seems to be saying that he sees no logical line that could be drawn to delimit such an assertion of power; if the President thought it necessary to use force in Cambodia, why could he not equally use it against Communist China or the Soviet Union, who were supplying arms and equipment to North Viet-Nam? It would be worth considering whether international law may not provide a line that would be relevant here for Constitutional purposes. In other words, the President's power under the Constitution to take action to protect our troops may be greater where the action is lawful under international law than where it is unlawful. In my opinion, whereas it was lawful to act against the sanctuaries in Cambodia, it would not be permissible under international law to take similar action

\* Deputy Legal Adviser, Department of State. The views expressed are those of the author and do not represent the views of the U. S. Government.

<sup>1</sup> Printed in 62 Department of State Bulletin 765-770 (1970); reprinted in 64 A.J.I.L. 933 (1970).

against Communist China or the U.S.S.R., whose territory is not being used in a similar fashion in the course of an armed attack.

*Wolfgang Friedmann \**

If the intervention of the United States forces in the neutral state of Cambodia had been an isolated event, it would probably have aroused little legal criticism and moral indignation. At what point and within what limits a state may violate the neutrality of another state in order to respond to violations of neutrality by a third state with which the responding state is at war, is far from clear. But it is open to serious doubt whether the occupation of sanctuaries by North Vietnamese troops, which had existed and were known to the United States and had been acquiesced in for several years, constituted an imminent threat of attack. Little had occurred in recent months to alter this situation. Nevertheless, if the United States forces had operated from United States territory in order to destroy military installations across the border clearly directed against the United States, the situation could have been likened to the Cuban missile crisis of 1962. The United States response to the installation of Soviet missiles on Cuban territory on that occasion was of doubtful legality, because it interfered, to a limited extent, with the freedom of the seas in time of peace. But it was overwhelmingly accepted by United States and world opinion, because it was clearly felt to be a response to a deliberate provocation and potential threat to the United States by a major Power, and because it was moderate, limited, and clearly defensive in character.

The Cambodian action is basically different. In the first place, it is not an action taken in defense of United States territory or security. It was launched from South Viet-Nam in conjunction with South Vietnamese operations, and its justification clearly stands and falls with the legality of the United States posture in Viet-Nam. This is not the place to reopen the Viet-Nam debate. Suffice it to say that it is a minimum condition of the justification of the United States intervention in Cambodia that its intervention in Viet-Nam should be regarded as in conformity with Article 51 of the Charter, and as an act of defensive aid and response to a request for help from a government attacked from outside. I have repeatedly stated my reasons for rejecting this contention,<sup>1</sup> and for regarding the United States intervention in Viet-Nam as a deliberate violation of the Geneva Accords (with which the United States had undertaken not to interfere by the threat or use of force) and a determined attempt to prevent the unification of Viet-Nam under Communist control. The open refusal of the United States to consider the nation-wide elections provided in the Geneva Accords for 1956, coupled with the military and diplomatic support for the South Vietnamese régime, which the United States elevated into an independent state, are the most significant aspects of this action.

Second, the Cambodian intervention, extending the Vietnamese intervention which was a major exercise in the world-wide "containment" policy

\* Columbia University School of Law.

<sup>1</sup> E.g., in this JOURNAL, Vol. 61 (1967) at 776 ff.

of the United States, in disregard of international commitments, continues a pattern of United States action that has become increasingly apparent over the last fifteen years.<sup>2</sup> The ouster of the incumbent government of Guatemala in 1954, the Dominican intervention of 1965, the Vietnamese intervention, escalating from 1954 to the present day, and now the invasion of Cambodia, are assertions of imperial power, of "spheres of influence," which increasingly disregard the integrity, independence, and self-determination of smaller nations. It is therefore no accident that the United States did not seek the request of the Cambodian Government for its intervention, of which it was informed after the invasion was under way. Nor did the United States even attempt to justify its intervention legally until many weeks after the event. The Soviet Union has, of course, acted similarly on occasions: in Hungary in 1956, when it set up a government of its own choosing and then asked that government to request U.S.S.R. intervention; and even more blatantly in Czechoslovakia in 1968, when the U.S.S.R. intervened without a request from either government or any insurgents. But this country has now put itself on the same legal and moral plane. It has forfeited the claim, which in the earlier postwar phase it could assert with some justification, to be the champion of international order and the defender of the integrity of small nations.

Third, we should seek to relate the legality—and the morality, which in international law is a closely related perspective—of the United States action to the basic issues of world order. Professor Moore has, in his defense of the United States intervention in Viet-Nam,<sup>3</sup> been very eloquent on the need to refer the lawfulness of assistance "to genuine self-determination and the requirements of minimum world public order. . . ." In the present debate he has been noticeably reticent on these issues. Of course, North Viet-Nam has violated Cambodian neutrality. But the establishment of depots and units in sanctuaries near the South Vietnamese border did not interfere with the ordinary life of the people of Cambodia, who went about their business more or less in peace. It is the massive United States-Vietnamese invasion, with all the attendant aerial operations, that has set into motion a process—so painfully familiar from Viet-Nam—of destruction and devastation, the displacement of hundreds of thousands, and the probable ruin of a small country. And this is how the great majority of the world—friends as well as foes—sees it. The North Vietnamese assuredly are neither democrats nor pacifists. Having been thwarted in the attempt to gain control of Viet-Nam through the processes agreed upon at Geneva in 1954, they have from 1960 onwards increasingly resorted to force in order to attain their objectives. Yet it is the United States which has taken the major steps that have involved an ever widening part of the Southeast Asian Continent in war (international and civil), in devastation, and in the total disruption of the life of the people, whose

<sup>2</sup> For a recent confirmation of this interpretation, see Townsend Hooper, a former Under Secretary of the Air Force, "Legacy of the Cold War in Indo China," 48 *Foreign Affairs* 60-61 (July, 1970).

<sup>3</sup> See, e.g., "The Lawfulness of Military Assistance to the Republic of Viet-Nam," 61 *A.J.I.L.* 1, 31 (1967).



only choice is between conflicting tyrannies. But of these contending forces, one is indigenous and only marginally dependent on foreign support. The other is essentially the creation of, and dependent on, a foreign Power, whose base is in another part of the world.

The Cambodian invasion marks a further escalation not only in the scale of the war but in the United States' disregard for the processes of international law. The Cambodian Government was not asked whether it wanted the occupation or not. It acquiesced after the event, and it is now quite clearly a client government of the United States and, even more ironically, after the withdrawal of the United States ground forces, dependent upon its ancient enemy, the South Vietnamese, who in turn depend upon United States help for their own survival and their military operations. That only a perfunctory report was made to the United Nations well after the event is hardly surprising. The major Powers, including the United States, have increasingly detached their international strategies and policies from the United Nations.

Those who hold international law in disdain and regard the present world situation as one in which the confrontation of the super-Powers in Orwellian fashion is inevitable may accept this state of affairs. But as international lawyers we can only record the United States intervention in Cambodia as a further deliberate step away from any attempt to put the use of force under some international control, and as a new move in the pursuit of imperial policies of confrontation.

*Robert H. Bork \**

The Cambodian incursion and its aftermath do raise important Constitutional questions, but they do not seem to me the questions posed by some of the other panelists. I think there is no reason to doubt that President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. That authority arises both from the inherent powers of the Presidency and from Congressional authorization. The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President.

The application of Constitutional principles necessarily depends upon circumstances, and when President Nixon took office he faced two unavoidable facts that bear upon the Constitutional propriety of his subsequent actions. The first fact was the presence of United States troops engaged in combat in Viet-Nam. The President's responsibility for their safety invokes his great powers as Commander-in-Chief of our armed forces under Article II, Section 2, of the Constitution. The second fact was the engagement in Viet-Nam of our national interests. The President's ability to carry out his general policy of phased withdrawal as the South Vietnamese took over the war—a policy Congress has not in any way re-

\* Professor of Law, Yale University.

pudiated—will affect in many ways, both direct and indirect, the position of the United States in world affairs. The necessity for judgment and choice in carrying out that policy effectively invokes the President's powers as Chief Executive with primary responsibility for the conduct of foreign affairs.

These inherent powers of the President are themselves sufficient to support his order to attack the Cambodian sanctuaries seized by the enemy. It is completely clear that the President has complete and exclusive power to order tactical moves in an existing conflict, and it seems to me equally clear that the Cambodian incursion was a tactical maneuver and nothing more. The circumstances demonstrate that. The United States was conducting, with Congress's approval, armed hostilities in Viet-Nam, the enemy had extended the combat zone by seizing Cambodian territory and using it as a base for attacks upon American and South Vietnamese troops within South Viet-Nam, the Cambodian Government was unable to eject the North Vietnamese and Viet Cong who thus misused Cambodian territory, and the Government of Cambodia welcomed the American and South Vietnamese attack to clear out the enemy bases in Cambodia. The President's order did not begin a war with Cambodia or with anyone else. The decision to attack the sanctuaries was thus as clearly a tactical decision as is a directive to attack specified enemy bases within South Viet-Nam itself.

An attempt has been made to counter this argument by claiming that its logical extension places the entire war power in the hands of the President, that he could, for example, cite the need to defend the safety of American troops in Viet-Nam as justification for an order to bomb supply depots in China. This is a familiar but unsound form of argument. Its premise is that no principle can be accepted if it can be extrapolated to an undesirable result. That would be true only in those relatively rare cases in human affairs where only one principle or consideration is in play. That is not the case here. The Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President, while the major questions of war or peace are, in the last analysis, confined to the Congress. The example posed—the decision to bomb Chinese depots—is at one extreme of the spectrum, since it would involve the decision to initiate a major war, while the actual case before us, attacks made with the full approval of the Cambodian Government upon bases being used by the enemy in an existing conflict, is at the opposite end of the spectrum. The counter-example offered thus actually emphasizes the tactical nature of the President's decision.

In addition to the inherent powers of the President, there was Congressional authorization for the course he took. The most obvious authorization was in the Tonkin Gulf Resolution. We have heard an attempt to distinguish that document away, but Section 1 expressly authorizes the President "to take all necessary measures to repel any armed attack against the forces of the United States *and* to prevent further aggression." (Emphasis added.) Both branches of that authorization cover the Cambodian in-

cursion. Our forces were under armed attack mounted from and based upon the Cambodian sanctuaries, and the stated purpose of President Nixon's action was to repel that attack and to prevent further aggression. Lest there be any doubt of the intended breadth of the Tonkin Gulf Resolution, it should be recalled that Senator Fulbright, who led in its adoption, said at that time that the resolution was tantamount to a declaration of war. In a war the Commander-in-Chief certainly has the power, at an absolute minimum, to order troops across a border to attack an enemy operating from there, particularly when the move is welcomed by the government whose border is crossed.

It is perfectly clear that a President may conduct armed hostilities without a formal declaration of war by Congress and that Congress may authorize such action without such a declaration. Congress's power "to declare war" does not, even semantically, exclude such a course, and the Constitution has been interpreted in this fashion repeatedly throughout our history. The Korean War is the most recent major precedent, and there President Truman went much further than President Nixon, for he committed our troops to a new war without prior Congressional approval. The suggestion that Korea is not a precedent because President Truman acted with the sanction of the United Nations is without merit. The United Nations cannot give an American President any warmaking power not entrusted to him by our Constitution. Moreover, the approval of the United Nations was obtained only because the Soviet Union happened to be boycotting the Security Council at the time, and the President's Constitutional powers can hardly be said to ebb and flow with the veto of the Soviet Union in the Security Council.

I arrive, therefore, at the conclusion that President Nixon had full Constitutional power to order the Cambodian incursion, and that Congress cannot, with Constitutional propriety, undertake to control the details of that incursion. This conclusion in no way detracts from Congress's war powers, for that body retains control of the issue of war or peace. It can end our armed involvement in Southeast Asia and it can forbid entry into new wars to defend governments there. But it ought not try to exercise Executive discretion in the carrying out of a general policy it approves.

*John Lawrence Hargrove \**

Professor Falk has argued that the incursion of United States land forces into Cambodia was not justifiable from the point of view of international law, and Professor Moore that it was. There is a sense in which both are wrong.

In defense of the action, a sufficiently plausible argument can be made for its international legality to save the Administration's case from being thrown out on the pleadings. (This is true if one gives the Administration the benefit of all the doubts on the facts, and takes as assumed the underlying legal premise regarding the conflict in South Viet-Nam itself: namely, that the Republic of Viet-Nam is an entity legally capable of coming under

\* Director of Studies, American Society of International Law.

"armed attack" from the Democratic Republic of Viet-Nam, within the meaning of Article 51 of the United Nations Charter; I shall accept this premise *arguendo*.) There is nothing in the law of the Charter which necessarily excludes an exercise of the right of self-defense on the territory of a foreign state which is not itself the attacker, even without the valid consent of that state. Should, for example, Canada be militarily occupied by a Power hostile to the United States, and used as a base from which to sustain an attack against the American industrial Midwest, there is no basis for supposing that in all conceivable circumstances the Charter would restrict the use of defensive force by the United States to United States territory. The test would be whether there was an armed attack and thus a right of self-defense, and, if so, whether the action in question was necessary to put an end to the injury being inflicted by such attack and proportionate to it.

The same test applies to the Cambodian action. In that case there has been a systematic pattern of conduct, aimed at and resulting in armed violence on South Vietnamese territory, sustained by foreign military forces on Cambodian territory for years. It is unreasonable to assume that international law would provide no right of defense against such conduct under any circumstances, *i.e.*, would deny that it could ever amount to an armed attack. And when it does amount to an armed attack, the test of legitimate defense is not *where* defensive force is exercised but whether it is necessary and proportionate. On these last points the Administration's case can be endowed with a certain *prima facie* plausibility by reference to the fact that less radical measures had clearly proved inadequate, and by reference to the intended limits of time and geography to be placed on the incursion.<sup>1</sup>

The difficulty, however, is that being satisfied of this sort of *prima facie* legality is not sufficient to discharge a President's responsibility toward the law as he makes decisions about the international use of force. So far as international law is concerned, a President's duty is not just to be able to make out a case for legality which is not patently absurd, but to be willing to forgo actions which are in their sum effect injurious to the international legal order. He must therefore be concerned in advance with the full panoply of practical consequences which his action may have for the viability of law as a guide to conduct. However reasonable the United States' legal case may appear in the Oval Room, he must ask: Will it in fact be credited by other governments, and if so, with what deleterious effect on the evolution of the principles the United States has invoked? Or will they dismiss our action as simple lawlessness? Either way, will they in fact take our action as a means of justifying violence of their own in other circumstances even less defensible legally? Will our action further impair the ability of the United States to invoke legal restraints to reduce the level of violent conduct generally?

<sup>1</sup> It should be noted that the fact of Cambodian neutrality, whatever its other legal consequences, serves neither to enlarge nor diminish the scope of lawful force by or against any of the parties. The Charter, which exhaustively catalogues the kinds of permissible force, speaks only of self-defense (aside from force authorized by international organization decision), not of neutrality.

In the Cambodian case, it would have been reasonable to predict that the legal justification eventually put forward by the Administration, if noticed at all, would be largely discounted in the international community as contrivance if not pettifoggery. This is substantially because, on the Administration's own previously stated premises, the United States action just did not appear either necessary to put an end to the injury being inflicted by military movements from Cambodia into Viet-Nam, or proportionate to that injury. It looked instead like a massive military invasion undertaken ostensibly to deal with a long-standing situation which the world had previously been led to believe was sufficiently manageable as not to impede a program of fairly rapid withdrawal of United States ground combat forces from *Viet-Nam*, to say nothing of Cambodia. With the addition of the fact of a strong and obvious, but legally immaterial, extraneous inducement for the invasion (shoring up the Cambodian régime), and the fact that even many friendly governments have doubts about the international status of the Viet-Nam conflict itself, the task of devising a legal explanation which would be widely convincing internationally was recognizably foredoomed. Unfortunately, as if to make sure on this score, the Administration constructed a public record which pointedly indicated that the decision was taken and initially executed without consideration even of the existence of international legal restraints on using force against the territory of another, despite the workmanlike effort of State Department Legal Adviser Stevenson to repair the damage after the fact.

The sum practical effect has been a further enfeeblement of these restraints—an effect surpassed, among United States actions in recent years, probably only by our acquiescence in the indefinitely extended occupation of foreign territory by Israel as a means of compelling a favorable political settlement. So far as international law is concerned, it is likely that most of the world's international policy-makers would accept the proposition that the United States invaded Cambodia on a grand scale on nothing more, at best, than a legal technicality. There is little reason to hope that their memories will fail them when in the future they come to weigh their own decisions about the resort to violence.

We can learn from this experience something about the rôle of law and lawyers in the international conduct of states. In a national legal order, private persons want to know: Can the system be made to permit me to do what I want? How can I turn it to my purposes? Their lawyers are paid to produce the answers, and the system usually provides ways to tell, eventually, whether the answers were right or wrong. The public international legal order, however, is for many reasons a radically different affair. Here, such questions should be put (by governments to their lawyers) only as a first step, if at all; the fundamental and controlling legal question must always be: What will we be doing to the system itself? Here the proper concern of legal counselors is not so much with nice lawyers' arguments showing how to establish legality, as with the wise husbanding of the legal order.

## MARINE POLLUTION PROBLEMS AND REMEDIES

By OSCAR SCHACHTER \* and DANIEL SERWER \*

Marine pollution is a global problem in several senses. It affects the health of the oceans in all parts of the world; it affects all countries, both developed and developing; and all countries contribute to some aspects of the problem. Some marine pollution problems are local, but many have international implications. Particularly if the effects of pollution on the living resources of the sea are considered, very few marine pollution problems can be considered matters of exclusively local interest.

It is not only a global problem in extent but a many-sided complex phenomenon with interlocking economic, technological, political and legal aspects. Obviously no single remedy or solution can be expected. The simple maxim that those who pollute should clean up or pay compensation has only limited utility. Wastes are disposed of in the oceans partly because the costs and risks of putting them elsewhere are greater. In many cases the blame for damage cannot be assigned. Even where it can be, liability may not be a deterrent. Outright prohibition may be necessary to prevent pollution but that may involve substantial deprivation to legitimate users. It may well be that new structures of authority are required, as the Secretary General of the United Nations has recommended,<sup>1</sup> but the effec-

\* Mr. Schachter, of the Board of Editors of the JOURNAL, is the Director of Research of the United Nations Institute for Training and Research (UNITAR). He was the President of the American Society of International Law for 1968-1970. Mr. Serwer, an Assistant Research Fellow of UNITAR, has been a Danforth Fellow in the Department of Chemistry at the University of Chicago and a National Science Foundation Fellow in the Program in History and Philosophy of Science at Princeton University. The article is based on research undertaken for UNITAR and the Pacem in Maribus Convocation in Malta, 1970, and has been distributed as a UNITAR Research Report. The views, interpretations and conclusions are those of the authors and are not to be attributed to UNITAR.

<sup>1</sup> The Secretary General of the United Nations has "urgently recommended" the creation of a "global authority to deal with the problems of the environment." See U Thant, "The United Nations: the Crisis of Authority," Address to the Fourteenth World Congress of the World Association of World Federalists (Ottawa, Aug. 23, 1970), as reported in U.N. Press Release SG/SM/1323. An eloquent call for an International Environmental Authority has been made by George Kennan in "To Prevent a World Wasteland: a Proposal," 48 Foreign Affairs 401 (1970). A suggestion for an International Environmental Authority of a somewhat different nature has been made by R. R. Baxter in "International Cooperation to Curb Fluvial and Maritime Pollution," Proceedings, Columbia University Conference on International and Interstate Regulation of Water Pollution held on March 12-13, 1970, p. 73. See also the statements of Professors Richard A. Falk and Richard N. Gardner in 1970 A.S.I.L. Proceedings, 64 A.J.I.L. (September, 1970) 211, 217. A different approach to establishing international supervision of at least some kinds of marine pollution is found in the Draft United Nations Convention on the International Seabed Area, U.N. Doc. A/AC.138/25, 9 Int. Legal Materials 1046 (September, 1970), presented to the United Nations Seabeds Committee by the United States on Aug. 3, 1970. Under

tive exercise of authority would still be limited by the inherent complexities of the problems themselves, by the gaps and uncertainties of scientific knowledge and by the hard facts of economics and political interest. Clearly, the difficulties of setting goals and priorities will not be solved at a single stroke. Continuing wise management will be needed.

This management will need information as well as wisdom. We are profoundly ignorant of much that goes on in the marine environment. The oceans are, along with extraterrestrial space and the interior of the atomic nucleus, one of the frontiers of scientific and technological research. The present ignorance is not limited to isolated details like the number of fish in the sea, though that too is a question which cannot now be answered satisfactorily. We lack knowledge of fundamental aspects of the physical, chemical and biological working of the oceans. It should be no wonder, then, that events in the sea like the recent explosion in the population of the Crown of Thorns starfish—a population explosion which has threatened to destroy coral reefs throughout the Pacific Ocean—are not quickly explained. This ignorance of the oceans and the life in them is one of the reasons why the problem of marine pollution and its effects must be treated with respect and caution.

The need for information about pollution has been recognized in the plans for world-wide monitoring of the oceans—most notably, the International Global Ocean Station Systems (IGOSS).<sup>2</sup> That plan rests on an impressive technical capability to gather data through automated buoys and transmit the information throughout the world. But technical monitoring capability is not in itself sufficient for producing useful knowledge; it needs to be designed and employed for scientific understanding. Yet, because of our ignorance of the oceans, we may not have reached the point where our scientific knowledge of ocean problems would justify a data-gathering system on a global scale.<sup>3</sup> Whether or not this is the case, it is quite clear that routine global monitoring will not in itself provide the information required for pollution control. Ocean research and especially experimentation are equally required and, beyond that, a much greater theoretical

---

this convention, the control of marine pollution arising from activities in the International Seabed Area would be under the supervision of an International Seabed Authority entrusted as well with supervising the exploration and exploitation of seabed resources.

For a general treatment of the processes of authority over the seas, see Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven: Yale University Press, 1962), and W. T. Burke, *Ocean Sciences, Technology and the Future International Law of the Sea* (1966).

<sup>2</sup> See "General Plan and Implementation Programme of IGOSS Phase I," UNESCO Doc. SC/10C-VI/21 Ref. (Oct. 27, 1969).

<sup>3</sup> Henry Stommel, "Future Prospects for Physical Oceanography," 168 *Science* 1536 (June 26, 1970). Dr. Stommel, an oceanographer, has expressed misgivings as to the utilities of the proposed global monitoring system to scientists. In his opinion, "... no oceanographic problem has yet been formulated that can justify a data-gathering system on a global scale involving several hundred widely dispersed buoys." He feels that both IGOSS and the U. S. National Data Buoy Project "do not appear to be aimed at any clearly defined scientific problem."

understanding of the ocean systems and how they work.<sup>4</sup> Moreover, for adequate fact-finding a variety of investigators will still be needed, even though there may be several thousand automated buoys dispersed in the oceans. We may recall that the harmful effects of DDT were discovered by the efforts of a number of bird watchers, game wardens, conservationists and a variety of professional scientists.<sup>5</sup> It is unlikely that a single global automated monitoring system can take the place of this kind of information-gathering network.

What measures can and should be taken in marine pollution control is complicated by the variety of pollutants. These vary not only in their chemical composition and behavior, but also in the manner in which they enter the marine environment and the nature and extent of their effects. Some materials which pollute the marine environment are discharged intentionally; others are only discharged accidentally. Some sources of marine pollution can be pin-pointed; others are for all practical purposes untraceable. Some marine pollutants maintain their chemical integrity for decades and even centuries; others are degraded to harmless materials in a matter of hours or days. Some marine pollutants present a clear and immediate threat to marine life; others may only be dangerous in the long term, and the precise nature of these dangers may still be unknown. No single measure or type of measure on either the national or international level is adequate to meet the range of marine pollution problems. Marine pollution control measures must be tailored carefully to fit particular problems. Moreover, the fashioning of these measures is not a task for the imagination alone. The present international system, based as it is on the interdependency of sovereign states, is the material from which solutions must be cut. This system has both considerable capacity and serious limitations for dealing with marine pollution problems.

The capacities can be illustrated most clearly if the specifics of marine pollution problems are immediately at hand. Accordingly, in what follows we select what appear to be the most important problems and summarize what is known about where the pollutants originate, the extent to which they are found in the marine environment, how they affect the marine environment, what international controls now apply and the prospects for future pollution and its control. This is done under four headings:

<sup>4</sup>The U.N. General Assembly has passed several resolutions on the need for more research on the oceans and has endorsed an "International Decade of Ocean Exploitation." See U.N. General Assembly Res. 2172 (XXI), 2412 (XXIII) and 2467 (XXIII). Research needs are outlined in "Global Ocean Research," a report of the Joint Working Party on the Scientific Aspects of International Ocean Research (set up by the Food and Agriculture Organization, the World Meteorological Organization and the International Council of Scientific Unions), and also in the "Comprehensive Outline of the Scope of the Long-term and Expanded Programme of Oceanic Exploration and Research," submitted by the Intergovernmental Oceanographic Commission, in Annex to the Note by the Secretary General to the U.N. General Assembly, U.N. Doc. A/7750 (Nov. 10, 1969). Stommel, *ibid.*, comments on the relative merits of these two documents.

<sup>5</sup>David R. Zimmerman, "Death Comes to the Peregrine Falcon," *New York Times Magazine*, Aug. 9, 1970, p. 8.



oil, chlorinated hydrocarbons, wastes discharged from coasts and wastes dumped from vessels. This discussion of specific marine pollution problems and remedies is prefaced by a few background facts about the marine environment which bear on the problem of marine pollution.

#### SOME BASIC FACTS ABOUT THE MARINE ENVIRONMENT

While the primary chemical constituent of the oceans is water, many other chemicals are found dissolved in this water. Even in "natural" sea water, these chemicals include many of the substances which we refer to as pollutants. Mercury, lead, hydrocarbons similar to those found in oil, and some radioactive nuclides would all have been found in the oceans millions of years ago. The difference between now and millions of years ago is that man is adding to the concentrations of these materials, as well as introducing new materials like chlorinated hydrocarbons, in amounts which are significantly altering the chemical composition of the marine environment. In a number of cases, the "significant amounts" added by man's activities are doubling the natural concentration of marine chemicals and introducing new chemicals in concentrations approaching those of naturally occurring chemicals.

The significance of these added chemicals in the marine environment lies in their effects on the ecology of the marine environment, that is, in their effects on the relationship among living things and between living things and their environment.<sup>6</sup> These relationships are delicately balanced. Marine life is interconnected in a web of interrelated food chains, all of which depend in the end on the chemical situation in the marine environment. Diversity of species is an essential characteristic of these food webs, for diversity is frequently associated with stability in ecological systems. At the base of marine food webs there is usually some form of phytoplankton, tiny plants which float on the surface of the sea. Phytoplankton are responsible for the primary production of 90 percent of the living material in the sea. Moreover, they have produced by photosynthesis about 70 percent of the oxygen on the earth. The marine life which supplies man with food, usually fish ten inches or longer, is found relatively high in the marine food webs. The continued production of these fish depends on the maintenance of the species below them. Of course, changes in food webs have always occurred, with some species becoming extinct and others evolving. The adaptive capacity of marine life may not, however, be unlimited, and the adaptations are not necessarily beneficial to man. The greatest long-term danger from marine pollution lies in its potential for upsetting the ecological balance of the oceans in such a way that man will find the usefulness of the marine environment vastly diminished. That this can in fact happen is clearly demonstrated in many of the world's fresh-water areas.

<sup>6</sup> The "Ocean" issue, 221 *Scientific American* (September, 1969), is a good layman's introduction to the scientific aspects of the oceans. For more technical material see reports referred to in note 4 above.

The ecological balance of the oceans can be upset in many ways. Some pollutants simply poison the animals and plants with which they come into contact. Other pollutants make such a demand on the oxygen dissolved in sea water—oxygen which is essential to the life of marine animals—that the living competitors suffocate. Some pollutants encourage the growth of a single species which either consumes or poisons other species. Still other pollutants accumulate in marine food chains and webs because they are not readily metabolized. Pollutants concentrated by food chains can reach levels which upset physiological functions. Examples of these mechanisms can be found in the outlines of the effects of specific pollutants given later in this paper.

The operation of these mechanisms and the effects they have are determined, in part, by where in the marine environment pollution occurs. The oceans are not homogeneous. Physical parameters like temperature and pressure vary greatly. Marine life and the nutrients required to support it are not evenly distributed over the oceans, but are instead found concentrated in certain areas. These fertile areas of the oceans often lie along coastlines; estuaries are the most fertile areas. Some species of marine life are found concentrated in certain areas, while others range over wide expanses of the oceans. Even the motion of water in the oceans is not uniform. As much as waves may appear to be similar all over the earth, oceanographers find that some water moves rapidly in ocean currents and some water remains in much the same place for many years. Putting a pollutant in some ocean areas is like putting it in a lagoon: it stagnates for a long time. On the other hand, pollutants do not have to be put in a particular part of the oceans, or even in the oceans at all, in order to end up there. Not only do the rivers run into the sea and the currents of the sea run over the earth, but the atmosphere and the sea constantly exchange materials.

### OIL

Hydrocarbons in the marine environment come from a variety of sources. These include natural submarine seepage,<sup>7</sup> natural decay of marine plant and animal life, shore-based industrial and transport activities, offshore drilling, wrecked oil tankers and other ships, and discharges from ships which pump out cargo and ballast tanks with sea water. Of the two natural sources, submarine seeps may be controllable, but plant and animal decay is not. Most of the hydrocarbon due to human activities is crude oil, but fuel oil has also been spilled. Fuel oil is usually much more toxic than crude oil.

Of the persistent pollutants in the marine environment, oil is found in

<sup>7</sup> Natural submarine seepage of oil occurs in both the Santa Barbara Channel and the Gulf of Mexico, two areas which have recently been the scene of oil pollution from off-shore wells. Oil from submarine seepage was observed in the Santa Barbara Channel as early as 1793, as pointed out by Jan Hahn in "Natural Oil Seepage," XV *Oceanus* 12 (Woods Hole Oceanographic Institution, October, 1969).

the greatest quantities. A recent estimate<sup>8</sup> puts oil pollution from oil transport activities alone at one million metric tons per year and the total from all human activities at no less than ten times this amount. Another recent estimate puts the volume of oil discharged from seagoing sources, including offshore wells, at 1.5 million tons per year and the volume of oil from land-based sources at no less than 3 million tons per year.<sup>9</sup> If these estimates are correct, the total amount of oil entering the marine environment from human activities is approximately as great as the total amount of hydrocarbon entering the marine environment from natural plant and animal decay. These losses of oil from human activities are not uniformly distributed in the world's oceans. A large fraction of the total oil pollution originates from shore installations and offshore wells. Much of the oil pollution from ships is spilled in coastal areas, particularly in harbors. The major sea lanes for oil transport at present—the Persian Gulf, the Mediterranean, the Western coastal waters of Europe and the Eastern coastal waters of the United States—all lie close to coastal areas.

Due to the research efforts of recent years, an outline of what happens to crude oil once it enters the marine environment is now clear.<sup>10</sup> The oil first forms slicks whose composition varies from virtually pure oil to a water-in-oil emulsion to an oil-in-water emulsion. Some lighter fractions of oil, including the toxic aromatic hydrocarbons, evaporate quickly if they are exposed to the atmosphere. The slicks float on the ocean surface, spreading and traveling in a way determined primarily by winds and ocean currents. If the oil becomes adsorbed on solid particles—which happens more often in coastal areas—it may sink. Little is known about how far the oil sinks and what happens to it deep below the surface or on the bottom. Oil on the surface undergoes auto-oxidation, a process catalyzed by the mineral salts in sea water and by sunlight and bacterial oxidation. Bacterial oxidation is favored by dilution of the oil in water and by heat. Below 10 degrees centigrade, bacterial oxidation is very slow, and oil spilled in Arctic areas may last as long as fifty years. Even in temperate zones in the summer, as much as 50 percent of the oil may remain unoxidized after a week. In coastal areas oil may be beached, and oxidation continues on the beach. If the oil remains on the sea, tarry lumps are formed. Tarry lumps have been found in the Mediterranean consisting of oil which had been at sea for as long as two months. On a cruise of a Woods Hole research vessel between Rhodes and the Azores, these tarry lumps were found in at least 75 percent of the tows made with neuston nets on the

<sup>8</sup> M. Blumer, "Oil Pollution of the Ocean," XV *Oceanus* 3 (Oct. 10, 1969).

<sup>9</sup> Luther J. Carter, "Global Environment: MIT Study Looks for Signs of Danger," 169 *Science* 660 (Aug. 14, 1970).

<sup>10</sup> The fate of oil in the marine environment is discussed in Robert W. Holcomb, "Oil in the Ecosystem," 166 *Science* 204 (Oct. 10, 1969); Julian McCaull, "Black Tide," 11 *Environment* 2 (Committee for Environmental Information, St. Louis, Mo., November, 1969); and Claude E. Zobell, "The Occurrence, Effects, and Fate of Oil Polluting the Sea," *Proceedings, International Conference on Water Pollution Research* (London: Pergamon Press, 1964).

surface of the sea.<sup>11</sup> In the Sargasso Sea, a region of the North Atlantic known for its masses of floating vegetation which is not crossed by major shipping lanes, a research vessel found as much as three times as much tarry material as Sargasso weed in its neuston nets.<sup>12</sup> The Expedition "RA" has reported to IMCO that it sailed through water "visibly polluted" with "tar-like or asphalt-like material" on six out of fifty-two days of its trans-Atlantic voyage.<sup>13</sup>

In the short term, oil can cause damage to both marine life and the recreational potential of coastal areas. Damage to marine life varies greatly with the species involved, the type of oil and the length of exposure. Birds are particularly sensitive to oil pollution, and attempts to save them by cleaning have been largely unsuccessful.<sup>14</sup> Fish populations do not appear to be affected by short-term exposures to crude oil spills, although fish taken from water polluted with crude oil may be unpalatable. Fuel oil, on the other hand, can kill fish in great numbers. Recovery of a coastal area from the effects of a fuel oil spill can be very slow. Chronic oil pollution, a condition present in some ports, appears to have more drastic effects on marine life than isolated oil spills, primarily due to deoxygenation of the water. Damage to beaches from oil spills appears to be temporary, but it may not be limited to the inter-tidal zone.<sup>15</sup> Without special efforts to remove the oil, oil on beaches can last for months, that is, for long enough to have a serious effect on areas which depend on beaches for their livelihood.

The long-term, low-level effects of oil pollution are still not well understood. These effects are probably non-lethal to marine life, though some chemicals present in crude oil may be carcinogens. The non-lethal long-term effects may, however, pose serious problems. Even if hydrocarbons present in oil do not kill marine life, they may accumulate in food chains and affect human beings who eat fish. There have been complaints in several countries about fish which taste like crude oil.<sup>16</sup> It has been suggested<sup>17</sup> that hydrocarbons present in crude oil may interfere with biological processes which depend on low concentrations of chemical mes-

<sup>11</sup> Michael H. Horn, John M. Teal and Richard H. Backus, "Petroleum Lumps on the Surface of the Sea," 168 *Science* 245 (April 10, 1970).

<sup>12</sup> M. Blumer, note 8 above.

<sup>13</sup> Thor Heyerdahl, "Ocean Pollution Observed by Expedition 'RA,'" attached to IMCO Doc. OPS/Circ. 21 (Oct. 23, 1969) and GESAMP/30 (Feb. 20, 1970). GESAMP documents come from the Joint IAEA/IMCO/FAO/UNESCO/WHO/WMO Group of Experts on the Scientific Aspects of Marine Pollution for which IMCO handles the secretariat responsibilities.

<sup>14</sup> The much-publicized attempts to clean oiled birds after both the Santa Barbara Channel and *Torrey Canyon* oil spills were not successful. According to Julian McCaull, note 10 above, only 450 of 7,849 birds cleaned were alive two months after the *Torrey Canyon* spill; 198 of 1,653 birds cleaned were alive two months after the Santa Barbara Channel spill.

<sup>15</sup> G. R. Hampson and H. L. Sanders, "Local Oil Spill," XV *Oceanus* 8 (October, 1969).

<sup>16</sup> Edward E. Goldberg, "Chemical Invasion of the Ocean by Man," 1970 *Yearbook of the Encyclopedia of Science and Technology* 68 (McGraw-Hill).

<sup>17</sup> M. Blumer, note 8 above.

sengers—many of which are hydrocarbons—in sea water. The oxidation of oil by bacteria, though it may provide an increase in nutrients available to the food web, depletes the dissolved oxygen supply on which much marine life depends. Under average conditions, the complete oxidation of one liter of oil would deplete 400,000 liters of sea water of its dissolved oxygen.<sup>18</sup> The long-term effects of oil which has sunk to the ocean floor, where the supply of dissolved oxygen is very limited, are still unknown.

Many techniques have been tried for reducing the volume and effects of oil pollution.<sup>19</sup> The most effective techniques have, so far, been straightforward, arduous and expensive. They involve, in general, mechanical removal of oil from polluted beaches, from the surface of the sea or from wrecked tankers. Mechanical removal of oil from beaches is labor-intensive and messy, but with enough effort significant amounts of oil can be removed. Skimming oil from the surface of the sea in large quantities is becoming feasible. The Soviet Union reports that it now has available a specially equipped ship which can skim 7 tons of oil per hour from the surface.<sup>20</sup> It is possible to prevent damage from oil by removing it from tankers before it spills. The United States is experimenting with a system of rubber bladders capable of removing large quantities of oil from wrecked tankers.<sup>21</sup> Canada has succeeded in pumping a large quantity of oil from a sunken tanker.<sup>22</sup> Bombing wrecks in order to burn the oil and sinking oil with sand or hydrophilic chemicals have reduced the volume of oil which reaches beaches, but the effects of these measures on marine life are still largely unknown. Oil slicks have been contained with booms, but weather conditions can make this procedure difficult. Chemical dispersants have been sprayed on oil both on the sea and after it has been reached, but the discovery that the dispersants are sometimes more toxic to marine life than the oil they disperse has shed doubt on the wisdom of using them extensively. In addition, oil which is dispersed may still be dangerous to marine life.

In the future, oil pollution of the marine environment can be expected to increase unless steps are taken to cope with both the increasing volume of oil being produced and transported and the increasing risks of production and transportation. Total world production of oil is expected to increase five times by 1980.<sup>23</sup> The percentage of this production coming from offshore wells is expected to increase as well. Wells are continually being drilled in deeper water, with increasing risks of an accident and increasing difficulties in plugging a blow-out. Many new wells are being drilled off the coasts of countries which must import help from abroad when a blow-out occurs. The size of oil tankers used for the transporta-

<sup>18</sup> Claude E. Zobell, note 10 above.

<sup>19</sup> The practices of a number of governments can be found in "Replies to the Questionnaire on Action taken by Governments to implement National Arrangements for Dealing with Significant Spillages of Oil," IMCO Doc. OPS/Circ. 19 (Oct. 3, 1969) or GESAMP/29 (Feb. 20, 1970).

<sup>20</sup> "Spectrum," 11 Environment S-3 (September, 1969).

<sup>21</sup> New York Times, May 15, 1970, p. 67, col. 1.

<sup>22</sup> *Ibid.*, April 27, 1970, p. 13, col. 1.

<sup>23</sup> Robert W. Holcomb, note 10 above.

tion of oil is increasing. While many of the new tankers are equipped to retain oily water used for cleaning out tanks on board, the damage which could result from a wreck of one of these tankers is greater than the damage from the *Torrey Canyon*. The discovery of oil in Alaska and the plans to transport it to the United States through the Northwest Passage have raised the possibility of a major oil spill in the Arctic.<sup>24</sup>

A number of legal measures have been taken to deal with the growing threat of oil pollution, and particularly oil pollution from ships, on both the national and international levels. They have been aimed at four objectives: (1) limiting or prohibiting the intentional discharge of oil; (2) preventing accidents which may cause oil pollution; (3) eliminating or mitigating oil pollution arising from an accident; and (4) imposing liability for damage caused by oil pollution. Besides these specific steps, both the 1958 Convention on the Continental Shelf<sup>25</sup> and the 1958 Convention on the High Seas<sup>26</sup> oblige states to take measures for the prevention of damage due to oil in the marine environment.

The limitation or prohibition of the intentional discharge of oil is the object of the 1954 Convention for the Prevention of Pollution of the Sea by

<sup>24</sup> The problems of oil pollution in the Arctic are discussed in the "Arctic Issue," 1 (NS) Marine Pollution Bulletin (May, 1970).

<sup>25</sup> 499 U.N. Treaty Series 312; 52 A.J.I.L. 858 (1958). Art. 5: "The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents."

The U.S. proposed Draft United Nations Convention on the International Seabed Area, note 1 above, would place deep-water drilling beyond the 200-meter isobath on the continental margins under international supervision. It would also place exploration and exploitation of the other resources of the seabed under international supervision. This is a subject likely to be of considerable importance in the future. See J. E. Portmann, "Marine Pollution by Mining Operations, with Particular Reference to Possible Metal-Arc Mining," GESAMP/20 (Feb. 2, 1970); Jan Lopuski, "Legal Aspects of Problems Connected with the Development of International Control of Pollution Deriving from the Exploration or the Exploitation of the Sea-bed and Ocean Floor," GESAMP/16/1 (Jan. 14, 1970); Part III of the Questionnaire on Pollution of the Marine Environment, IMCO Doc. OPS/Circ. 15 (May 13, 1969), attached to GESAMP/22 (Feb. 10, 1970); and the Report of the Secretary General to the General Assembly on "Marine pollution and other hazardous and harmful effects which might arise from the exploration and exploitation of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction," U. N. Doc. A/7924 (June 11, 1970).

<sup>26</sup> 450 U.N. Treaty Series 82; 52 A.J.I.L. 842 (1958). Art. 24: "Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject." 45 states were parties to the 1958 Convention on the High Seas as of October 1, 1970.

A provision applicable to pollution by oil, and to pollution by wastes in certain cases is Art. 24 of the Convention on the Territorial Sea and the Contiguous Zone, 516 U.N. Treaty Series 206, which provides that a coastal state has the right to exercise in the contiguous zone the control necessary to "(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea." This article is, however, limited to action by a coastal state in a contiguous zone of no more than 12 miles for enforcement of its sanitary regulations (insofar at least as marine pollution is concerned).

Oil, as amended in 1969.<sup>27</sup> This convention prohibits the discharge of oil by ships except under specified conditions and requires special fittings to prevent the escape of oil. It also requires detailed records to be kept and provides for rights of inspection. In the future, any strengthening of this convention is likely to hinge primarily on the provisions for supervision of compliance rather than on the substance of the prohibition.<sup>28</sup>

For the prevention of accidents, the importance of which has been illustrated repeatedly by incidents off many coasts, there is a need for legal requirements concerning the design and equipment of ships, the use of navigation instruments, qualifications of officers and crews, and in some cases maximum speeds, traffic lanes and compulsory pilotage. Regulations of this kind have been adopted in many national jurisdictions but they have not yet been prescribed by international conventions. The Intergovernmental Maritime Consultative Organization is planning to hold a conference in 1973 for the preparation of a "suitable international agreement for placing restraints on the contamination of the sea, land and air by ships, vessels or other equipment operating in the marine environment."<sup>29</sup> Even apart from international agreements, however, states presumably have the right under general international law to prohibit any ship which does not conform to reasonable standards of design and equipment (or which fails to meet other safety requirements) "from crossing their territorial seas and contiguous zones and from reaching their ports."<sup>30</sup> The exercise of this right by even a small number of states could have a widespread effect, for many oil tankers depend for their trade on a limited number of major ports.

<sup>27</sup> 9 Int. Legal Materials 1 (January, 1970).

<sup>28</sup> Albert W. Koers in "The Enforcement of Fisheries Agreements on the High Seas. A Comparative Analysis of International State Practice," Occasional Paper No. 6 of the Law of the Sea Institute (University of Rhode Island, June, 1970), suggests that the enforcement of fisheries agreements may provide some guidance in this area.

There has, however, already been a significant degree of compliance, due in large part to the "clean seas" policies of the major oil companies; see Graham Brockis and Ray Beynon, "Keeping Coasts Clean," 37 New Scientist 196 (Jan. 25, 1968). According to the Shell Briefing Service, "Conserving Our Environment" (July, 1970), "Eighty per cent of the world's tanker fleet now conform to this [load-on-top] system, and it is conservatively estimated that two million tons of oil per year are now retained which once found their way to the sea."

<sup>29</sup> Report of the Tenth Session of the ACC Sub-Committee on Marine Science and its Applications, U.N. Doc. CO-ORDINATION/R. 793 (March 10, 1970), Annex III, p. 10.

<sup>30</sup> This view was taken by the Institut de Droit International in a recent resolution on "Measures Concerning Accidental Pollution of the Seas" adopted at its Edinburgh session, 1969. The Canadian Government has gone much farther than this in the Arctic Waters Pollution Bill which asserts Canadian jurisdiction to prevent pollution over a 100-mile zone in the Arctic region, 18-19 Eliz. 2, c. 47 (Can. 1970); 9 Int. Legal Materials 543 (1970). Prime Minister Trudeau appealed for an effective international régime to control pollution but said that, until such a régime exists, Canada had to take steps to ensure that irreversible harm will not occur as a result of negligent or intentional conduct in the Arctic region. See press release issued by the Office of the Prime Minister, Ottawa, Canada, April 15, 1970, and 9 Int. Legal Materials 600 (1970).

The elimination or mitigation of oil pollution arising from an accident which has already occurred is the object of the 1969 Brussels Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.<sup>31</sup> This so-called "Public Law Convention" contains provisions entitling a coastal state facing grave and imminent danger from oil pollution to take necessary measures to prevent damage to its coasts. Although coastal states may be said to have this right already, independently of the treaty, the new convention is a step forward in that it spells out the modalities for the exercise of that right and provides for consultation with states and persons who might be affected. It also includes specific provisions for conciliation and arbitration in the event of controversy between states parties to the convention.

The imposition of liability for damage caused by oil pollution is the object of the 1969 Convention on Civil Liability for Oil Pollution Damage.<sup>32</sup> While providing for strict liability irrespective of fault, the convention entitles an owner who is not actually at fault to limit that liability to an aggregate sum of 210 million francs (approximately \$14,000,000). The convention also requires owners to maintain insurance or other financial security, a requirement which may result in improvements in ship design and equipment as a consequence of conditions that are likely to be required for insurance.

These measures for the control of oil pollution from vessels are important, but they would be more effective if the capability of states to take action were increased. The burden of responsibility for acting to prevent oil pollution rests with states, but not all states are equipped to execute this responsibility. Capping blow-outs, detecting oil spills and identifying their origin, bombing a wrecked tanker in order to set its oil on fire, sinking an oil slick, skimming oil from the surface of the sea and any number of other measures which can, and which under existing and proposed treaties should, be taken by coastal states, are all measures which require a considerable degree of technical expertise and extensive financial resources. This is true as well for many of the measures which states can and should require of the vessels operating under their own flags. Few states possess all the expertise they need or could use in this area. It might, indeed, be wasteful if all states did individually possess the capacity to take all possible measures for the control of oil pollution from ships and off-shore wells. Even wealthy countries may find it difficult to mobilize the necessary manpower, technology and hardware. Individual developing countries, many of which have only short coastlines, may find it much more difficult to institute the necessary pollution control measures. There would appear to be considerable potential for international action in helping states to acquire, either singly or co-operatively, the capability of carrying out adequate oil pollution control.

<sup>31</sup> 64 A.J.I.L. 471 (1970); 9 Int. Legal Materials 25 (January, 1970). The convention has not yet entered into force.

<sup>32</sup> 64 A.J.I.L. 481 (1970); 9 Int. Legal Materials 45 (January, 1970). The convention has not yet entered into force.



Even with adequate control of oil pollution from ships, however, the problem of oil pollution would not be solved. Shore-based sources of oil pollution account for at least as much oil pollution as the seagoing sources. The point is being reached at which the returns on efforts to control shore-based sources of pollution may be greater than the returns on efforts to control pollution from ships. Some individual states have taken steps to curb shore-based sources of oil, but there has been no co-ordinated effort to reduce oil pollution from shore-based sources. In this as in other pollution problems, a state which is conscientious in controlling pollution may be putting its industry at a competitive disadvantage as compared to the industries of states which do not take steps to control pollution. The provision of Article 25 of the 1958 Convention on the High Seas that "All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or airspace above, resulting from any activities with radioactive materials or other harmful agents" creates an obligation which could apply to shore-based sources of oil, but this depends on international organizations doing their part in initiating the necessary measures. Any such effort would have to recognize that, as in the case of oil pollution from ships, the control of oil pollution from shore-based sources requires a considerable degree of expertise. There are many different technological, administrative and legal tools available for controlling industrial pollution. Sharing experiences with these tools, as well as co-ordinating the use of them when it is desirable, can help to make them both more effective and more equitable.

#### CHLORINATED HYDROCARBONS

The term chlorinated hydrocarbons refers to a group of pollutants which are chemically similar but come from different types of human activity. The chlorinated hydrocarbon pesticides—including DDT, dieldrin and endrin—and the polychlorinated biphenyls (PCB's) are known to be important pollutants in the marine environment. The pesticides usually enter the environment as sprays for agricultural pest control. PCB's are not intentionally introduced into the environment on a large scale. They are manufactured for a variety of uses, including insulation and fire retardation. How they enter the marine environment is still unknown. Although chlorinated hydrocarbons, and particularly DDT, are used in many parts of the world, much of its production is concentrated in the developed countries. In 1968 approximately 25 percent of the total world production of DDT was manufactured in the United States. Two thirds of this DDT was exported.

Chlorinated pesticides enter the marine environment in two ways: in water run-off from agricultural areas and from the atmosphere. The major source of the pesticides in the marine environment is the atmosphere.<sup>33</sup>

<sup>33</sup> The question of how pesticides and other chlorinated hydrocarbons enter the marine environment, as well as the concentrations of chlorinated hydrocarbons in marine life and the effects of these concentrations, is discussed in Justin Frost, "Earth, Air, Water," 11 *Environment* 15 (July-August, 1969), and F. W. Riseborough, "Chlorinated Hydrocarbons in Marine Ecosystems," in Morton W. Miller and George C. Berg, *Chemical Fallout: Current Research on Persistent Pesticides* (Springfield, Illinois: Charles G.

Greater concentrations of pesticides are not necessarily found in areas where the amount of run-off from agricultural areas is greatest. Rather, the global distribution of pesticides appears to be what would be expected if the pesticides were distributed by winds. As much as 50 percent of the pesticides sprayed in agricultural areas never reaches the plants they are intended to protect. Much of the remaining 50 percent is carried off by winds into the atmosphere. DDT has been detected on dust particles in areas far from any spraying of pesticides. Precipitation carries pesticides from the atmosphere into the marine environment. DDT and DDT residues have been found in penguins in the Antarctic and in petrels in Bermuda.

Precisely how much chlorinated hydrocarbon is in the marine environment is not known. One estimate<sup>34</sup> puts the total amount of DDT—the chlorinated hydrocarbon which has been manufactured in the greatest quantities—in the biosphere at one billion pounds. Since DDT is a persistent pollutant—its half-life is probably between ten and fifty years—much of the total amount can be expected to enter the oceans. The total amount of DDT in the marine environment is not, however, an enlightening fact. In terms of the effects of chlorinated hydrocarbons on marine ecology, what counts is the concentrations found in marine life. Concentrations of chlorinated hydrocarbons vary greatly according to where one looks for them. Chlorinated pesticide concentrations large enough to cause widespread concern are found in fish and marine birds. PCB concentrations are usually several orders of magnitude smaller. Chlorinated hydrocarbons are not readily metabolized but dissolve in fat. Even when they are metabolized the products of the metabolic reactions are usually chlorinated hydrocarbons themselves. Because they are not readily metabolized, chlorinated hydrocarbons accumulate in marine life and are concentrated by food webs. Oysters alone have been found to amplify small concentrations of DDT 70,000 times in a month.<sup>35</sup>

At their present levels in the marine environment, chlorinated hydrocarbons do not appear to be directly lethal to any species. Serious non-lethal effects are, however, possible. Laboratory experiments have shown that low concentrations of DDT can inhibit photosynthesis in phytoplankton. It has been shown that this effect does not threaten the world's oxygen supplies,<sup>36</sup> but because phytoplankton are at the base of many marine food chains, "changes in the rate of primary photosynthesis are certainly critical to man's food resources."<sup>37</sup> Field observations and lab-

---

Thomas, 1969). Other pollutants are known to enter the marine environment via the atmosphere, including lead and carbon dioxide. The input of lead from human activities, primarily from the burning of leaded gasoline, is of the same order of magnitude as the input of lead from natural sources, approximately 150,000 metric tons per year. See Edward E. Goldberg, note 16 above.

<sup>34</sup> G. N. Woodwell, "Toxic Substances and Ecological Cycles," 216 *Scientific American* 24 (March, 1967).

<sup>35</sup> Tony J. Peterle, "Pyramiding Damage," 11 *Environment* 34 (July-August, 1969).

<sup>36</sup> Wallace S. Broecker, "Man's Oxygen Reserves," 168 *Science* 1537 (June 26, 1970)

<sup>37</sup> *Ibid.* at 1538.

oratory experiments have shown that DDT is causing reproductive failures in a number of marine and other birds and possibly in crabs as well. The reproductive failures in birds are often due to thin-shelled eggs, which in turn are due to interference by DDT in the normal sex-hormone metabolism. DDT and other chlorinated hydrocarbons are present in detectable amounts in other forms of marine life, including marine fish. Levels of DDT contamination in marine fish may, in fact, be "approaching levels associated with the collapse of fisheries in freshwater areas," in which case, according to one expert, we could "soon expect a repeat performance in the oceans."<sup>38</sup> Much less is known about the effects of PCB's than about the effects of DDT.

The control of pollution by chlorinated hydrocarbons depends almost entirely on discontinuing their use. Methods of control which apply to many other pollutants, such as degradation, dispersion and collection, are not feasible for persistent pollutants found in low concentrations. Chlorinated hydrocarbons are not readily degraded to harmless materials; they are already dispersed and cannot be collected. The major problems facing control of chlorinated hydrocarbons are to determine what levels are harmful and how their use can be discontinued before concentrations reach these levels. The first is a technical problem with a technical solution. The second is an economic, social, administrative, legal and even a political problem and its solution is likely to be complex. Particularly in the case of the pesticides, prohibition is likely to be expensive and difficult in every way. The chlorinated pesticides are considered essential to maintaining health in countries with insect-borne diseases. Several countries, including Hungary, Sweden and Denmark, have prohibited the use of DDT, but none of these has a major problem with insect-borne diseases. Even in these countries, the banning of DDT may not be an unalloyed benefit. As the recent deaths from parathion,<sup>39</sup> an insecticide which has been used instead of DDT in the United States, remind us, there is as yet no entirely satisfactory substitute for DDT. Banning DDT and other chlorinated hydrocarbons in individual countries may not have the desired effect, for this may lead to "the economic dumping of large quantities in tropical countries where there are pests enough and little control over the production and use of pesticides."<sup>40</sup> The Director General of the World Health Organization has made it clear that he feels DDT should not be banned world-wide because of its importance in malaria control.<sup>41</sup>

In the future, chlorinated hydrocarbons in the marine environment are likely to increase. With the production of many chlorinated hydrocarbons continuing to increase, a major spill of these materials becomes more likely. The example of the Rhine fish-kill, in which approximately 200 pounds of

<sup>38</sup> C. F. Wurster in the discussion following R. W. Riseborough, note 33 above.

<sup>39</sup> New York Times, Aug. 21, 1970, p. 1, col. 4.

<sup>40</sup> Frank Fraser Darling, "Man Against Nature," UNESCO Courier 35 (January, 1969).

<sup>41</sup> Report of the Director General to the Twenty-Second World Health Assembly (Boston, July 8-25, 1969), Official Records of the World Health Organization, No. 177, Part II, p. 46.

the pesticide endosulfan killed at least 100 tons of fish, is now a matter of record. Even without such a spill, and even if the use of chlorinated hydrocarbons were discontinued today, one might expect an increase in their concentration in the marine environment due to those already en route to the oceans. Several species of marine birds have already been decimated by reproductive failures due to chlorinated hydrocarbons, and extinction of some of these species appears likely. The loss of several bird species may not seem to outweigh the health benefits of chlorinated pesticides, but the long-term effect of these losses on marine ecology is not yet known. Nor, for that matter, is there any reason to believe that chlorinated hydrocarbons will affect only bird populations. No final accounting can be made until all the costs are reported.<sup>42</sup> Action for the control of chlorinated hydrocarbons should not, however, have to wait for a final accounting. A number of recent suggestions for general principles governing man's interaction with his environment have recognized the importance of preventing irreversible ecological changes and preserving the diversity of natural systems.<sup>43</sup> It is possible that the Universal Declaration on the Human Environment to be presented at the United Nations Conference on the Human Environment will incorporate such suggestions. While a final accounting on DDT and other chlorinated hydrocarbons is not yet available, the extinction of bird species due to the effects of DDT and other chlorinated hydrocarbons is an irreversible change.

As already mentioned, Article 25 of the Convention on the High Seas requires states parties to co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas resulting from any activities with "harmful agents." Since DDT, and perhaps other chlorinated hydrocarbons as well, may be considered "harmful agents," the states parties would be obliged to co-operate with the competent international agency in limiting DDT, but thus far no international organization has adopted recommendations restricting the use of DDT or other chlorinated hydrocarbons. Some states have prohibited the use of DDT but, without international action, unco-ordinated national measures may do no

<sup>42</sup> The accounting problem with regard to chlorinated pesticides is not limited to their effects in the marine environment. Their effectiveness as broad-spectrum pesticides has led to increased pest problems in some areas. One case is recounted in some detail in Gordon R. Conway, "A Consequence of Insecticides" in M. Taghi Farvar and John Milton, *The Unforeseen Ecological Boomerang* (Natural History Special Supplement) 46. See also the Staff Report, "Diminishing Returns," 11 *Environment* 6 (September, 1969).

<sup>43</sup> Among the suggestions are the Declaration on the Management of the Natural Environment of Europe, adopted at the European Conservation Conference (Strasbourg, Feb. 9-12, 1970), the Draft Rules Governing Certain Changes in the Environment of Man (prepared by David Davies Memorial Institute of International Studies, London) and the Tokyo Resolution of the International Social Science Council's Standing Committee on Environmental Disruption (March 12, 1970). The question of what criteria should be applied in formulating environmental policy, and in particular the relative merits of maximizing benefit as opposed to minimizing risk, are discussed in S. V. Ciracy-Wantrup, "Economics of Environmental Policy," *Pacem in Maribus*, Vol. V, *The Ocean Environment* 235 (Center for the Study of Democratic Institutions, Santa Barbara, California).

more than change the pattern of use of chlorinated hydrocarbons. Other countries have banned the production of DDT, at least for some purposes. While banning production may be the most effective way of halting DDT use, it may put an excessive financial strain on developing countries who must then purchase higher-priced substitutes. International measures are needed to co-ordinate a planned reduction in the use of chlorinated hydrocarbons. Such measures might include regulating trade in chlorinated hydrocarbons, setting standards for their use and providing subsidies to developing countries for the difference in price between DDT and less persistent substitutes.<sup>44</sup> Some uses, such as the spraying of crops, might be identified as non-essential and subject to limitation. Other uses, such as the painting of walls with DDT to prevent the spread of malaria, might be considered essential and exempt from limitations.<sup>45</sup> Regulating trade and providing subsidies may be facilitated by the concentration of chlorinated hydrocarbon production in developed countries.

In addition, the international community should consider equipping itself to gather the knowledge it needs to take action on questions of this type. At present, the long-term, low-level effects of pollutants in the marine environment are primarily matters for scholarly study and lay speculation. The problem of how technical matters of widespread concern are to be presented reliably for national and international consideration and action remains unsolved, particularly on the international level. Technical problems are, of course, handled by the secretariats of international organizations, committees of scientists and the normal diplomatic apparatus. There is, however, little machinery for direct interaction between those with technical knowledge and those with administrative and legal skills.<sup>46</sup>

#### WASTES DISCHARGED FROM COASTS

The term wastes is a broad one covering materials of different chemical compositions from many different sources. Wastes are often divided into two major categories: domestic and industrial wastes. For our purposes, domestic wastes include domestic sewage, wastes from food-processing, detergents, and run-off from agricultural areas. Industrial wastes include heavy metals, radioactive nuclides, inorganic chemicals and heated water.<sup>47</sup>

<sup>44</sup> This has been suggested previously by Peter Thacher of the U.S. Mission to the United Nations. See Proceedings, Columbia University Conference on International and Interstate Regulation of Water Pollution, note 1 above, at 102.

<sup>45</sup> The amount of DDT used for malaria eradication is unknown, but it is probably less than 15 percent of a total of about 300,000 tons per year. See the comments of the delegate of The Netherlands at the Twenty-Second World Health Assembly, note 41 above, at 222.

<sup>46</sup> See Oscar Schachter, "Scientific Advances and International Law Making," 55 California Law Review 423 (May, 1967), in particular pp. 427-428.

<sup>47</sup> Examples of domestic and industrial wastes are listed in the Annex to the Report of the Special Session of the ACC Sub-Committee on Marine Science and Its Applications, UNESCO Doc. AVS/9/87 (August, 1967), and in the Report of the First Session of the Joint Group of Experts on the Scientific Aspects of Marine Pollution, GESAMP I/11 (July 11, 1969). Categorizing wastes is a popular exercise of dubious usefulness. The categories used here correspond roughly to those used in the above documents.

Wastes discharged from coasts enter the marine environment from rivers used for waste disposal, as well as from effluent points located on the coast. The composition of wastes entering the marine environment varies greatly according to the source of the waste and the extent of treatment it receives. Pollution from wastes differs from chlorinated hydrocarbon pollution, and in part from oil pollution as well, insofar as the bulk of the pollution from wastes arises from the intentional discharge of materials into the marine environment. Marine pollution from wastes is generally a less severe problem than fresh-water pollution from wastes, but the two issues are not independent of each other. For example, it has been noted that "Indiscriminate discharges have converted many of the rivers of northern England into biological deserts" and that, as a result, "the seas into which they flow are in danger of falling into the same state . . ."<sup>48</sup> Estuarine disposal of wastes can be particularly harmful because as much as two thirds of the marine animal population depends directly or indirectly on estuarine waters.<sup>49</sup>

The problem of wastes in the marine environment is widespread. In a United Nations survey of member countries in 1966,<sup>50</sup> forty-three of the forty-nine countries reporting marine pollution problems cited pollution from wastes as a problem. The single most frequently cited marine pollution problem was domestic wastes. The thirty-two countries citing domestic wastes as a problem included both developed and developing countries. Indeed, the problem of domestic wastes depends in large part on population and its distribution, perhaps to a greater extent than any other form of pollution. Agricultural practices also affect the quantity of domestic wastes, with fertilizers and animal waste making a significant contribution. In the United States, the volume of animal waste has been estimated to be ten times as great as the volume of human waste.<sup>51</sup>

Some type of industrial waste was cited as a pollution problem by thirty-eight of the forty-nine countries reporting marine pollution problems in the United Nations survey. The most frequently mentioned industrial wastes were heavy metal compounds, petrochemicals, pulp and paper wastes, oil, and dredging and mining spoils. Although some marine pollution from industrial wastes is accidental and occasional, most is intentional and routine. Industries are often located along rivers, lakes and coasts because of the ease of waste disposal in water. As is the case for domestic wastes, the methods used for disposing of industrial wastes vary from mere dumping of untreated materials to discharge of extensively treated effluent, but it is often the case that industrial wastes are more toxic than domestic wastes.

The effects of both domestic and industrial wastes depend on the chemi-

<sup>48</sup> London Times, May 15, 1970, p. 4.

<sup>49</sup> First Annual Report of the Council on Environmental Quality of the United States Government 175 (transmitted to the U.S. Congress, Aug. 1970). For a detailed study of pollution in estuaries, see the United States Department of Interior's National Estuarine Pollution Study (Nov. 3, 1969).

<sup>50</sup> UNESCO Doc. AVS/9/87, note 47 above.

<sup>51</sup> "Spectrum," 11 Environment S-3 (September, 1969).

cal composition of the wastes, their physical state, the method of discharge, the place of discharge, and local environmental conditions. Two of the more important polluting effects of a number of domestic and industrial wastes in the marine environment are over-fertilization and poisoning. Over-fertilization is due to an excessive flow of nutrients into the marine environment. The nutrients can be many different chemicals, including the nitrates found in fertilizers and the phosphates found in detergents. Over-fertilization becomes evident when the population of a marine species, often a species of phytoplankton, increases very quickly, causing what is known as a bloom. Blooms occur naturally, that is, without the addition of nutrients into the marine environment by man, but they have become much more frequent with the increased disposal of nutrients by man. Blooms of phytoplankton known as the red tide occurred along the Florida Gulf Coast in 1916, not again until 1932, not again until 1948, and then in 1952, 1953, 1954, and every year between 1957 and 1964 inclusive. Other species of phytoplankton have caused different-colored tides off the coasts of Ceylon, Brazil and Spain. Irritating smells are often associated with blooms, and some blooms kill other forms of marine life. When a bloom dies, decay of the organic material can cause de-oxygenation of the water. Serious economic damage to coastal recreational areas and to fishing have resulted from outbreaks of red and other tides.<sup>52</sup>

Blooms of phytoplankton are not the only way in which over-fertilization from domestic and industrial wastes can affect the marine environment. The chemical breakdown of nutrients uses oxygen dissolved in sea water. Since this oxygen is essential to marine life, shortages due to the chemical breakdown of nutrients can decrease the fertility of ocean areas. There are indications that such shortages are occurring in the Baltic Sea due in part to phosphorus from human activities. The situation there may be such that "an increase of organic material probably will result in permanent anaerobic conditions."<sup>53</sup> In many coastal areas, nutrients have encouraged the growth of bacteria to the point where the waters are unsuitable for bathing. Despite extensive treatment of domestic sewage, the bacterial count in New York Harbor has increased at least ten times between 1948 and 1968, probably due to nitrogen enrichment from land runoff. The invasion and decimation of commercially utilized kelp forests off the California coast by sea urchins was traced to sewage effluent. Sewage effluent probably encouraged the growth of both the kelp and the sea urchins, but the balance tipped in favor of the sea urchins.

The danger of poisoning from domestic and industrial wastes depends in part on the ability of individual species and food webs in the marine environment to concentrate poisonous materials. Although human beings may drink water from the red tides off the Florida Gulf Coast, oysters taken from the same water and eaten can cause illness. Mercury which was

<sup>52</sup> Wesley Marx, *The Frail Ocean* (New York: Ballantine Books, 1969). Chap. 2 describes the case of the Florida red tides in some detail.

<sup>53</sup> Bengt Lundholm, "The Oceans—Their Production and Pollution with the Baltic as a Case Study," in *Pacem in Maribus*, Vol. V, *The Ocean Environment* 92 (Center for the Study of Democratic Institutions, Santa Barbara, Calif.).

discharged in small quantities from a factory in Minamata, Japan, was diluted in a bay but accumulated in fish.<sup>54</sup> Throughout the 1950's and into the 1960's, incidents of mercury poisoning from these fish occurred. If what is known of the pollution of fresh-water areas is an indication of what may be happening in the oceans without our knowledge, pollution of the oceans by other poisonous metals may well be discovered soon. Strontium 90, most of which comes from atmospheric nuclear weapons tests conducted over the last twenty-five years, may have accumulated in some fish to levels which contribute to high mortality rates.<sup>55</sup> Although many scientists feel there is no danger from radioactive wastes in the marine environment, at least one expert feels that the danger from accumulated radioactive wastes is so great that no more marine disposal of such wastes should be permitted.<sup>56</sup>

The discharge of wastes from coasts into the marine environment is likely to increase in the future. There are few areas of the world in which waste treatment has been able to keep pace with economic and population growth. Moreover, in many areas industrial expansion and population are both becoming more concentrated in coastal areas. One third of the population of the United States already lives in the 15 percent of the United States land area which is considered coastal,<sup>57</sup> and this coastal concentration of population is increasing. The volume of industrial wastes in the United States, already twice the volume of domestic wastes, is expected to increase sevenfold within a decade.<sup>58</sup> Increasing power demands during the next several decades will be met in part by an increase in the number of nuclear-powered generating plants. Although the impact of increased power generation will be felt most strongly in inland waterways, marine areas will also be affected. In 1969, nine nuclear-powered generating plants were scheduled to be built on Long Island Sound by 1975, with water from the Sound used for cooling. Increased concern about environmental problems will not necessarily act to decrease marine pollution from wastes. Concern about the effects of wastes on inland waters and land is increasing the pressure for marine disposal.

The effects of increasing marine disposal of wastes will be determined by the care taken in the management and conservation of the capacity of the oceans to absorb and recycle wastes. This capacity is, indeed, an important natural resource. Like other natural resources, it can be squandered. In many cases, no more thought is being given to the increased discharge of wastes into the marine environment than has been given to the discharge of wastes into inland waters. The Baltic, many times the

<sup>54</sup> Discharges of mercury from factories are not the only source of mercury in the oceans. Mercurial fungicides are used as seed dressings in many countries. Water run-off from agricultural areas carries some of this mercury to the oceans.

<sup>55</sup> J. W. Hedgpeth, "The Oceans: World Sump," 12 *Environment* 44 (April, 1970).

<sup>56</sup> G. G. Polikarpov, *Radioecology of Aquatic Organisms* (New York: Reinhold Book Division, 1966).

<sup>57</sup> Note 49 above, at 174.

<sup>58</sup> Edward Wenk, Jr., "The Physical Resources of the Ocean," 221 *Scientific American* 174 (September, 1969).



size of Lake Erie, may be even more contaminated than Lake Erie.<sup>59</sup> As mentioned above, one of the major problems in the Baltic is de-oxygenation of the water due to an excess of phosphate nutrients. Meanwhile, some parts of the marine environment, particularly mid-ocean areas, are poor in nutrients and as a result are unable to sustain large populations of marine life. Wise disposal of nutritious wastes in these areas might contribute to an expansion of the world's fish resources. Even if such intentional fertilization of mid-ocean areas is not possible, disposal of wastes farther from shore may be preferable because of the importance of coastal, and particularly estuarine, waters to marine life and to man. Heated water from nuclear-powered generating plants can be harmful to some marine life, but it can also be beneficial to the growth of shellfish. There will, however, be little opportunity to reap this benefit if shellfish-producing areas continue to be destroyed by other kinds of pollution. Marine pollution from wastes is not simply a problem of good against evil. A major part of the problem may be how to turn evil into good.

The direct effects of wastes discharged from coasts are usually felt most immediately by the coastal states from which they are discharged, and coastal states possess the authority to deal with this type of marine pollution. Unfortunately, pollution problems arising from wastes have come to be viewed by some as luxury problems on which only the developed countries can afford to spend time and money. In the case of wastes discharged from coasts, this point of view overlooks the importance of coastal waters as a natural resource to both developing and developed countries. It is unrealistic to expect that many governments will protect coastal areas from pollution by wastes when these areas are of little or no economic importance, but it is a mistake to assume that coastal areas are in fact of little or no economic importance. With many developing countries depending increasingly on fish for food, offshore wells for oil and foreign exchange, and beaches for tourism, to mention but a few of the important uses of coastal areas in developing countries, the control of pollution from coastal waste disposal can clearly be viewed in many cases in the context of the development of marine resources. Moreover, coastal waste discharges are one aspect of the total waste-disposal problem whose impact on fresh-water areas has long been recognized as a development problem. The international apparatus which exists to promote development has taken some action along these lines. The United Nations Development Program Special Fund has, in co-operation with the World Health Organization, a number of field projects on waste disposal in coastal areas of developing countries. The World Health Organization, in co-operation with the Food and Agriculture Organization, is offering its first course on coastal pollution control in 1970. Further financial aid and technical assistance in plan-

<sup>59</sup> "Spectrum," 12 Environment S-1 (April, 1970), and Stig H. Fonselius, "Stagnant Sea," 12 Environment 2 (July-August, 1970). The report on which these are based is the Report of the ICES Working Group on Pollution of the Baltic Sea, Cooperative Research Report No. 15, Series A (International Council for the Exploration of the Sea, February, 1970).

ning and executing both coastal development and coastal pollution control will contribute to both the economic development of marine resources and the solution of waste disposal problems of developing countries.

The wide variety of effects which wastes can cause in the marine environment, as well as the many sources and types of waste, makes the control of pollution from wastes a particularly complex task. In many countries control of wastes in the marine environment depends on co-operation among authorities whose primary missions are diverse (public health, wild-life conservation, fisheries, agriculture) as well as co-operation between local and national authorities. The needed co-operation is often lacking. During the summer of 1970, a Genovese city official who had closed the city's beaches because of pollution from wastes was overruled by a national official who asserted that the coast was so badly polluted that only national authorities had the power to act.<sup>60</sup> This incident is admittedly an unusual manifestation of the problems arising from divided authority—it is surely more often the case that divided authority leads to lack of any action—but it illustrates the frustrations which many officials have experienced. On the international level authority is not so much divided as non-existent. Officials from France and Italy have traded charges over pollution in the Mediterranean. The French claim they are the victims of wastes from Italy; the Italians claim they suffer pollution from oil slicks originating in the port of Marseilles.<sup>61</sup> Handling such problems through the normal diplomatic channels may well be slow and difficult. Direct co-operation on such problems between non-diplomatic officials in different countries may be desirable. Indeed, the reluctance of local officials in some countries to surrender authority to either national officials or international organizations may make such co-operation a necessity.<sup>62</sup>

A basis for the international regulation of waste disposal can be found in Article 25 of the Geneva Convention on the High Seas (which has been quoted above in the discussion of oil), on the premise that the wastes disposed of may be "harmful agents" if they are high in toxicity or if for other reasons they cause substantially deleterious effects. The obligation placed upon the parties by that article to co-operate with competent international organizations in taking measures for the prevention of pollution by such harmful agents requires as a condition precedent that an international organization adopt recommendations or regulations for measures. This has been done to a limited extent for radioactive wastes by the IAEA.<sup>63</sup>

<sup>60</sup> New York Times, July 17, 1970, p. 3, col. 5.

<sup>61</sup> *Ibid.*, July 19, 1970, p. 3, col. 1.

<sup>62</sup> See, for example, New York Times, Sept. 11, 1970, p. 26, col. 4.

<sup>63</sup> Among the relevant IAEA guides and standards are Radioactive Waste Disposal Into the Sea (Safety Series No. 5, 1961), Regulations for the Safe Transport of Radioactive Materials (Safety Series No. 6, 1964 and later editions), Methods of Surveying and Monitoring Marine Radioactivity (Safety Series No. 11, 1965), and Safety Considerations in the Use of Ports and Approaches by Nuclear Merchant Ships (Safety Series No. 27, 1968). The second of these sets forth IAEA standards which, in accordance with the IAEA Statute, must be applied to IAEA activities and to projects which the IAEA assists.

and for toxic chemicals by the World Health Organization.<sup>64</sup> On a more general basis, studies have been undertaken by regional groups<sup>65</sup> and by the Joint Group of Experts on the Scientific Aspects of Marine Pollution.<sup>66</sup> The increasing concern with the effects of some wastes on food resources and human health is likely to lead to the adoption of standards at least for some substances and to recommendations on means of disposal.

It is also, of course, open to an individual state to bring an international claim on the basis of general international law, if it could show that it has suffered injury within its own territorial sea or if it were damaged in respect of fish stocks which were normally exploited by nationals of that state. Presumably the doctrines of *Corfu Channel* and *Trail Smelter* would be relevant, but of course there would be serious questions regarding the degree of the harm and the standards of proof required.<sup>67</sup> However, it is quite obvious that this is a problem that does not lend itself to adequate treatment through international claims and that what is needed is action by an international organization which will bring into play the existing obligation of Article 25.

#### WASTES DUMPED FROM VESSELS

Wastes dumped from vessels are discussed separately here because some of them pose problems which are qualitatively different from the problems which arise from wastes which are discharged from coasts. Two methods of dumping wastes from vessels should be distinguished: wastes which are dispersed and wastes which are containerized. Wastes dispersed from vessels differ from wastes discharged from coasts primarily in that they are more likely to be discharged directly into international waters. Containerized wastes dumped from vessels, in addition to being dumped frequently in international waters, are often highly toxic materials.

According to an IMCO survey,<sup>68</sup> the dispersed wastes include dredging

<sup>64</sup> As described in the Annex to the Report of the Secretary General to ECOSOC, "Problems of the Human Environment," U.N. Doc. E/4667 (May 26, 1969).

<sup>65</sup> These include studies in the Baltic, the North Sea, the Mediterranean and the Caribbean.

<sup>66</sup> See the Report of the Second Session of Joint Group of Experts on the Scientific Aspects of Marine Pollution, GESAMP II/11 (June 20, 1970), and the background documents listed in Annex II to the Report.

<sup>67</sup> Thus, as Michael Hardy observed, a case "would be likely to turn, not on the basic question of the legality or illegality of waste disposal *per se*, but on the extent of knowledge, the foreseeability of harm and the standard of proof required, all matters of which international tribunals (by comparison with national courts) have relatively little experience or case law to guide them." See Hardy, "International Control of Marine Pollution," in the collection of essays in memory of John McMahon edited by James Fawcett (Royal Institute of International Affairs, London) to be published in 1971.

<sup>68</sup> IMCO Report on the Questionnaire on Pollution of the Marine Environment, IMCO Doc. OPS/Circ. 15 (May 13, 1969) or Annex I to GESAMP/22 (Feb. 10, 1970). The United States Council on Environmental Quality, noting that marine dumping is likely to increase rapidly in the future due to increasing concern about waste disposal on land and in inland waters, has proposed "phasing out all harmful forms of ocean dumping" and the licensing by a Federal agency of all permitted dumping. See New

spoils, industrial wastes, garbage and trash, large pieces of machinery and sewage sludge. The United States disposed of about 48 million tons of wastes in this way during 1968.<sup>69</sup> New York City has been dumping sewage sludge in international waters for twenty-two years, thus creating a "dead sea" at the mouth of its harbor. Researchers who recovered a fish from almost five miles deep in the Puerto Rico trench also recovered "empty paint cans, fruit juice cans, beer can lids, pieces of old aluminum, empty bottles and flashlight batteries"<sup>70</sup> from the same depth. The effects of the dispersed wastes are as varied as the effects of wastes discharged from coasts. Some are clearly harmful, poisoning marine life and tearing fishing nets. Others may provide habitats for marine life. The feasibility of creating artificial reefs out of discarded automobiles and automobile tires is being studied.

Wastes are often containerized in the hope that they will remain containerized for long periods, with dilution occurring very slowly or not at all. The wastes which are containerized and dumped in the oceans are usually wastes whose dispersion is considered dangerous. These include low-level radioactive wastes and highly toxic chemicals. Many of these chemicals, such as the chemical weapons, mustard gas and nerve gas, are wastes only in the sense that someone wants to be rid of them, and not in the sense that they are the unwanted by-products of human activities. Disposal of containerized wastes in the marine environment inside or outside national jurisdictions is often a government-supervised or a government activity.

How much containerized waste has been dumped in the oceans is not known. Registration of dumpings has been recommended and studied several times in the past, but governments have been reluctant to reveal what they dump and where they dump it.<sup>71</sup> What is known about the dumping is that it has been going on for some time and continues today. Surprisingly high levels of arsenic in the Baltic Sea led recently to the discovery that 7,000 tons of arsenic had been dumped almost forty years ago in concrete containers, reportedly enough to kill the population of the world three times over if properly administered.<sup>72</sup> In recent years, nerve gas has been dumped in the Gulf of Mexico and the Atlantic Ocean by the United States, and a number of European countries continue to dump containerized chemical weapons and radioactive wastes in the Atlantic and Mediterranean. In some cases, extensive studies have been undertaken to determine the likelihood of damage. In other cases, it is difficult to know how much care has been taken because the operations were conducted under military secrecy.

---

York Times, Oct. 8, 1970, p. 1, col. 4, and the report itself, "Ocean Dumping: A National Policy," October, 1970.

<sup>69</sup> Robert P. Brown and David D. Smith, Interim Summary of "Marine Disposal of Solid Wastes" for the Bureau of Solid Waste Management of the Department of Health, Education and Welfare of the United States Government (Oct. 24, 1969).

<sup>70</sup> "Monitor," 46 New Scientist 102 (April 16, 1970).

<sup>71</sup> The proposal for registration is still alive. See GESAMP I/11, note 47 above.

<sup>72</sup> "Spectrum," 11 Environment S-2 (July-August, 1969).

The extent of damage from containerized wastes so far appears to be minor. There is no evidence that there has been damage from containerized radioactive wastes,<sup>73</sup> although in at least one instance a container of low-level radioactive wastes dumped in the oceans has been found washed up on shore. Containerized chemical wastes have caused damage in several cases. Danish fishermen operating off the Swedish coast in the Baltic have been burned by fish contaminated with German mustard gas dumped by the Allies after World War II.<sup>74</sup> Similar incidents have occurred elsewhere. Recent research indicates that fish and plant life on and near the ocean floor is more extensive than was once thought,<sup>75</sup> and any estimate of the potential danger from containerized wastes may have to be increased accordingly. Moreover, ocean currents are still not well understood, particularly at great depths. Prediction of where a container of wastes dumped in the oceans will lie, even immediately after it is dumped, is very difficult.

Perhaps the greatest potential danger from containerized wastes arises from the uncertainty of when and how the material in the container will be dispersed in the marine environment. Containers are usually made of very strong materials, often concrete or steel or both. Concrete, however, does crumble and steel rusts. Earthquakes on the ocean floor can break open any containers known. No one expects the containers to last forever, even those who make them. The usual expectation appears to be that materials will escape from the containers slowly and be diluted in vast quantities of sea water. No one can guarantee that this will indeed happen, and even if it does, that marine life will not be contaminated.

Since little is known about the quantities of containerized wastes dumped in the oceans in the past, it is impossible to estimate whether dumpings are likely to increase or decrease. The United States has curtailed dumping containerized radioactive wastes in the oceans, but a number of European countries and perhaps others as well continue to dump considerable quantities of low-level radioactive wastes. With the uses of atomic power and radioactive materials expected to increase rapidly in many countries during the next few decades, and with suitable areas for burial of radioactive wastes on land scarce in many countries, there will be no scarcity of radioactive wastes to dump in the oceans. Containerized chemicals to be dumped in the oceans are also plentiful; marine disposal of outmoded or defective chemical weapons will probably continue.

The inadequacy of the international machinery to deal with marine dumping of containerized wastes has been most clearly demonstrated by the sinking of a ship loaded with nerve gas rockets in the Atlantic Ocean by the United States in August, 1970. American citizens, including Florida

<sup>73</sup> See the Recommendations of the First Meeting of the IOC Working Group on Marine Pollution, August 14-17, 1967. The IAEA has been active in studying marine disposal of radioactive wastes for some time, as described in Annex XI to "Marine Science and Technology: Survey and Proposals," Report of the Secretary General to ECOSOC, U.N. Doc. E/4487 (April 24, 1968).

<sup>74</sup> London Times, Aug. 10, 1969.

<sup>75</sup> New Scientist, note 70 above, and New York Times, April 2, 1970, p. 15, col. 1.

State officials, were able to file a suit in an American court and at least force what had been planned as a secret military operation into the public arena. It was possible that this suit would stop the proposed dumping. The international machinery was not nearly as fast-moving or effective. The Bahamas, whose citizens probably had at least as much at stake as those of the State of Florida, could only act through normal diplomatic channels. No mechanism was available for the public presentation of technical testimony concerning the nerve gas dumping by interested parties outside the United States or for an independent evaluation of the dumping on the international level. It may be that the dumping will not cause any damage and it may be the case that marine disposal was the best of the available alternatives.<sup>76</sup> Necessity in this one case does not, however, justify the general lack of mechanisms for reconciling international disagreements and protecting the common interest. The dumping of the nerve gas in international waters was no more a private matter of the United States than it was a private matter of the United States Army.

The problem of wastes dumped from vessels, like the problem of chlorinated hydrocarbons, is clearly a problem of widespread concern. Improved machinery for bringing the best available scientific and legal expertise to bear on this problem is needed. Damages from these wastes have in the past been few, but the dangers are so great that constant surveillance and perhaps strict liability, as well, are called for. Surveillance cannot take the form of monitoring by an international agency or by individual states simply because the practice of dumping wastes in a big ocean is so difficult to detect. Registration of dumpings of dangerous materials would appear to be the most appropriate first step in surveillance. Registration need not be a mere report of how much of what was dumped where, but might well include a detailed account of safety procedures. Once registration is established, the appropriate international intergovernmental and scientific organizations might consider setting standards for marine dumping of wastes. The activities of the Committee on Space Research (COSPAR) of the International Council of Scientific Unions in setting standards for the biological de-contamination of space equipment are an indication that standard-setting can be based firmly on scientific expertise rather than political expediency. It is important to recognize, however, that COSPAR sets standards for scientific activities only. In the case of marine dumping, health and security interests may also be at stake and standard-setting cannot be left solely to marine scientists.

It is only in respect of radioactive waste that there has been international activity on dumping. The explicit reference to radioactive waste in Article 25 of the High Seas Convention and the resolutions of the 1958 Conference on the Law of the Sea have brought about a series of recommendations by the International Atomic Energy Agency for monitoring and reporting.<sup>77</sup> However, no regulatory action has been taken by the IAEA

<sup>76</sup> There is still some question about this. See Luther J. Carter, "Nerve Gas Disposal: How the AEC Refused to Take Army off the Hook," 169 *Science* 1296 (Sept. 25, 1970).

<sup>77</sup> See note 63 above.

beyond such procedural recommendations. The European Nuclear Energy Agency has supervised a dumping of containerized radioactive wastes.<sup>78</sup> With regard to dumping of other wastes, whether containerized or not, there appear to have been no measures taken by international organizations up to the present time. As we have observed above, such action by international organizations could bring into play the obligations placed on states by Article 25 to exercise measures of control. Recent incidents have shown that toxic chemical wastes are unquestionably "harmful agents" which could have serious deleterious effects for human life.

Marine dumping of dispersed and containerized wastes would be subject to controls under the draft United Nations Convention on the International Seabed Area, submitted by the United States "for discussion" to the United Nations Sea-Bed Committee. The relevant article would obligate states to conduct all their activities in the International Seabed Area, which "comprises all areas of the seabed and subsoil of the high seas seaward of the 200 meter isobath adjacent to the coast of continents and islands," "with strict and adequate safeguards for the protection of human life and safety and of the marine environment."<sup>79</sup> Thus, according to the Legal Adviser of the State Department, a state party to the convention could be brought before the Tribunal, an organ of the Authority to be set up by the convention "on account of either a potential or actual deposit on the seabed of a material or substance which might harm the marine environment."<sup>80</sup> The marine environment would extend beyond the seabed area and include the superjacent waters from coast to coast. It is presumed that this obligation would extend to dumping, whether dispersed or containerized, if such dumping involved a potential or actual deposit on the seabed. Thus, as Mr. John Stevenson observed in the United Nations Committee, "if the draft Convention were today in force any contracting party would have been able to bring the United States before the Tribunal in respect of its proposed dumping of nerve gas in the ocean"<sup>81</sup> and the United States would be required to abide by the decision of the Tribunal. The obligations, combined with extensive provisions for compulsory settlement of disputes and considerable enforcement authority, would be a considerable step beyond the present situation under Article 25 of the Convention on the High Seas. However, this draft is still in its early stages and there can be no telling when, or if, it will be more. There would seem to be reason to continue other efforts towards the regulation of marine dumping, particularly of dangerous containerized wastes, while at the same time

<sup>78</sup> See the European Nuclear Energy Agency's Radioactive Waste Disposal into the Atlantic (1968).

<sup>79</sup> Draft United Nations Convention on the International Seabed Area, note 1 above. Art. 1(2) defines the international seabed area; Art. 9 provides for safeguards of the marine environment; and Art. 23 requires the Seabed Authority to prescribe rules and recommended practices for protection of the environment and prevention of injury to persons, property and resources.

<sup>80</sup> Statement before the United Nations Seabed Committee, Aug. 20, 1970.

<sup>81</sup> *Ibid.*

pressing for a treaty with more effective provisions for the protection of the marine environment from pollution.

Action in the area of marine dumping need not, however, come only through the initiative of international organizations and governments. In a number of countries, action on pollution problems of the "dangerous practices" type has been stimulated largely through the initiatives of private citizens and concerned organizations who have taken pollution problems to court. The effectiveness of such private actions varies with the situation, but they must be considered an important mode of action where governments which are responsible for controlling pollution are participants in practices which may cause pollution. An international mechanism for handling complaints and grievances from private groups as well as governments might contribute to the control not only of marine dumping of wastes but to the control of other dangerous practices as well. Moreover, such a mechanism might be one form in which problems of international concern could be adequately discussed from both the technical and legal points of view.

#### SOME CONCLUDING OBSERVATIONS

Marine pollution is, of course, but a part of the totality of environmental problems which confront us today. The immediate effects of marine pollution are not as severe as are the immediate effects of pollution of air and inland waters in many countries, though the potential for catastrophe may be greater, due to the global character of marine environment and the fact that it is the ultimate receptacle for so many pollutants. It is not, however, either possible or desirable to limit problem-solving efforts to one or even a small number of problems. Marine pollution problems have their place in the total environmental problem and must be dealt with. Nor is it either possible or desirable to view environmental problems solely from a single point of view, and each of the problems discussed here as a marine pollution problem may well be found discussed elsewhere in a different context. Wastes discharged from coasts are not only a marine pollution problem; they are also a part of the problem of the proper use of the coastal and fluvial margin, a problem which includes land-use planning, urban population growth, the building of dams and the digging of canals. DDT is not only a marine pollution problem; it should also be viewed as an agricultural problem and as a health problem. What we call marine pollution problems here are, in reality, part of a vast overlapping set of problems which will have to be cut up again and again in different ways before the solutions become clear.

The comprehensiveness which is essential to reaching such solutions will be gained only through new efforts to reveal the full complexity inherent in the problems themselves. A purely piecemeal approach, characterized by approaching a single problem without considering its relationship to others, would not be adequate. The attempt to achieve comprehensiveness in a single leap may be equally illusory. Even if a global environmental authority could be set up tomorrow, the difficulties and obstacles will have



to be dealt with through a variety of specialized instrumentalities. This has come to be recognized on the international level by the specialized agencies and the United Nations bodies concerned. The decision to hold a United Nations Conference on the Human Environment in 1972 has had a rôle in clarifying the various tasks of specialized agencies<sup>82</sup> and has stimulated as well new activities by international non-governmental organizations.<sup>83</sup> Along with these activities there has come to be a greater recognition of the need for regional pollution control organs since it is apparent that, although pollution is a global problem, it is not uniformly global. Regional arrangements in the Baltic, the North Sea, Mediterranean, Caribbean and perhaps in the Arctic are now under way, and it is likely that these organs will have a decisive part to play in achieving day-to-day practical controls. The adoption of standards and procedures by international global and regional organizations, even though only recommendatory, can have an added degree of effectiveness by virtue of the open-ended obligation of Article 25 of the Convention on the High Seas on states parties to take anti-pollution measures in co-operation with competent international organizations. On that basis, supervisory and surveillance machinery may be more easily instituted by international organizations pending the conclusion of new treaties.

In short, we need a many-sided institutional approach to achieve the right balance. Pollution problems will not be solved by a single discipline, a single institution or a single wave of enthusiasm. Science can provide certain types of information, but that information will have to be communicated effectively to the international and national decision-makers. There is certainly a need for new institutions, though a large part of the solution will lie also in making old institutions more effective. There is as well a continuing need for maintaining the needed pressure from scientists, professional groups and the public at large. The fact that pollution has come to be seen as a problem of great intricacy in a world where many cannot afford to be clean underlines the importance of sustained professional concentration on the whole range of problems.

<sup>82</sup> See the Report of the Secretary General, note 64 above, and the Report of the Preparatory Committee for the United Nations Conference on the Human Environment, A/CONF.48/PC/6 (April 6, 1970). With regard to marine pollution in particular, see the Prospectus for the FAO Technical Conference on Marine Pollution and Its Effects on Living Resources and Fishing (Rome, Dec. 9-18, 1970) and report pursuant to U.N. General Assembly Res. 2566 (XXIV).

<sup>83</sup> The International Council of Scientific Unions and the International Union for the Conservation of Nature, in particular, are likely to play significant rôles in international efforts to solve environmental problems. For a comprehensive and lively account of recent developments in the international non-governmental conservation movements, see Max Nicholson, *The Environmental Revolution* (London, 1970).

## DEVELOPMENTS IN THE LAW AND INSTITUTIONS OF INTERNATIONAL ECONOMIC RELATIONS \*

[EDITOR'S NOTE: In recent years, there has been a great deal of discussion concerning the fixed par-value system of exchange rates established in the Articles of Agreement of the International Monetary Fund. A recent report (September, 1970) from the Executive Directors of the Fund to its Board of Governors—"The Role of Exchange Rates in the Adjustment of International Payments"—grouped the main problems which have been encountered in the operation of the par-value system: (1) adjustments in par values have often been unduly delayed; (2) the general cost of delayed exchange adjustment is high in relation to the general benefit from the avoidance of premature adjustment; and (3) there is a likelihood that disequilibria between major modern economies may arise fairly frequently, or even continuously, and hence calls for prompt and smooth adjustments of exchange rates more frequently than have occurred in the past. The Executive Directors, in that Report, reaffirmed the basic features of the Bretton Woods system and rejected three major alternative exchange rate systems which have been proposed in recent years: (a) a régime of fluctuating exchange rates; (b) a régime based on par values agreed with the Fund but allowing substantially wider margins than are now permitted by the Articles; and (c) a régime under which parities would be adjusted at fixed intervals on the basis of some predetermined formula which would be applied automatically. The Executive Directors also considered various proposals for adapting the par-value system, which they believe continues to be sound. Those that appeared to them to merit continuing study were a slight widening in the margins around parity, and permitting temporary deviations from the par-value obligations of members, *i.e.*, moving to fluctuating rates, with appropriate safeguards.

All of these questions, so important to sensible international economic relations among nations, have been, and no doubt will continue to be, hotly debated.

In the ensuing pages, Joseph Gold, General Counsel and Director of the Legal Department of the Fund and one of the foremost international monetary law scholars, provides the necessary legal underpinning for an understanding of some of the major issues involved in the continuing debate on the par-value system, particularly those affecting the distribution of authority over exchange rates between individual member states and the organization. He discusses the negotiating history of the relevant Fund articles, their meaning, and some anomalies which have been disclosed in twenty-five years of their operation.—S.D.M.]

\* Edited by Stanley D. Metzger.

## UNAUTHORIZED CHANGES OF PAR VALUE AND FLUCTUATING EXCHANGE RATES IN THE BRETTON WOODS SYSTEM

*By Joseph Gold \**

### UNAUTHORIZED CHANGES OF PAR VALUE: THE NEGOTIATIONS

In these days when the exchange rate provisions of the Articles of Agreement of the International Monetary Fund are being scrutinized, although in a spirit of continued approbation of the basic principles of what is called the par-value system or the Bretton Woods system, it may be useful to examine one of the most remarkable features of the agreement which was reached in July, 1944. The reference is to Article IV, Section 6, of the Articles of Agreement, which deals with what are called, in the title of the provision, "unauthorized changes" of par values. The provision is interesting not only because it establishes an important principle of the par-value system but also because it does this by means of a novel and ingenious legal technique.

One of the achievements of the Bretton Woods Conference was the acceptance of the thesis that the exchange rate for a currency is a subject of international concern.<sup>1</sup> This thesis was elaborated in provisions which call for agreement between the Fund and a member on an initial par value for the member's currency, fixed directly or indirectly in terms of gold.<sup>2</sup> A change in the par value of a member's currency can be made only on the proposal of the member and only to correct a fundamental disequilibrium. Normally, but not invariably, a change can be made only if the Fund concurs in it. The par-value system was described at the Bretton Woods Conference as one that aims at "stability without rigidity and elasticity without looseness."<sup>3</sup> The system is also one of fixed and not fluctuating rates. Therefore, a member is obligated to adopt appropriate measures to ensure that exchange transactions in its territories involving its own and other members' currencies take place only within the margins prescribed by the Articles around the par value established under the Articles.<sup>4</sup>

\* The General Counsel and Director of the Legal Department of the International Monetary Fund. The opinions expressed in this article are those of the author and not the official views of the Fund unless the context indicates that they are.

<sup>1</sup> Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944 (U. S. Department of State Publication 2866, International Organization and Conference Series I, 3 (hereinafter referred to as Procs. and Docs.)), Vol. I, pp. 867-886, Vol. II, pp. 1210-1212.

<sup>2</sup> "The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944." (Art. IV, Sec. 1(a).) On initial par values, see Art. XX, Sec. 4.

<sup>3</sup> 2 Procs. and Docs. 1213.

<sup>4</sup> "Foreign exchange dealings based on parity

The maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity

Changes in par values are governed by Article IV, Section 5:

*Changes in par values*

(a) A member shall not propose a change in the par value of its currency except to correct a fundamental disequilibrium.

(b) A change in the par value of a member's currency may be made only on the proposal of the member and only after consultation with the Fund.

(c) When a change is proposed, the Fund shall first take into account the changes, if any, which have already taken place in the initial par value of the member's currency as determined under Article XX, Section 4. If the proposed change, together with all previous changes, whether increases or decreases,

(i) does not exceed ten percent of the initial par value, the Fund shall raise no objection,

(ii) does not exceed a further ten percent of the initial par value, the Fund may either concur or object, but shall declare its attitude within seventy-two hours if the member so requests,

(iii) is not within (i) or (ii) above, the Fund may either concur or object, but shall be entitled to a longer period in which to declare its attitude.

(d) Uniform changes in par values made under Section 7 of this Article shall not be taken into account in determining whether a proposed change falls within (i), (ii), or (iii) of (c) above.

(e) A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund.

(f) The Fund shall concur in a proposed change which is within the terms of (c)(ii) or (c)(iii) above if it is satisfied that the change is necessary to correct a fundamental disequilibrium. In particular, provided it is so satisfied, it shall not object to a proposed change because of the domestic social or political policies of the member proposing the change.

Section 6 is entitled "Effect of unauthorized changes" and provides that:

If a member changes the par value of its currency despite the objection of the Fund, in cases where the Fund is entitled to object, the member shall be ineligible to use the resources of the Fund unless the Fund otherwise determines; and if, after the expiration of a reasonable

(i) in the case of spot exchange transactions, by more than one percent; and

(ii) in the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the Fund considers reasonable."

(Art. IV, Sec. 3.)

*"Obligations regarding exchange stability"*

(a) Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.

(b) Each member undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article. A member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking." (Art. IV, Sec. 4.)

period, the difference between the member and the Fund continues, the matter shall be subject to the provisions of Article XV, Section 2(b).<sup>5</sup>

These provisions were profoundly affected by a prolonged difference of opinion between the United Kingdom and the United States which can be understood only if it is realized how radical the idea was that exchange rates should be subject to international control and no longer determined solely by unilateral action. The United Kingdom insisted steadfastly on the autonomy of a country to regulate its domestic affairs, and with that principle in mind it urged that a country must retain broad authority to determine the exchange rate for its currency. The United States approached the negotiation with the proposition that exchange rates must be established or changed in agreement, and not simply in consultation, with the international institution which was contemplated. In addition, it started from a position of greater reserve towards changes. The United States was reinforced in its views by the preference of some negotiators for the unobstructed access of a country to the Fund's resources if it was in balance-of-payments difficulties.<sup>6</sup> Each of the two parties felt itself supported in its views by its public and parliamentary opinion.

The United States authorities had sent the Finance Ministers of the United and Associated Nations a preliminary draft of a proposal for an international stabilization fund for study by their technical experts. Discussions among the experts of more than 30 countries led them to conclude that the most practical method of assuring international monetary co-operation was through the establishment of an International Monetary Fund, and on April 21, 1944, they issued the document entitled "Joint Statement by Experts on the Establishment of an International Monetary Fund of the United and Associated Nations." In it they set out the principles which they believed should form the basis for the Fund.<sup>7</sup> Section IV of the Joint Statement ("Par Values of Member Currencies") included the following passages:

2. . . . [N]o change in the par value of a member's currency shall be made by the Fund without the country's approval. Member countries agree not to propose a change in the parity of their currency unless they consider it appropriate to the correction of a fundamental disequilibrium. Changes shall be made only with the approval of the Fund, subject to the provisions below.

3. The Fund shall approve a requested change in the par value of a member's currency, if it is essential to the correction of a fundamental disequilibrium. In particular, the Fund shall not reject a requested change, necessary to restore equilibrium, because of the domestic social

<sup>5</sup> Art. XV, Sec. 2(b) provides: "If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power."

<sup>6</sup> The International Monetary Fund 1945-1965: Twenty Years of International Monetary Cooperation (Washington, D. C., IMF, 1969; hereinafter referred to as History), Vol. I, pp. 6, 23, 28-29, 46-47.

<sup>7</sup> 2 Procs. and Docs. 1629-1636.

or political policies of the country applying for a change. In considering a requested change, the Fund shall take into consideration the extreme uncertainties prevailing at the time the parities of the currencies of the member countries were initially agreed upon.

4. After consulting the Fund, a member country may change the established parity of its currency, provided the proposed change, inclusive of any previous change since the establishment of the Fund, does not exceed 10 percent. In the case of application for a further change, not covered by the above and not exceeding 10 percent, the Fund shall give its decision within 2 days of receiving the application, if the applicant so requests.

Various features of Section IV of the Joint Statement gave greater recognition than had some earlier proposals to a country's authority over the exchange rate for its currency. Nevertheless, there continued to be opposition to the way in which the Joint Statement proposed to share authority between the new international organization and member states.

The Bretton Woods Conference, which convened on July 1, 1944, was preceded by a preparatory conference at Atlantic City in June which was attended by the representatives of 17 countries, including the delegations of the United Kingdom and eight other countries that had traveled across the Atlantic on the same ship and had taken the opportunity to exchange views on the Joint Statement. Before the departure of the British Delegation, which was headed by Lord Keynes, the Chancellor of the Exchequer had said, in briefing the delegation, that

... the delegation should press for an overriding proviso reserving to a country, in case of necessity, the exercise of its sovereign rights over the parity of its exchange in consultation with the Fund, subject to the right of the Fund at its discretion to suspend the member from continued use of the Fund's facilities if the Fund disagreed with the exchange policy proposed.<sup>8</sup>

At Atlantic City, the British Delegation proposed an amendment of the Joint Statement which included the statement that "Nothing in the above provisions shall affect the right of members to modify their exchange rates as they may consider necessary or advisable." They also argued that Section VIII, paragraph 1, of the Joint Statement was not an adequate safeguard of a country's authority. It provided that "A member country may withdraw from the Fund by giving notice in writing."<sup>9</sup> The British Delegation argued that, if there should be disagreement on an exchange rate, the best remedy was not necessarily that the relationship between the member and the Fund should be terminated and that the country should be released from all of the obligations involved in membership. The British position was that the dispute might prove temporary, and the right remedy, it was suggested, was suspension of the right to use the Fund's resources if a member resumed its freedom of action in connection with the par value of its currency.<sup>10</sup> In these circumstances, the member would remain subject to its other obligations, such as the obligations of convertibility and the maintenance of orderly exchange rates.

<sup>8</sup> 1 History 82-83.

<sup>9</sup> 2 Procs. and Docs. 1635.

<sup>10</sup> 1 History 84.

If an aside may be permitted, it would be to recall that in the course of its history the Fund has tended to observe a similar attitude towards the failures of members to fulfill their obligations, although it must also be said that these failures have not been numerous. The Fund has been reluctant to apply the sanctions which might lead to compulsory withdrawal on most of those occasions on which failures have occurred. One of the main reasons has been the absence of any advantage for the international community in the severance of relations between a member and the Fund, particularly if the member was willing to remain in consultation with the Fund and showed in that way that its failure was not contumacious.<sup>11</sup>

The United States Delegation would not accept the British proposal that a member should retain the right to modify its exchange rate as it might consider necessary or advisable. Mr. White's advice to the Secretary of the Treasury on June 25, 1944, was that: "The British want to increase the flexibility and ease of alterations of exchange rates. We think we should not budge one bit."<sup>12</sup> The disputants had not reached an understanding when the Atlantic City Conference was concluded on June 30, 1944.

#### UNAUTHORIZED CHANGES OF PAR VALUE: THE SOLUTION

The Bretton Woods Conference opened on July 1, 1944, and on that date Document 32, which had been prepared by the Secretariat, was presented to the Conference.<sup>13</sup> It was entitled "Preliminary Draft of Suggested Articles of Agreement for the Establishment of an International Monetary Fund," and it took into account the work that had been done at Atlantic City. It consisted of the provisions of the Joint Statement together with the variant and supplementary texts that had been submitted to the Secretariat. Paragraphs 2, 3, and 4 of Clause IV of the Joint Statement were circulated without any additional material but with the comment: "All alternatives to be supplied later."<sup>14</sup> An alternative text for these provisions was circulated as a joint proposal of the British and American delegations on July 7.<sup>15</sup> It may be assumed, therefore, that the two delegations had settled their differences of opinion on the provisions dealing with changes in par value. It is interesting, however, that even when Commission I had completed its task and was reporting to the plenary session of July 20, 1944, the reporting delegate felt impelled to mention the two competing philosophies that had shaped the exchange rate provisions:

There were some who attached so much importance to exchange stability that they desired to give the Fund great authority to prevent changes in exchange rates; while others started from the position that this was a matter of sovereign right and that there should be no suggestion of interference on the part of the Fund. In the end a text was developed and incorporated in the Articles of Agreement which steers a course between these two extreme views.<sup>16</sup>

<sup>11</sup> 2 *Ibid.* 582-588.

<sup>13</sup> 1 *Procs. and Docs.* 21-60.

<sup>15</sup> *Ibid.* 270-271.

<sup>12</sup> 1 *Ibid.* 84.

<sup>14</sup> *Ibid.* 38.

<sup>16</sup> *Ibid.* 868.

The joint proposal of July 7 began with provisions that are in substantial conformity with the final provisions of Article IV, Section 4(a), and Article IV, Section 5, although there are differences of language, a more extensive concept for the last sentence of what became Section 5(f), and a different arrangement of the various provisions of Section 5. The last paragraph in the proposal is the forerunner, with little modification, of Article IV, Section 6:

Section 4c. If a member alters the par value of its currency despite the objection of the Fund, in cases where the Fund is entitled to object, *the member shall be ineligible to use the resources of the Fund unless the Fund otherwise determines and if, after the expiration of a reasonable period of time, the difference between the member and the Fund continues, the matter shall be subject to the provisions of Article VIII, Section ———.*

The italics are in the original, possibly in order to draw the attention of delegates to the fact that this part of the proposal was new. The reference to "Article VIII, Section ———" is to provisions which dealt with withdrawal.<sup>17</sup> The text of Article IV, Section 6, in its final form, subject to one difference, appears for the first time in the first draft of the Articles prepared for the Drafting Committee, apparently on July 12, 1944.<sup>18</sup> The one difference is that the reference to Article XV, Section 2(b), appeared first as a reference to the predecessor of Article XV, Section 2, and then to that provision as a whole.<sup>19</sup> This change, which confined the reference to Section 2(b), was an essential step in the solution.<sup>20</sup>

In its final form Article IV, Section 6, was a compromise which does not grant a member the right to change the par value for its currency despite the objection of the Fund in cases in which the Fund is entitled to object,<sup>21</sup> but which accepts the principle that if a member makes a change of this kind it will not be considered to be in violation of its international obligations. The principle was made effective by insulating the consequences of an "unauthorized change" of par value from Article XV, Section 2(a), and by emphasizing this in Article XV, Section 2(b). The drafting history is relevant because it shows that the reference to Article XV, Section 2, and its predecessor was narrowed down to Article XV, Section 2(b). The significance of avoiding a reference to Section 2(a) is that Section 2(a) speaks of a member which "fails to fulfill any of its obligations under this Agreement." When the drafters had no wish to avoid the conclusion that a member would be failing to fulfill its undertakings, they simply relied on Article XV, Section 2(a). Article XIV, Section 4, concludes with the sentence: "If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XV, Section 2(a)."

<sup>17</sup> *Ibid.* 52-53, 272-273.

<sup>18</sup> *Ibid.* 522.

<sup>19</sup> *Ibid.* 662 (Drafting Committee text of July 16).

<sup>20</sup> *Ibid.* 772. The change was made in the second report of the Drafting Committee (apparently of July 18).

<sup>21</sup> The Fund has no right to object under Art. IV, Sec. 5(c) (i) or (e).



The full significance of the absence of a reference to Article XV, Section 2(a), in Article IV, Section 6, becomes clear when it is noted that Article XV, Section 2(a), deals with the ineligibility of a member to use the Fund's resources, *i.e.*, to make purchases of the currencies of other members from the Fund. Article IV, Section 6, also provides that a member shall be ineligible to use the Fund's resources. Moreover, a member making an unauthorized change of par value becomes ineligible without the declaration of ineligibility by the Fund which is necessary to make a member ineligible under Article XV, Section 2(a). A member need not become ineligible under Article IV, Section 6, if the Fund thinks that the member should continue to have access to the Fund's resources, but the Fund must then take a decision to prevent ineligibility from arising. Article XV, Section 2(a), itself makes it clear that the ineligibility procedures of Article IV, Section 6, are distinct from those of Article XV, Section 2(a), by declaring that "Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6. . . ."

It has been seen that there was no controversy about the appropriateness of ineligibility as a consequence of what was finally called an unauthorized change of par value. One of the purposes of the Fund is to assist members to establish and maintain effective par values that carry the endorsement of the Fund, and for this reason a member's access to the Fund's resources is interrupted without the necessity for a decision by the Fund when the member makes an unauthorized change of par value. The automatic character of ineligibility could create the mistaken impression that an unauthorized change of par value is not simply a failure to fulfill obligations but a particularly heinous failure. There is no rule of law or logic, however, which declares that ineligibility can be associated only with a failure to fulfill obligations. The compromise represented by Article IV, Section 6, was explained as follows in the Report of July 12, 1944, by Committee 2 to Commission I of the Bretton Woods Conference when approving the joint proposal of the British and American delegations:

The Canadian Delegate wished to record his observation that these sections, as approved, allow a member country to change its rate without the approval of the Fund, and yet remain a member in good standing. He thought that the provisions of the Joint Statement regarding changes in exchange rates had provided a happy compromise between exchange rigidity and exchange flexibility. The clause evidently represents a compromise between international agreement and control on the one hand and national autonomy on the other. The Fund will have, if not the arm of justice to inspire some respect, at least an *argumentum ad crumenam*; it is entitled to refuse the use of its resources to a member country which has altered the par values of its currency despite the objection of the Fund.<sup>22</sup>

The absence of the arm of justice refers to the treatment of the unauthorized change as something other than a failure to fulfill undertakings; the *argumentum ad crumenam* is ineligibility to use the Fund's resources.

<sup>22</sup> 1 Procs. and Docs. 557. See also pp. 271, 463.

The difference between a failure to fulfill obligations and an unauthorized change of par value is emphasized by Article XV, Section 2(b), when it deals with the power of the Fund to require a member to withdraw "if, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues. . . ." The theory of the provision is that, although an unauthorized change of par value is not a failure to fulfill obligations, it is nevertheless so serious a departure from the principle of the Articles that exchange rates are a matter of international concern that the Fund should be able to conclude that the continued membership of the country would be little more than formal. The Fund is not bound to insist on the withdrawal of a member after the expiration of a reasonable period, and it is not even required to define what it will regard as a reasonable period in any case of an unauthorized change of par value. These provisions follow the British proposal that a member should not be required to withdraw automatically, or should not feel under any pressure to withdraw, because it makes an unauthorized change of par value, and that it would be more useful to attempt to resolve the difference of opinion between the member and the Fund while the member continues to be held to the performance of its obligations under the Articles.

A difference of opinion between the Fund and a member that has made an unauthorized change of par value could be resolved by the adoption of a further par value in which the Fund concurred or by the withdrawal of the Fund's objection to the change that has been made, which would be equivalent to concurrence. There has been only one unauthorized change of par value in the history of the Fund. This was the change made by France on January 26, 1948, when it adopted both a new par value in which the Fund refused to concur and discriminatory multiple currency practices which the Fund refused to approve.<sup>23</sup> France eliminated the multiplicity of exchange rates in September, 1949, but a new par value was not proposed until December 27, 1958. The Fund concurred in the proposal on the same date, and the new par value became effective on December 29, 1958. France became ineligible under Article IV, Section 6, when it made the unauthorized change of par value; the Fund terminated the ineligibility of France on October 15, 1954. The Fund at no time established a "reasonable period" under Article IV, Section 6, for the purpose of withdrawal.

#### THE CIRCUMSTANCES OF UNAUTHORIZED CHANGES

Nothing in Article IV, Section 6, permits a member to ignore its obligations under Article IV, Section 5, if it wishes to make a change in the par value for its currency. Any change of par value must be the subject of a proposal to the Fund. A member may not propose a change except to correct a fundamental disequilibrium. The member may not make a change before it has consulted the Fund. If the member does not observe any one

<sup>23</sup> 1948 IMF Annual Report 36-38, 76-78.

of these obligations in any case in which it makes a change, it will be failing to fulfill its obligations within the meaning of Article XV, Section 2.

In addition, a member must obtain the concurrence of the Fund before making a change in par value. It should not escape the reader's attention that the Fund is called on to "concur" in a change of par value and not to "approve" it, which would have been the function of the Fund if the language of the Joint Statement had been adopted. The difference in language is one way in which the Articles recognize the retention by members of considerable authority in connection with par values. Only a member can propose a change in the par value of its currency, and, if the Fund accepts the change, it "concurs" in the proposal.

There are two limited categories of cases in which the Fund has no power to object or the concurrence of the Fund is not needed. The Fund has no power to object if a proposed change, together with all preceding changes, whether devaluations or revaluations, does not exceed a total of ten percent of the original par value.<sup>24</sup> The purpose of this provision was to give members a limited freedom to change par values in the uncertain conditions that were likely to prevail for a time after the war, but the operation of the provision is not confined to any particular period, and a member that has not yet exercised its freedom may exercise it even today. The second provision, under which the concurrence of the Fund is not necessary for a change in par value, refers to a change that "does not affect the international transactions of members of the Fund."<sup>25</sup> The provision was introduced in the Articles at the instance of the Russian Delegation at Bretton Woods, which felt that a change in the par value of a currency that was not in use internationally was not a matter of international concern in the same sense as changes in the par values of other currencies. It has not been necessary for the Fund to determine whether there could be a change in the par value of such a currency that would have no economic effects on the international transactions of members.<sup>26</sup>

Even proposals to make changes when the Fund has no power to object or the concurrence of the Fund is not necessary may be made only to correct a fundamental disequilibrium, and the changes may be made only after the Fund has been consulted. In these cases, the changes are not ones to which the Fund is entitled to object, and therefore changes of this character can never be unauthorized changes of par value. For other changes the concurrence of the Fund is necessary, and the Fund is entitled to object and withhold its concurrence, but members have retained the authority to make these changes despite the objection of the Fund without the risk of any judgment that they have failed to fulfill their obligations if they exercise this authority. But the Articles do not go so far as to provide that members are entitled to make these changes, and their consequences may be indistinguishable from a failure to fulfill obligations. If it is not possible to force this solution into some traditional legal category, this means only that traditional legal categories have been expanded.

<sup>24</sup> Art. IV, Sec. 5(c)(i).

<sup>25</sup> *Ibid.*, Sec. 5(e).

<sup>26</sup> See 1 History 360.

## THE EFFECTS OF UNAUTHORIZED CHANGES

Not all the legal effects of an unauthorized change of par value have been determined by the Fund. The one case involving an unauthorized change was complicated by the member's adoption of other exchange practices. There is little experience, therefore, on which to base a comprehensive statement of the legal effects of an unauthorized change of par value. In addition, the widespread convertibility of currencies and freedom for exchange markets, and the performance of exchange rate obligations by the intervention of monetary authorities in the market, have helped to bring about conditions that are radically different from those that prevailed in the days of broad exchange controls.

If the proposal of the British Delegation at Atlantic City that a member should be entitled to change the par value for its currency notwithstanding the objection of the Fund had been accepted, the probable legal result would have been that any par value so adopted would have been binding for all purposes under the Articles. In the case of France, the Fund refused to consider the proposed new par value in isolation from the discriminatory multiple currency practices which the Fund decided not to approve. The Fund held that the former par value was no longer binding on other members, and that they were not bound to confine exchange transactions in their territories between their currencies and the French franc within the prescribed margins of the former par value. The Fund took the same position in relation to the new par value and the other rates of exchange, but it reminded all members that they were bound by their undertaking in Article IV, Section 4(a), to "collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations." The Fund decided that the adoption of rates of exchange based on the new par value resulting from the unauthorized change would be consistent with that undertaking, but members would have to get specific approval for any other rate of exchange.<sup>27</sup> What is interesting about this solution is that, although the Fund started from the proposition that the new par value did not bind other members, it went on to approve rates of exchange based on that par value.

Even if there had been no discriminatory multiple rates of exchange, the same solution might have been followed. The refusal by other members to permit exchange transactions in a currency on the basis of a par value which the issuer was observing could lead to disorderly consequences. The new par value, however, might constitute a competitive exchange depreciation. The promotion of exchange stability, the maintenance of orderly exchange arrangements, and the avoidance of competitive exchange depreciation are all purposes of the Fund. A solution which enables the Fund to examine the circumstances of an unauthorized change of par value and

<sup>27</sup> Joseph Gold, "The Duty to Collaborate with the International Monetary Fund and the Development of Monetary Law," in *Law, Justice and Equity* 143-146 (edited by R. H. Code Holland and G. Schwarzenberger; London and Dobbs Ferry, N. Y., 1967).

to call for an appropriate response by members under Article IV, Section 4(a), puts the Fund in the best position to safeguard the Fund's purposes. *Prima facie* the appropriate response would be recognition of the new par value, but the Fund would have the opportunity to find that this would be more injurious to the purposes of the Fund than some other reaction.

#### FLUCTUATING RATES

It is unlikely that the drafters of the Articles expected that unauthorized changes of par values would be commonplace, but they might have been surprised by a forecast that only one case would occur in the first quarter-century of the history of the Fund. A decision adopted by the Executive Directors on March 1, 1948, may help to explain why there has been only one case. The decision recognizes that the extent of a change in par value that is necessary to correct a fundamental disequilibrium cannot be determined with precision and that a member proposing a change should be given the benefit of any reasonable doubt.<sup>28</sup> Another explanation may be the Fund's reluctance to define "fundamental disequilibrium" and its preference for a pragmatic approach to the application of the concept. Yet another explanation may be that when, in some cases, a member has been uncertain about the appropriate par value for its currency, it has preferred to "free" the rate instead of proposing a new par value. In the result, the adoption of a fluctuating rate for a currency, for which no special provision was made in the Articles, has been a more common phenomenon than an unauthorized change of par value.

In the cases that have been referred to, the member has decided, because of its special difficulties, not to observe its obligation to take appropriate measures to permit exchange transactions involving its own and other members' currencies to take place in its territories only at rates of exchange within the margins of parity that are prescribed by the Articles. At the same time, the member does not adopt a new par value, whether authorized or unauthorized, so that the exchange rate for its currency may be determined by market forces, with more or less control of those forces by the member's monetary authorities. In these circumstances, the rate of exchange for the member's currency may fluctuate, although the general movement of the rate is likely to be in the direction of either a depreciation or an appreciation. The rate of exchange may become stable, however, and remain unchanged, or virtually unchanged, for a substantial period, so that to call it a fluctuating rate is somewhat misleading. In these circumstances, there is no more than the possibility of fluctuation and that exists because the member has announced that it is not observing its exchange rate obligations. Fluctuating rates in the sense that has been explained here have been adopted by Canada from September 30, 1950, to May 2, 1962, and again since May 31, 1970, by Mexico from July 22, 1948,

<sup>28</sup> Selected Decisions of the Executive Directors and Selected Documents (Washington, D. C., IMF, Fourth Issue, April, 1970; hereinafter referred to as Selected Decisions), p. 18.

to June 17, 1949,<sup>29</sup> and by the Federal Republic of Germany from September 30, 1969, to October 26, 1969.

A member which adopts a fluctuating rate is not observing its undertaking to permit exchange transactions in its territories to take place only within the margins prescribed by the Articles, and therefore it is failing to fulfill its obligations within the meaning of Article XV, Section 2. The Articles of Agreement provide only for the immediate substitution of a new par value for a par value that is found to be inappropriate. There is no provision for a transitional period in which the exchange rate is allowed to fluctuate so that the member can test the market in order to see at what level the new par value should be established. There has been much debate of the question whether the absence of such a provision is a weakness of the Bretton Woods system.

It follows from the principle that a member can move only from one par value to another par value that, until a new par value is established, the one last established under the Articles remains the par value for the purposes of the Articles, no matter how unrealistic it becomes because of the development of exchange rates in the market. If the Fund has to carry out operations and transactions in the member's currency, it is likely to decide that its holdings of the member's currency shall be adjusted so that their gold value is maintained. The adjustment will be made by the payment of further currency by the member to the Fund if the Fund concludes that the currency has depreciated to a significant extent within the member's territories, or by the return of currency by the Fund to the member if the Fund concludes that the currency has appreciated. The Fund will then conduct its operations and transactions in the currency and make calculations involving it at the new "book rate."<sup>30</sup> Any other procedure could lead to a chaotic situation. In addition, if the Fund had to apply the par value to its operations and transactions in the currency, requests to purchase the currency from the Fund would probably cease in the case of depreciation and might be all too frequent in the case of appreciation. The reverse might be expected in connection with payments to the Fund. Because of the complexities of operations and transactions in, and calculations involving, a currency which fluctuates in value, the Fund has adopted a general decision which it may apply to such a currency and which attempts to resolve all the problems that can arise.<sup>31</sup>

If the exchange rate for a currency fluctuates, and the Fund's holdings of the currency have been adjusted under the decision in order to reflect fluctuations in the rate and in this way maintain the gold value of the Fund's holdings, the par value, though still the legal par value under the Articles, has only symbolic significance. What it symbolizes is that the member is failing to perform its obligation to render the par value effective. Other members are not bound to ensure that exchange transactions in their territories involving the currency that fluctuates in value take place only

<sup>29</sup> 2 History 152-173.

<sup>30</sup> Joseph Gold, *Maintenance of the Gold Value of the Fund's Assets* (IMF Pamphlet Series, No. 6, 1965).

<sup>31</sup> Selected Decisions 7-11.

within the prescribed margins of the par value. The principle on which the exchange rate provisions of the Articles are based is that each member is obligated to maintain the value of its currency. If it fails to observe this obligation, it does not transfer the burden to other members. It must not be assumed, however, that other members may do as they please in fixing rates of exchange between their currencies and the currency that fluctuates in value. The Fund has the same rôle in relation to currencies that fluctuate as it has to unauthorized changes of par value: it will seek to ensure that as little harm as possible is done to the purposes of the Fund.

Of course, if a member fails to fulfill any of its obligations under the Articles, the Fund may react by applying sanctions. It may declare the member ineligible to use the Fund's resources<sup>32</sup> and, if the member persists in its failure, the Fund may require the member to withdraw. The Fund has a discretion in deciding whether or not to apply these sanctions. It need not declare the member ineligible and, if it does decide to follow that course, it is not bound to take the further step of requiring withdrawal. In practice the Fund has not applied these sanctions against any of the members that adopted a fluctuating rate for their currencies.<sup>33</sup> The Fund's attitude to the application of sanctions is less interesting for the present purpose than the fact that the Articles do not impose an automatic sanction on a member that adopts a fluctuating rate for its currency. The contrast with the unauthorized change of par value is sometimes regarded as a legal anomaly. If a member makes an unauthorized change of par value, it is nevertheless maintaining defined rates of exchange for its currency because it will be permitting exchange transactions only within the margins from the new par value that are prescribed by the Articles. The rates of exchange are confined to these limits and they give the same assurance to parties engaged in conducting international transactions and making international payments that they receive from a par value in which the Fund has concurred. A fluctuating rate, however, does not give this assurance, because the member does not undertake to keep exchange rates within margins around a par value. It can be regarded, therefore, as a régime which is less compatible with the exchange-rate objectives of the Articles. Yet the adoption of an unauthorized change of par value leads to an automatic ineligibility to use the Fund's resources, whereas the adoption of a fluctuating rate does not.

The explanation of the apparent anomaly is implicit in what has been said about the compatibility of the two régimes with the exchange-rate objectives of the Articles. It was foreseen that a member might be disposed to act on its own conviction of what the par value for its currency should be, but it was assumed that the member would remain within the framework of fixed rates of exchange. It was thought desirable to make special provision for a member in those circumstances by protecting it against the charge of wrongdoing. No concessions were made in favor of a member that breaks out of the framework of fixed rates and institutes a fluctuating rate for its currency.

<sup>32</sup> Art. XV, Sec. 2(a).

<sup>33</sup> 2 History 582-588.

## MULTIPLE CURRENCY PRACTICES

There is another feature of the exchange-rate provisions of the Articles that seems anomalous. It has been seen that a member is not authorized to move from a par value to a fluctuating rate but must adopt a new par value if it does not intend to maintain the one already established under the Articles. From the standpoint of the Fund, the proposition can be restated in terms of the Fund's lack of authority to approve a fluctuating rate even as a brief transition to a new par value. For the purpose of this proposition a fluctuating rate means a unitary rate. Although the rate may move without reference to a fixed point (*i.e.*, a par value), any movement determines the rate in relation to all other currencies and to all payments. A change in the exchange value of the currency does not disturb a harmonious pattern of exchange rates in terms of all other currencies, based on their par values, and it does not produce different rates of exchange for different categories of payments.

There are exchange rate régimes, however, in which this harmonious pattern may not prevail. There may be rates of exchange for a currency that are not uniformly related to the par values of other currencies or are not uniform for all payments. It is within the power of the Fund to authorize these regimes as involving multiple currency practices or discriminatory currency arrangements. Under Article VIII, Section 3:

No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1, to engage in, any discriminatory currency arrangements or multiple currency practices except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 4 of that Article shall apply.

The absence of uniformity in the exchange rate for a member's currency for the purposes of all payments results in multiple currency practices. The absence of uniformity in relation to other currencies constitutes both multiple currency practices and discriminatory currency arrangements. There will be discrimination because the rate in relation to the currencies of some members will necessarily be more favorable to them than the rates for the currencies of other members. If a member employs multiple currency practices, some of the rates of exchange may be fixed and some may fluctuate. The member may enforce fixed rates in relation to some currencies or for some payments, but allow other rates to fluctuate.

The Fund's authority under Article VIII, Section 3, extends to all cases of multiple currency practices, including those that take the form of fluctuating rates of exchange.<sup>34</sup> The powers of the Fund, therefore, enable it to approve a fluctuating rate if it is a multiple currency practice but not if it is a unitary rate for the currency. Multiple currency practices are likely to diverge further from the objectives of the Fund than a

<sup>34</sup> Selected Decisions 104-105.



unified rate because of the restrictive and possibly discriminatory effects of the former. This judgment is more likely to be valid if there is a multiplicity of rates for payments and transfers for current transactions. It does not follow, however, that a unified rate is inoffensive. The uncertainty which it creates is itself incompatible with the objectives of the Fund, and this incompatibility would be seriously intensified if the rate were managed in such a way as to become unfairly competitive. Although a safe judgment can be made only in relation to the facts of an actual case, the generalization that a unified rate is likely to be less disturbing than multiple currency practices is defensible. Why, then, are the Fund's powers of approval applicable only to the less preferable of the two exchange-rate regimes?

The answer is supplied less by logic than by history. Multiple currency practices were common when the Articles were drafted. One reason, but not the exclusive reason, for them in some countries was that they had the same effect as exchange restrictions but did not call for the same complicated administration as exchange control. Members of the Fund were to be allowed to retain multiple currency practices, but with the understanding that they would be removed progressively. It was assumed that, once a member was able to unify its structure of exchange rates, it would be in a position to operate with an effective par value, and there would be no need or justification for a unitary fluctuating rate. The analysis is not quite so simple, however, because the Fund's power to approve multiple currency practices is not confined to cases in which the movement is towards the unification of exchange rates by the elimination of multiplicity in them. It is within the discretion of the Fund to approve an introduction of or proliferation in multiple currency practices, although undoubtedly there would have to be some adequate reason for the approval of a development that fundamentally had to be regarded as retrogressive. Moreover, approval could be no more than temporary and confined to the period in which the special circumstances that had led to the development continued to justify it.

#### CONCLUDING REMARKS

One of the major advances in the creation of an international monetary law was the acceptance of the principle at the Bretton Woods Conference, at which the Articles of Agreement of the International Monetary Fund were drafted, that the exchange rate for a member's currency is a matter of international concern. In the negotiation of the Articles, however, there was a conflict of opinion on the way in which authority over the exchange rate of a member's currency was to be apportioned between the member and the Fund. A major contribution to the resolution of the conflict was the concept of an unauthorized change of par value. This concept enables a member to make a change in the par value of its currency in certain circumstances, notwithstanding the objection of the Fund, without being in breach of any international obligation. A member making an unauthor-

ized change will be cut off automatically from access to the Fund's resources, but the Fund may prevent this ineligibility from arising.

An unauthorized change of par value assumes the adoption of a new par value and the existence of fixed rates of exchange based on that par value. The special treatment of an unauthorized change of par value has not been accorded to a unitary fluctuating rate. A member that has such a rate necessarily will be in violation of its obligations because the par value last established under the Articles remains the par value in contemplation of law, and the member will not be taking appropriate measures to permit exchange transactions only within the prescribed margins around that par value. Nevertheless, there is no automatic ineligibility to use the resources of the Fund in these cases, although the Fund can decide to impose ineligibility if it sees fit. It can be said, therefore, that the Articles treat the violation less harshly than the non-violation. Yet another curiosity of the legal apparatus is that, although the Fund cannot approve a unitary fluctuating rate, it can approve a fluctuating rate if it is a multiple currency practice.

Time has emphasized what seem to be the anomalies that analysis brings to light. There has been only one unauthorized change of par value in the history of the Fund. Unitary fluctuating rates have been more frequent. On four occasions a member that had had an effective par value resorted to a unitary fluctuating rate, and in some other cases a member unified multiple currency practices by adopting or maintaining a single fluctuating rate without adopting a new par value. Multiple currency practices have been even more common than unitary fluctuating rates, although the Fund presses for the simplification and elimination of multiple rates of exchange, and is resolutely opposed to those that are discriminatory. On a number of occasions, the Fund has made its resources available to members in order to enable them to progress towards a unitary fixed exchange rate. In some of these cases the Fund has not flinched from urging a member to allow the rate to move in accordance with market forces as the best means of achieving an ultimate stability.

## EDITORIAL COMMENT

JOSEF L. KUNZ, 1890-1970

The death of Josef Laurenz Kunz on August 5, 1970, is a grievous loss to international legal scholarship. Born in Vienna, April 1, 1890, he settled in the United States in 1932, and became a United States citizen. After studies in Paris and London, he earned a doctorate in law at the University of Vienna in 1913, and a doctorate at the same university in political science in 1921. He was later made Doctor *honoris causa* of the National University of Mexico.

Before coming to the United States, where he taught international law at the University of Toledo Law School from 1934 until his retirement, Kunz had been privat-docent in international law at the University of Vienna and had been consultant for the Hungarian Ministry of Foreign Affairs in the *Hungarian-Rumanian Optants* case. He had already established his name as a legal scholar of distinction by publishing, *inter alia*, *Die Völkerrechtliche Option*, Vol. I (1925), Vol. II (1928), *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), and *Die Staatenverbindungen* (1929), as well as contributing some thirty articles to Karl Strupp's *Wörterbuch des Völkerrechts*.

After settling in the United States, Kunz continued his prolific and perceptive contributions to international law and developed an interest in Latin American legal philosophy, law and practice, publishing many monographs in Spanish. Elected to the Board of Editors of the *AMERICAN JOURNAL OF INTERNATIONAL LAW* in 1944, Kunz faithfully contributed to its pages critical, constructive and lucid comments on current questions of international law and matters of legal theory which always commanded his interest. The range and depth of his scholarship were immense. He published over six hundred book reviews; and some forty of his selected articles are reprinted in *The Changing Law of Nations—Essays on International Law*, by Josef L. Kunz (1968).<sup>1</sup>

Kunz achieved a lifelong ambition when he was elected Associate of the *Institut de Droit International* in 1957, and Member in 1965, but, with failing health, he characteristically resigned in 1969 in order to make room for younger men in its limited membership.

The catholicity of his interests, the ebullience and charm of his conversation, and the warmth of his personality were a joy to those who knew him. His great learning and skills in legal analysis were a constant stimulus, and these are fortunately available to posterity in his published work.

HERBERT W. BRIGGS

<sup>1</sup> See review by Quincy Wright, 63 A.J.I.L. 348 (1969). See also, for lists of publications by Kunz, *Annuaire de l'Institut de Droit International*, Session d'Amsterdam, 1957, Vol. II, pp. 505-510, and Analytical Index, *American Journal of International Law*, etc., 1941-1960, pp. 277-279 (1968).

## QUINCY WRIGHT, 1890-1970

On October 17, 1970, the Board of Editors of this JOURNAL lost its senior member in length of service, Quincy Wright, who became a member of the Board in 1923 and served for nearly half a century. Readers of the JOURNAL over the years are well aware of the extent of Professor Wright's contributions to its pages on subjects ranging over the whole field of international law. Professor Wright was a widely known scholar, teacher and writer who devoted his activities to the study of war and the exposition of the means to preserve and restore peace in the world. He was a constant contributor to the JOURNAL, and its pages carry his articles and comments on the rules of law involved not only in the major wars but also in the lesser international disputes and conflicts of this century, from the bombardment of Damascus and the Mosul dispute in the early 1920's to the Middle East conflict of today.

Professor Wright had a long career as a teacher, first as an instructor in international law at Harvard University, then as Professor of Political Science at the University of Minnesota from 1919 to 1923, at the University of Chicago from 1923 to 1931, and subsequently as Professor of International Law at the University of Chicago, where he became professor emeritus in 1956. He taught at the University of Virginia as Professor of International Law from 1958 to 1961, when he became professor emeritus. After his retirement from the Universities of Chicago and Virginia, Professor Wright was visiting professor at the Indian School of International Studies at New Delhi, American University at Cairo, Egypt, Ankara University, Turkey, Makerere University, Uganda, and Columbia, Cornell, Syracuse and Rice Universities in the United States.

During World War II Professor Wright served as consultant to the Department of State, and, during the Nuremberg Trials, was technical adviser to the U. S. member of the International Military Tribunal. He was later consultant to the U. S. High Commissioner for Germany.

Professor Wright was active in many professional and scholarly organizations and served as president of several of them, including the American Association of University Professors, the American Political Science Association, the International Political Science Association and the United Nations Association of Greater Chicago. He was President of the American Society of International Law from 1955 to 1956. He was an Associate Member of the *Institut de Droit International*. In 1953 he shared with Professor William F. Cottrell of the University of Miami the Norwegian Science Prize for research in peace, and had recently been proposed for the Nobel Peace Prize.

Professor Wright's presence and views will be sorely missed both in the pages of the JOURNAL and in the gatherings of its editors, as well as in the annual meetings of the American Society of International Law, where he contributed so much to the discussions. He joined the Society in December, 1916, and was a member emeritus.

He was the author of several books dealing with questions of war and peace and international law. There will be published in a later issue of

the JOURNAL a full critique of Professor Wright's contributions to the promotion of the Society's purpose, as expressed in the motto on its seal, "*Inter gentes jus et pax*," which appears on the cover of the JOURNAL. His colleagues can presently express only their deep sense of loss of a genial friend and inspiring scholar and teacher.

ELEANOR H. FINCH

ARCTIC ANTI-POLLUTION: DOES CANADA MAKE—  
OR BREAK—INTERNATIONAL LAW?

The seas continue to be fertile for international law and for international controversy garbed as controversy about law. Canada's recent actions with respect to the Arctic Sea and United States reactions to them might have been couched in the favored lawyer's latinisms: *mare liberum* and *res communis omnium*, *pacta sunt servanda* and *rebus sic stantibus*, *lex lata* and *de lege ferenda*, *non liquet*, *consensus omnium* and *opinio iuris*, as well as that classic of legal as of other human argument, *tu quoque*.<sup>1</sup>

The story to date has been widely told. Briefly, last spring Canada enacted two statutes: one extended Canada's territorial sea to twelve miles and authorized the establishment of exclusive fishing zones beyond twelve miles; the other declared an "anti-pollution" zone up to 100 nautical miles from Canada's Arctic coast,<sup>2</sup> forbade pollution in that zone, imposed penalties and civil liability for violations (including unintentional violations), and authorized comprehensive regulation and inspection of vessels to prevent pollution.<sup>3</sup> At the same time, Canada modified its declaration under Article 36 of the Statute of the International Court of Justice to decline compulsory jurisdiction as regards issues arising out of its anti-pollution measures.

The United States reacted publicly and sharply, criticizing Canada for acting unilaterally instead of pursuing change by international agreement, challenging the legality of her actions, and offering to have them litigated before the International Court of Justice. Canada replied, equally tartly, that repeated efforts to obtain satisfactory international agreement had failed and that it "cannot accept in particular the view that international

<sup>1</sup> Not irrelevant were some renowned latinate derivatives: *laissez-faire* and *fait accompli* and classic manifestations of Georges Scelle's *dédoublement fonctionnel*.

<sup>2</sup> The legislation on pollution discussed here appears as Bill C-202, 2nd Sess., 28th Parliament, 18-19 Elizabeth II, c. 47 (1969-70). It is reprinted in 9 Int. Legal Materials 543 (1970). Canada's declaration concerning the compulsory jurisdiction of the I.C.J. is there at p. 598.

<sup>3</sup> E.g., any deposit of waste must be reported (Sec. 5). The Governor in Council can require evidence of financial responsibility as a condition of passage (Sec. 8). He is authorized to prescribe shipping safety control zones, establish regulations for ships navigating in those zones and prohibit navigation by vessels that do not comply; regulations may include requirements for hull and fuel tank construction, navigation and safety equipment, pilotage and ice-breaker escort (Secs. 11, 12). He may order the removal or destruction of ships or cargo which threaten pollution (Sec. 13), and may appoint officers with comprehensive powers to inspect vessels (Secs. 14-17). Many of the provisions apply as well to other activities which threaten pollution, e.g., the exploration and exploitation of natural resources,

law provides no basis" for these measures, but declined to have its anti-pollution legislation judged by the Court.<sup>4</sup>

Canada surely has some points. The law of freedom of the seas has been a law of *laissez-faire* favoring the shippers of the world. Shipping states are potential perpetrators of serious pollution threatening coastal states as well as the "commonage" of the seas, but they have the votes at conferences and the principle of unanimity to resist comprehensive regulation. Recent flurries of activity have produced neither cure nor effective control, and Canada, in particular, has been outvoted at several anti-pollution conferences.<sup>5</sup>

Canada has other kinds of points, too. Needed change in the law has often been achieved only by the initiative of interested states. The special rights of coastal states (including the territorial sea) began as unilateral assertions: in our days, for particular example, the contiguous zone, the Truman Proclamation on the Continental Shelf, the United States (and Canadian) Air Defense Zones. Special rights at sea have been claimed also on bases other than coastal proximity, for example United States (and other) nuclear testing areas.

Canada even has a point in that, virtually by hypothesis, any state which seeks to make new law cannot agree to litigate under old law. In fact, she has reason to fear that an impartial tribunal would reject her anti-pollution regulations. For while Canada has refrained from calling it that, she has, in effect, proclaimed a "contiguous zone" for a new purpose, with new and radical forms of regulation, and of new and grand dimension. The purpose is surely legitimate, is not very different from those for which such a zone has been claimed in the past, and is surely within the spirit, and perhaps the letter, of the 1958 Convention authorizing coastal states to exercise in their contiguous zone "the control necessary" to prevent "infringement of . . . sanitary regulations within its territory or territorial sea."<sup>6</sup> Some of Canada's regulations, at least, appear reasonable enough, and not unlike others now pertaining in contiguous zones; some are perhaps novel though not objectionable, if the burden on shippers be balanced against the coastal state's interest; some, for example the asserted right to prescribe the construction of vessels, may or may not be

<sup>4</sup> See Summary of Canadian note of April 16 Tabled by the Secretary of State for External Affairs in the House April 17. 9 Int. Legal Materials 607 (1970).

<sup>5</sup> The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, signed at Brussels, 1969, reprinted in 64 A.J.I.L. 471 (1970), empowers states to "take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline . . . following upon a maritime casualty." This presumably permits action by the coastal state only after an accident has occurred. The other Brussels Convention on Civil Liability for Oil Pollution Damage (*ibid.* 481) imposes liability on shipowners, but there is a ceiling on liability in the absence of fault. These conventions do not deal at all with other sources of pollution. Canada alone voted against the Liability Convention, and its subsequent unilateral action no doubt partly reflects its dissatisfaction with those conventions.

<sup>6</sup> Art. 24 of the Convention on the Territorial Sea and Contiguous Zone. 52 A.J.I.L. 840 (1958).

"necessary," but reach farther than states have attempted even in their territorial waters. The 1958 Convention, however, provides that the contiguous zone may not extend beyond twelve miles from the coast; Canada has claimed almost ten times that. Canada may be saying that a twelve-mile anti-pollution zone is not adequate and perhaps it is not, but oil pollution was hardly unknown in 1958,<sup>7</sup> and there was no suggestion that there could be larger zones by the same or any other name for anti-pollution or any other purpose, in some seas if not in others.

Canada has cited several instances in which others, notably the United States, unilaterally asserted exclusive rights at sea, but if the Canadian kettle's response to the United States pot was human enough, it is not necessarily decisive in law. The law of the contiguous zone did indeed develop in unilateral assertions (some by the United States), but these did not infringe deeply on important, *bona fide* interests of other states and, not strongly challenged, they slowly added up to custom modifying previous fluid custom. The Truman Proclamation, some think, was mistaken and perhaps unlawful, but whatever law there had been was uncertain, hypothetical and largely irrelevant; the proclamation responded to a new opportunity in ways which did not affect the perceived rights of others; it was immediately accepted and later codified. The Air Defense Zone is indeed a kind of contiguous zone, and if it has apparently survived as a tacit exception to the 1958 Convention, it is perhaps because states did not see any interest to challenge the minor burdens on approaching aircraft. Nuclear testing at sea has not claimed permanent rights, has required only temporary detour, and its legality has indeed been questioned. In other instances, Canada knows, states which have sought to develop new law by deviant action met not with acclaim or acquiescence but with protest and resistance, and what they proclaimed as new law was received as violation of the old. In this instance, Canada has deviated from the law, recently codified with the agreement or acquiescence of the mass of nations, in ways that continuously challenge important rights of major nations.<sup>8</sup> She does not make the case she may be insinuating—that anti-pollution is more like air defense (or nuclear testing) than like other sanitary regulations—by asserting that "a danger to the environment of a state constitutes a threat to its security":<sup>9</sup> the "environment" is a seamless whole, and many activities at

<sup>7</sup> See Arts. 24 and 25 of the Convention on the High Seas, quoted below, note 10.

<sup>8</sup> Forty-four states, including the United States and Canada, signed the 1958 Convention on the Territorial Sea and Contiguous Zone, and some 35 have adhered to it. While most states (including Canada) have not bothered to adhere, few have questioned it and it is commonly accepted that the convention is generally only a codification of customary law.

Unilateral regulation of tanker construction in particular would make it possible for one state controlling an important passage to prescribe tanker specifications for the whole world. Compare *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), where the United States Supreme Court invalidated as imposing an undue burden on interstate commerce a regulation by the State of Illinois requiring interstate trucks to have a new kind of mud-guard which might contribute to safety but which was different from that required by other States.

<sup>9</sup> See the Canadian reply, cited note 4 above, at p. 608.

sea "threaten" it in some degree; but the nations have agreed in the recent past on the area in which and the ways by which a coastal state may protect the security of its environment.

Whatever its fortunes would be in a court of law, Canada's case in the relevant diplomatic universe might have fared better but for other circumstances. Its principal adversary in this matter is the United States, and, for Canada especially, pollution is one of several Arctic issues which are part of many larger ones. Immediately, too, there are political and economic issues behind the legal issue: The United States has interests in the Arctic and some are adverse to Canada's; it is a major shipper and buys oil, while Canada has few ships and sells oil. It is doubtless true, however, that the United States is also disturbed by the Canadian "precedent" and example, and is championing international law. Canada, unhappily, asserts a new and large coastal state jurisdiction at a time when the law of the sea is threatened; when, in particular, other coastal states are extending into the sea for some or all purposes, and some (notably in Latin America) are preaching this practice as a principle that a coastal state can take as much of the sea as it wants for any purpose. Canada would no doubt reject that startling view of the international law of the sea. It could say that pollution is different and that the Arctic is different, even unique, and it seems to blame the United States for not seizing those differences to deny the Canadian action as a precedent to Latin America. But how do you prove or persuade, say, poor Peru that its interests in fish are less entitled to protection "for mankind" than rich Canada's concern for its Arctic ecology?

If others might have sought, and might yet seek, to minimize the Canadian action so as to minimize its example and effect, Canada did not help them. It did not purport to act under accepted principles, by invoking claims to sovereignty of the area (under the "sector principle" or on the theory that it is an archipelago). It did not limit its regulations to its now-extended territorial waters, effectively governing tankers, which can hardly avoid them. It did not purport to act within the 1958 Conventions, perhaps by proclaiming its regulations as implementing the provisions forbidding pollution,<sup>10</sup> or by other constructions and distinctions. It did not show

<sup>10</sup> Art. 24 of the Convention on the High Seas provides:

"Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject."

Art. 25 provides:

"1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

"2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air-space above, resulting from any activities with radioactive materials or other harmful agents." 52 A.J.I.L. 848 (1958).

There is no provision for enforcement but unilateral enforcement is not expressly excluded.

The Convention on the Prevention of the Pollution of the Sea by Oil prohibits the discharge of oil from vessels within large coastal zones. Both the United States and



how anti-pollution differed from other coastal-state interests, perhaps invoking general doctrine to justify prescribing for acts which have effect in its territory. It did not announce its program as temporary, pending and subject to new international legislation, and seek to take pollution out of forums where shippers dominate, into others where the world's coastal-state majority could prevail. It might have avoided setting a precedent for coastal-state expansion, and set a different, novel, and needed precedent by acting (and tailoring its regulations) not in its coastal interests but as a member of the community protecting the common interest in the seas. It might have dealt with the passage of oil tankers *ad hoc* and by negotiation, as others have done in regard to nuclear vessels passing through their waters, or sought limited, general agreement with the United States and the few other states that have Arctic interests.<sup>11</sup>

However legitimate Canadian concerns, however true its accusations against shipping states, however urgent the dangers of pollution, the fact is that it is asserting new unilateral rights as a coastal state against the world. However good the intentions that pave it, the road newly broken is the harder when it is a major deviation from one recently established and widely accepted. In international law, too, it "is usually more important that a rule of law be settled, than that it be settled right";<sup>12</sup> in international law it is particularly important that when the difficult labor of lawmaking finally produces respectable issue, neither product nor process be lightly discarded. Surely today, the answer to inadequate law or inadequate process is not in unilateral assertions enhancing national authority and national judging for oneself and for others.

Canada has struck a blow against pollution and for today's crusade for the environment, but it is a blow also at international law and its law of lawmaking. A blow at international law by Canada is perhaps the most unkindest cut of all; for if the Canadas teach that coastal states can decide where their interests must prevail over those of others, other coastal states, and non-coastal states too, will better the instruction. But the blow need not be fatal, either to law, to Canada's aspiration and reputation as the law's defender, or to the common interests in the sea. Canada's action can be superseded, modified, reinterpreted. But the task is not hers alone, and all might begin by recognizing the true issue. Canada has framed

---

Canada are parties, the United States with reservations. The convention provides for enforcement by the flag state of an offending vessel, but regulation by the coastal state is not expressly excluded.

Compare Art. 2 of the 1958 Convention on the High Seas which provides, *inter alia*, that the freedom of the seas must be exercised "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

<sup>11</sup> The United States concluded special agreements with several coastal states to ensure passage of the nuclear vessel *Savannah* through their territorial seas. Compare the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil, June 9, 1969. These and other suggestions as to how Canada might have acted to avoid giving comfort to the coastal-state onslaught against the law of the sea would not, of course, all be equally effective or equally pass legal muster.

<sup>12</sup> Mr. Justice Brandeis dissenting in *DiSanto v. Pennsylvania*, 273 U.S. 34, 37, 42 (1927).

the issue as freedom of the seas, *i.e.*, *laissez-faire* for shipping states, against adverse rights of coastal nations. But *laissez-faire* largely prevailed when navigation was the principal use of the sea, when freedom of navigation did not threaten coastal states or other users and other uses, and shipping states had the effective power to make it prevail. Now the uses of the seas are many and interdependent, now the fears and interests of coastal and other states are many and legitimate, now, happily, military force cannot be readily used to protect most of the interests at stake. International law, then, has to move quickly in the sea. But if those favored by the old law court catastrophe if they merely sit on ancient rights, coastal states are hardly likely to make the law that is needed by unilateral assertion. For the issue is not in fact between *laissez-faire* for shippers and *laissez-faire* for coastal states. The seas—all the seas—cry for regulation as a veritable *res communis omnium*. It is not only as regards the resources of the sea that the issue is truly between special claims of particular states and the “common heritage of mankind.”

LOUIS HENKIN

#### THE UNITED STATES ASSAULTS THE I.L.O.

David A. Morse, after twenty-two years of distinguished service as Director General of the International Labor Office, was succeeded in May, 1970, by C. Wilfred Jenks. The election of Dr. Jenks, then Principal Deputy Director General and an official of the I.L.O. for almost forty years, although closely contested, was widely welcomed, not least by international lawyers, among whom Dr. Jenks had long been so eminent. The United States supported Dr. Jenks' election.

On July 31, 1970, Congressman John J. Rooney of New York, submitting that “this bird Jenks thinks he has inherited the ILO lock, stock and barrel . . .,”<sup>1</sup> concluded that “Mr. Jenks needs to be rocked. I know of only one way to rock him, cut off his water.”<sup>2</sup> Congressman Rooney suggested that the Assistant Secretary of State for International Organization Affairs telephone the Chief of the United States Mission in Geneva, “Ambassador Rimestad and tell him to hotfoot it over to Mr. Jenks and tell him before nightfall that there will be no money for the ILO . . .”<sup>3</sup> Congressman Rooney did not wish the purposes of this threat to be concealed. On the contrary, he declared that “. . . Mr. Jenks should have a copy of this record air mailed to him as soon as it is printed. . . . Maybe it will help him”<sup>4</sup> . . . He might change his mind. I will lay odds that he eventually will.”<sup>5</sup>

The subject of the change so to be induced in the mind of the I.L.O.'s Director General was the appointment of an Assistant Director General of

<sup>1</sup> Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 91st Cong., 2nd Sess., “Additional Testimony on the International Labor Organization,” p. 79.

<sup>2</sup> *Ibid.* 69.

<sup>4</sup> *Ibid.* 70.

<sup>3</sup> *Ibid.* 76.

<sup>5</sup> *Ibid.* 77.

Soviet nationality (who ranks eighth in the I.L.O. hierarchy, and who heads a department concerned with social security and maritime and certain other affairs). In June, in the course of a conversation with the Deputy Under Secretary for International Affairs of the U. S. Department of Labor, George H. Hildebrand, about the appointment of a U. S. national to the senior directorate of the I.L.O. (there being none with the departure of Mr. Morse), Dr. Jenks informed him of his intention also to appoint a Soviet Assistant Director General.<sup>6</sup> That in turn led to consultations among U. S. labor, employer and governmental representatives in the I.L.O. and to the calling of extraordinary Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives on July 31, at which Congressman Rooney made the remarks quoted above.

His remarks, in turn, appear to have been stimulated by the testimony of George Meany, President of the AFL-CIO, Edwin P. Neilan, U. S. Employer Delegate to the I.L.O., and Mr. Hildebrand, who substantially supported suggestions by Congressman Rooney<sup>7</sup> that payment of I.L.O. assessments by the United States be cut off.<sup>8</sup> The purpose of withholding funds was candidly stated to be the exertion of pressure upon the Director General so as to lead him not to appoint, or to vacate the appointment, of a Soviet Assistant Director General. Mr. Neilan suggested that ". . . the delinquency [of the United States in withholding its payment] is not going to accomplish the purpose unless it is accompanied by a clear statement of the reason for it . . .";<sup>9</sup> whereupon Congressman Rooney remarked that the record of the Subcommittee's hearings would be airmailed to the Director General. That record manifests not only opposition to the appointment of a Soviet Assistant Director General but disapproval of what was alleged to be disproportionate Soviet influence in the International Labor Organization and in the International Labor Office. It was claimed that the Soviet Union gets what it wants in the I.L.O. by threatening to withhold its ten percent contribution to the budget; and the Subcommittee appeared to take up the suggestion that the United States would exert even more influence if those directing the I.L.O. could be brought to appreciate that the United States could withhold its twenty-five percent contribution.<sup>10</sup> The appointment of a Soviet representative was, in Mr. Meany's view, "the last straw."<sup>11</sup> Not only was the Organization inordinately influenced by the Soviet Union; in Mr. Meany's view, "It is quite obvious that the [International Labor] office is, and has been for some time, in the Russians' corner."<sup>12</sup>

By the time of the Subcommittee's Hearings, the House of Representatives had already adopted a bill containing, among other appropriations,

<sup>6</sup> *Ibid.* 71.

<sup>7</sup> *Ibid.* 59, 68-69. Mr. Hildebrand preferred the threat of withholding payment of U.S. assessments to actual withholding (*ibid.* 76). The representative of the Department of State, Samuel De Palma, Assistant Secretary of State for International Organization Affairs, opposed deletion of appropriations for the I.L.O. (at pp. 74-75, 78).

<sup>8</sup> *Ibid.* 5, 59.

<sup>9</sup> *Ibid.* 70.

<sup>10</sup> *Ibid.* 59, 66.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* 75.

the remaining half of the I.L.O. assessment for 1970. Nevertheless the Subcommittee decided to invite the Senate Appropriations Committee, which had not yet acted, to strike that sum of \$3,758,875 from the bill. This the Committee, led by Senator John L. McClellan, agreed to do, coupling this action with the recommendation that "the proper legislative committee review the continued participation of the United States in this organization."<sup>13</sup>

When these recommendations came before the Senate, Senator Javits moved vigorously to restore the I.L.O. appropriation. He noted that the United States "is bound as a matter of law to pay the assessments for the ILO duly made upon it."<sup>14</sup> He cited a number of reasons (among them, the thrust of the Advisory Opinion of the International Court of Justice in the case of *Certain Expenses of the United Nations*) why failure to pay would detract from the interests of the United States and the United Nations community.

In reply, it was maintained that the I.L.O. was deluged with Communist propaganda;<sup>15</sup> that some other Members were in arrears, and that the United States would lose its vote in I.L.O. organs only after the amount of its arrears were to equal or exceed the amount of contributions due from it for the preceding two full years, and that, accordingly, failure to pay would not be a treaty violation;<sup>16</sup> that Soviet nationals are appointed to international secretariats upon the nomination of a single candidate for the post in question, while the United States is "discriminated against" since it has to submit a number of candidates;<sup>17</sup> and that representation of Soviet workers' and employers' representatives in the I.L.O., as well as the manner of choice of Soviet members of the Secretariat, represents a "double standard."<sup>18</sup>

At the conclusion of the debate, and before the vote, Senator McClellan asked unanimous consent to have printed in the *Record* a letter from William B. Macomber, Jr., Deputy Under Secretary of State for Administration, which, however, Senator McClellan refrained from reading out. Nor apparently did the Senator give his colleagues indication of the letter's contents. Mr. Macomber wrote that, if the cut in the I.L.O. appropriation were adopted,

Serious legal consequences will follow . . . the United States has undertaken an international legal duty to pay the share of the budget that has been voted by the I.L.O. General Conference and . . . we would be in violation of that obligation if we did not pay our full assessment.<sup>19</sup>

After referring to the *U.N. Expenses Case*, Mr. Macomber noted that "non-payment of our dues to the I.L.O. could, of course, lead to the question being raised again in the International Court of Justice." And, he concluded, non-payment "would seriously weaken the ability of the United

<sup>13</sup> Congressional Record, Senate, Aug. 24, 1970, at S14103.

<sup>14</sup> *Ibid.* at S14094.

<sup>15</sup> *Ibid.* at S14098.

<sup>16</sup> *Ibid.* at S14105.

<sup>15</sup> *Ibid.* at S14097.

<sup>17</sup> *Ibid.* at S14103.

<sup>19</sup> *Ibid.* at 14106.

States to exert influence within the organization.”<sup>20</sup> The vote to sustain the deletion of funds for the I.L.O. was 49 to 22, 29 Senators not voting.<sup>21</sup> The Senate-House Conference Committee and the House of Representatives subsequently upheld the deletion (some three weeks after the Soviet Assistant Director General took office in September, 1970).<sup>22</sup>

In the light of these actions, it is clear that the United States has violated international law on two counts.

First, it has violated its explicit obligation to respect the international character of the responsibilities of the Director General of the I.L.O. As do the comparable provisions of the United Nations Charter, the I.L.O. Constitution provides that “The responsibilities of the Director-General and the staff shall be exclusively international in character” and that:

In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organisation. . . .

Each Member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.<sup>23</sup>

Among those responsibilities is the appointment of staff by the Director General under regulations approved by the Governing Body (regulations followed to the letter in this case). Thus, insofar as it seeks by the threat or use of non-payment to induce the Director General to vacate his appointment of a Soviet Assistant Director General or otherwise to adjust his policies to the will of the United States, the latter thereby endeavors to influence, and indeed instruct, the Director General contrary to this important international legal obligation. As the record of the House Hearings and Senate and House debate makes clear, this is precisely what the Congress had in mind. While the Department of State did not favor the course of action initially threatened and then implemented by the Congress, it has officially communicated that action to the Director General; and failure to pay an assessment in any event must be a matter of public and official record.

Representations by states to the Secretary General of the United Nations and the Directors General of the Specialized Agencies about secretariat appointments are a commonplace. That, however, is not sufficient to legalize the pressures exerted by the United States in this instance. It is one thing for a state to express preferences to an international official about aspects of his official functions, including staff appointments (almost in-

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Congressional Record, House, Oct. 6, 1970, at H9622-9633. Congressman Rooney then stated “that we belonged to an organization that has become dominated by Communists. It is now nothing but a stage for Communist propaganda, and there is no reason why our taxpayers should be paying 25 percent of every dollar of cost of keeping that organization alive.” (At H9623.) In response to Congressman Frelinghuysen’s statement that the reduction in the appropriation would cause “a default by the United States on an assessment which has already been levied against it,” Congressman Rooney replied “There is not any question about that. That is exactly what we want to do, is it not?” (at H9631).

<sup>23</sup> Art. 9, pars. 4 and 5.

variably about appointments of its own nationals); it is quite another for a state to inform an international official that, unless he takes or refrains from taking a specific action, that state will commit against the Organization a specific, grave, and, in this case, patently illegal injury. A clearer case of a state endeavoring to influence and instruct an international civil servant contrary to its international obligations would be hard to conceive.

Second, the United States has failed to meet its obligation under the Constitution of the I.L.O. to pay assessments upon it. Article 13 of the Constitution provides that the expenses of the I.L.O. "shall be borne by the Members." That this provision imports what the I.L.O. Constitution elsewhere describes as "financial obligations"<sup>24</sup> is the plainer in view of the interpretation of precisely that provision of the United Nations Charter by the International Court of Justice in its Advisory Opinion on *Certain Expenses of the United Nations*.<sup>25</sup>

This willful failure of the United States to pay an I.L.O. assessment, whose validity and legally binding character is not open to serious challenge, in a sense surpasses the violation of international law committed by the U.S.S.R. and allied states and France in failing to pay certain peace-keeping expenses of the United Nations. Those countries alleged (however unjustifiably) that the assessments in question were unlawful, a contention which the International Court of Justice did not sustain. But the United States can allege no illegal act to give a color of legality to its own. It does not challenge the validity of any I.L.O. assessments. The policy which the Congress has so far embraced is simply to withhold all unpaid contributions until I.L.O. policies are reshaped to suit it.

At the time when the United States ceased to press for the application of Article 19 of the U.N. Charter to the U.N. delinquents, it declared that it reserved the right not to pay future U.N. assessments if strong and compelling reasons existed for non-payment.<sup>26</sup> Whatever the legal force of that declaration—a question of considerable complexity and interest—the continuing delinquency of certain states in their United Nations payments cannot justify a default of the United States in the I.L.O. Moreover, in the I.L.O. there are no exceptions to collective financial responsibility to which U. S. non-payment may reasonably be claimed to be responsive. Indeed, the very rationale of the United States declaration in the United Nations is lacking in the I.L.O., for, unlike the United Nations, the International Labor Organization has consistently and automatically de-

<sup>24</sup> Art. 2, par. 5.

<sup>25</sup> [1962] I.C.J. Rep. 158, 164; 56 A.J.I.L. 1053 (1962).

<sup>26</sup> "... [We] must make it crystal clear that if any member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the Organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so. There can be no double standard among the members of the Organization." Ambassador Arthur J. Goldberg, in an address to the United Nations Special Committee on Peacekeeping Operations, Aug. 16, 1965, U.N. Doc. A/AC.121/PV.15, pp. 3-15; reprinted in 53 Dept. of State Bulletin 454, 456 (Sept. 13, 1965); excerpted in 60 A.J.I.L. 104 at 106 (1966).

prived Members in the requisite arrears of their votes in I.L.O. bodies.<sup>27</sup> It has not maintained a double financial standard. The deplorable double standard which the United Nations itself has maintained in respect of the payment of financial obligations due it and in the application of Article 19 has contributed to the broader undermining of the principle of collective financial responsibility in the world of international organization. But that hardly justifies the United States in making this singular contribution of its own in an I.L.O. context.

It remains to comment upon the arguments advanced in the Congress in support of cutting off payments to the I.L.O. The contention that the I.L.O. suffers a surfeit of Communist propaganda has no legal force; politically, the sensible course is to answer such propaganda rather than facilitate it by a process of United States retreat. The suggestion that because some Members are in arrears, the United States may lawfully be, rebuts itself, the more so in an organization where delinquents in the requisite arrears suffer the prescribed suspension of vote. Nor is there substance to the contention that, since two years' worth of delinquency must accrue before an I.L.O. Member loses its vote, non-payment of lesser sums is lawful; this confuses violation of the law with imposition of a sanction responsive to the violation.

The other arguments are more consequential. The United States has reason to complain that the Soviet Union is permitted to submit the name of but one candidate for a position in an international secretariat; this process in fact tends to enable the U.S.S.R. to select those of its nationals who are to be employed by international organizations, contrary to Article 101 of the United Nations Charter and comparable clauses of the constituent instruments of the Specialized Agencies. However, the situation would not be materially different if the U.S.S.R. were to submit several names for a post; the fact is that, in any totalitarian society, an international organization will have grave difficulty in freely recruiting and holding Secretariat members.

It is of course also true that Soviet workers' and employers' organizations are not free and representative in the sense in which they are in democratic countries; they hardly comport with the tripartite plan of the I.L.O.<sup>28</sup>

<sup>27</sup> See "Article 19 of the Charter of the United Nations: Memorandum of Law," by the Office of the Legal Adviser, Department of State, in 58 A.J.I.L. 752, 772-776 (1964).

<sup>28</sup> Nevertheless, the International Labor Organization in 1946 extended a warm invitation to the U.S.S.R. to rejoin the I.L.O. The employers' representatives noted that the existing I.L.O. Constitution had permitted the appointment of a representative "of socialized management when the U.S.S.R. was a Member of the Organization. . . . If the U.S.S.R. resumed membership of the Organization, and the Employers' representatives shared the general desire that it should do so, it would naturally appoint as Employers' delegate a representative of the socialized management of the U.S.S.R." The Conference Delegation on Constitutional Questions unanimously concluded that "appropriate provision for the representation of socialized management and of different sections of the labour movements of Member States can be made within the framework of the present system of representation . . ." Report II (1), pp. 91-94, quoted in International Labor Organization, Record of Proceedings of the 29th International Labor Conference, 1946, pp. 358-359.

But again the fact is that, in too much of the world, realities are not consonant with the structure of the I.L.O. or the ideals of the United Nations. If the Soviet Union and other non-democratic (including non-Communist) states are to be Members of the I.L.O. and the United Nations, if universality is to be put above purity, then it is plain that, up to a point, a "double standard" will have to be accepted; a standard in which many non-democratic states are prone to violate their international obligations more pervasively and importantly than democratic states characteristically do. The cure for this is not for democratic states to join in subverting international law and organization. Rather, it is for democratic states to fight the double standard by every lawful means; it is for democratic states to adhere to their international obligations and to strengthen the international organizations which are so important to the implementation of those obligations.

Universality is not of course the paramount goal. An international organization is meant to promote its purposes, not diffuse them. There is and will be a tension between universality and effectiveness which generalizations cannot resolve. There may come a point in a given international organization where violation by some members of their obligations will require others reciprocally to withhold performance of theirs.

What is clear in this case of assault by the United States Congress on the I.L.O. is that a sense of proportion, of intelligent and practical purpose, of legality, has been lamentably lacking. It is to be hoped that this gross display of international insensitivity and illegality will have been reversed by the time these comments appear in print; the longer it is prolonged, the greater will be the damage to the I.L.O., to international law and organization, and to the interests of the United States.

STEPHEN M. SCHWEBEL

#### RENEWED EMPHASIS UPON A SOCIALIST INTERNATIONAL LAW

The Soviet Society of International Law devoted a part of its 1970 annual meeting to discussion of the emergence of a new "Socialist international law" with special reference to its impact upon traditional concepts of sovereignty. While the record will not become available until publication of the 1970 *Soviet Yearbook of International Law*, its outlines are emerging in Soviet texts published in late 1970. The most striking of these is a revised second edition of Professor G. I. Tunkin's well-known volume, *International Law*, first published in Moscow in 1962, and subsequently translated into French, German, Hungarian and Polish.<sup>1</sup>

Tunkin comes to grips with the Czechoslovak events of 1968. While Tunkin is the first legal scholar of world-wide reputation to apply the principles of Socialist international law to analysis of these events from the

<sup>1</sup> G. I. Tunkin, *Voprosy Teorii Mezhdunarodnogo Prava* (Moscow, 1962); French trans. as *Droit International Public: Problèmes Théoriques*. Préface par Michel Virally (Paris, 1965). See book review, 57 A.J.I.L. 673 (1963).



Soviet side, his framework of analysis has been in the making for some time. Dr. V. M. Shurshalov, in a volume of essays published in English in 1969 under Tunkin's editorship,<sup>2</sup> reflects the discussion which has led up to Tunkin's new edition. Shurshalov declares that Socialist states in their relations with one another are "applying the principles and rules of international law and simultaneously filling the old form with a new socialist content."<sup>3</sup>

Shurshalov seems to be taking a position in international law which can be dated back to E. B. Pashukanis, who concluded in the 1920's that the newly emerging Soviet Union could and did utilize generally accepted norms both of municipal and international law in governing its citizens and conducting its relations with foreign states. In so doing it imbued them with a new Socialist content. Pashukanis was vigorously criticized, dismissed and eventually imprisoned in the 1930's, in part because of what was called a weakly based philosophical position on form and content. His critics claimed that he should have known that the two were inseparable with the consequence that when content was altered, form had also to change to create a new Socialist international law.<sup>4</sup>

Pashukanis wrote long before the U.S.S.R. became surrounded by fraternal Marxian Socialist states. Only the Mongolian People's Republic offered an arena in which to experiment with new law and new theory, but it was far away and attracted no attention from the international lawyers of the world. Pashukanis was handicapped by having to explain in support of his theory how a principle of law applied simultaneously by the U.S.S.R. and a capitalist state could become "Socialist" when only one of the parties was "Socialist." His problem was made the more acute because of the Marxist concept of law as an instrument of a ruling class, and many wondered how the same norm could be applied in the same situation by both a Socialist and a capitalist state.

When a number of Marxian Socialist neighbors were brought into existence after World War II, the theoretical problems fell away. A similar ruling class now existed in both partners to a legal relationship, and the norm could be seen to be taking on both a new content and a new form. Soviet authors were not quick to see their opportunity to develop new theory, but by 1950 the claim was being made that a new Socialist international law was in process of formulation.<sup>5</sup>

<sup>2</sup> C. I. Tunkin (ed.), *Contemporary International Law* (Moscow, 1969).

<sup>3</sup> *Ibid.* at 70.

<sup>4</sup> A summary of the literature on the subject was published in this JOURNAL as Hazard, "Cleansing Soviet International Law of Anti-Marxist Theories," 32 A.J.I.L. 244 (1938).

<sup>5</sup> The issue of "new law" was avoided in the 3-volume treatise by V. N. Durdenevskii and S. B. Krylov, published as the World War was finishing. See book review, 41 A.J.I.L. 481 (1947). The next study, written by F. I. Kozhevnikov, later to become a Judge of the International Court of Justice, also took no position on the subject. His colleague, Professor E. A. Korovin, took him to task for failing to take into consideration the new People's Democracies. See E. A. Korovin, book review, 43 A.J.I.L. 387 (1949). Kozhevnikov in a much rewritten second volume a year later concluded that

Tunkin emerged as one of the first of the postwar writers to break wholly with the past, and to insist that there existed a body of general international law which should be taught to the new Soviet generation and used in Soviet foreign relations. He argued that it was bereft of those principles which had been encrusted upon it during earlier centuries to support colonialism, and that it was emerging under Socialist pressures into something new, a law of "peaceful coexistence."<sup>6</sup> At the same time he saw growing up alongside this general international law yet another system, reflecting not a status of peaceful coexistence but the fraternal relationships of proletarian internationalism.<sup>7</sup>

In a rereading of his work of the past fifteen years, the impression emerges that the world lost sight of his second theme in contemplation of his first. He came to be known for his vigorous espousal at the Hague Academy of International Law and in the pages of law reviews both at home and abroad of a law of peaceful coexistence, but it was not his only interest. In 1959 he published a journal article on Socialist international law,<sup>8</sup> and it is this article that was evidently used to prepare his final pages in the text of 1962 and the revision of 1970. His emphasis is now placed on a Socialist international law which is more than emerging. It is here. He finds it wholly new, even though it borrows principles from general international law, but in his view the new principles correspond only in name with the old. In relationships between Marxian Socialist states a new law is applicable.

Even as recently as Shurshalov's article published in 1969, Tunkin's view had not been fully accepted, for Shurshalov refers in a footnote<sup>9</sup> to Tunkin's 1959 journal article and indicates that the thesis set forth in it differs from his own. For him, Marxian Socialist states apply general international law in their mutual relations. Their content, but presumably not their form, changes with the hand that applies them, but this is not what he understands Tunkin to be saying. Probably since the 1970 meeting of the Soviet Society of International Law Tunkin's view has prevailed to establish for Soviet scholars the view that a new Socialist international law has emerged which is new both in content and form.

Professor V. I. Lisovskii in a third edition of his standard text<sup>10</sup> gives further support to the presence today of a wholly new Socialist inter-

---

Soviet relations with the People's democracies were creating a new Socialist international law.

<sup>6</sup> This theme pervaded Tunkin's leading article in the first yearbook published by the Soviet Society of International Law as *Soviet Yearbook of International Law*, 1958 (Moscow, 1959).

<sup>7</sup> *Ibid.* at 36.

<sup>8</sup> Tunkin, *Novy tip mezhdunarodnykh otnoshenii i mezhdunarodoe pravo* [A New Type of International Law], [1959] *Sovetskoe Gosudarstvo i Pravo*, No. 1, at 81, 94. A Western scholar has interpreted Tunkin's position of 1959 as a contradiction of the opinions expressed a few months earlier in his Hague lectures. See K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* 18 (1970).

<sup>9</sup> Note 2 above, at 70.

<sup>10</sup> V. I. Lisovskii, *Mezhdunarodnoe Pravo* [International Law] (Moscow, 1970). For reviews of first and second editions, see 51 *A.J.I.L.* 135 (1957), and 57 *ibid.* 673 (1963).

national law governing relations between Marxian Socialist states. He has added a new chapter entitled "International principles and norms in effect in the world system of Socialism." In it he looks at the many treaties concluded by the U.S.S.R. and its Marxian Socialist neighbors and finds that Socialist states in their mutual relations "apply generally accepted norms of international law and also new norms which are being assembled in the process of conducting these relationships."<sup>11</sup> He finds that the U.S.S.R. in its relations with other Socialist states conforms to "Socialist international law principles," these being founded upon the concept of proletarian internationalism.

Lisovskii emphasizes as an example supporting his thesis the Council of Mutual Economic Assistance (COMECON). He cites General Secretary L. I. Brezhnev, speaking to the 23rd Communist Party Congress in 1966, to the effect that the national economies of the Socialist states must be integrated to provide for specialization and co-operation in production if they are to be successful in keeping pace with the tempestuous technological revolution of our times in competition with capitalism.<sup>12</sup> He refers to East European commercial treaties, to technical aid treaties, to the Warsaw Pact of 1955 calling for mutual respect for sovereignty and the equality of states and peaceful settlement of disputes, to treaties of friendship, mutual aid and collaboration, and from all of these he concludes that Socialist states could not limit themselves in their mutual relations to application of generally accepted principles of international law.<sup>13</sup> The Czechoslovak case is not mentioned.

Tunkin stands alone to date among the noted Soviet international lawyers in seeking to fit the Czechoslovak events of 1968 into the framework of a new Socialist international law. He expands his first edition's section on "International law in the relationships between countries of the worldwide system of Socialism." This method permits him to utilize a familiar framework to give the impression that the Czechoslovak events should not have come as the shock they did to those who directed the Czechoslovak Communist Party, and to Italian Communists, for they were nothing but a logical extension of a concept already well developed and previously applied in Hungary in 1956. Socialist international law is shown to include the principle that what are seen to be inroads by capitalist influences into a Marxian Socialist society may be prevented legally.<sup>14</sup>

This concept of fraternal aid in defense of Socialism is given a framework in international law by relating it to the concept of sovereignty. Tunkin notes<sup>15</sup> that both general and Socialist international law respect the concept of "sovereignty," but he concludes that respect is not one and the same in both systems. Socialist states will continue to insist upon respect for the principle as developed in general international law when speaking of the relationships between themselves and capitalist states, for

<sup>11</sup> *Ibid.* at 50.

<sup>12</sup> *Ibid.* at 51.

<sup>13</sup> *Ibid.* at 55.

<sup>14</sup> G. I. Tunkin, *Teoriia Mezhdunarodnogo Prava* [The Theory of International Law] at 493 (2nd revised ed., Moscow, 1970).

<sup>15</sup> *Ibid.* at 495.

it can be used to keep capitalist states from intervening in the internal affairs of Socialist states, but the concept of sovereignty has evolved within the conceptual framework of proletarian internationalism when the mutual relationships of Marxian Socialist states are the issue.

Like Lisovskii, Tunkin refers to COMECON, and notably to its creation of something more than "respect for sovereignty." That something more is explained as being a guarantee to each Socialist state that it will have the economic means of exercising that sovereignty. Tunkin concludes that the guarantee carries with it a companion obligation placed upon each Socialist state to aid any other whose Socialist character is threatened by capitalist states. Soviet military action in Czechoslovakia and Hungary must, therefore, be understood in this light.

Tunkin argues that the Western scholars who have thought the Czechoslovak events to be evidence of the creation of a concept of "limited sovereignty of Socialist states" have distorted the issues. To him the aid given assures the preservation of sovereignty and national independence.<sup>16</sup> Tunkin quotes the much cited speech of L. I. Brezhnev to the Fifth Congress of the Polish United Workers' Party in 1968, not as creating but as conforming to a position already firmly established in Socialist international law.

Western scholars familiar with works on Soviet Constitutional law may ask whether there is not emerging a convergence of principles of constitutional and international law. The issue is the definition to be given "sovereignty." If it is identical in both systems, there could be argument that there is no more reason to raise in international forums the question of the legality of action taken within the Marxian Socialist community of states than there is reason to raise a question concerning the relations between the Ukrainian and Russian Republics of the Soviet federation.

As early as 1964 B. L. Manelis faced the problem of the simultaneous existence of two sovereignties in Soviet Constitutional law: the sovereignty of the U.S.S.R. (the federation) and that of its member Republics.<sup>17</sup> He concluded that the sovereignty of the federation and of its members were in organic unity; that the federation is sovereign not because of any delegation of sovereignty to it by the member Republics but because at its inception in 1922 the attributes of sovereignty attached to the federation from the start.

The Republics lost no sovereignty by entering the federation but retained their full sovereign rights. This retention did not exclude the existence of the complete sovereignty of the federation. Manelis anticipates opponents of his position, for he says, "At first glance such a statement may appear to be paradoxical." He denies that it is, citing in support of his position Lenin's declaration that the Republics on entering the Union preserved their independence, and the provision in the U.S.S.R. Constitution authorizing Republics to secede.

<sup>16</sup> *Ibid.* at 498-499.

<sup>17</sup> The Russian text appears in [1964] *Sovetskoe Gosudarstvo i Pravo*, No. 7, at 17. An English trans. of pertinent paragraphs is in Hazard, Shapiro and Maggs, *The Soviet Legal System* at 34 (2nd ed., Dobbs Ferry, N. Y., 1969).

Manelis suggests to those who may differ with him that they are confusing "competency" and "sovereignty." His argument runs: Sovereignty is stable and inalienable; competency is a specific legal authority which may be transferred back and forth between the federal authority and the Republics as circumstances require in accomplishing various tasks; the federation has a "competency of competencies" under the principle of democratic centralism, but it does not have to exercise this legal power to retain its supreme authority; supremacy is assured by the Communist Party and by the state agencies which make certain that any tendency to disagree is made the subject in practice of conflict resolution through mutual consultation and agreement.

International lawyers in the developing world as well as in the developed West may find themselves confused by this argument. It is not necessarily Socialist, for it has been used by Westerners in support of a stronger United Nations. When it has been argued by critics of a stronger United Nations that power to the center necessarily reduces the sovereignty of Members, partisans of strengthening the United Nations have replied that a strengthened central authority in the United Nations would not infringe upon the sovereignty of Members but would enhance that very sovereignty. The Members who are poor would be enriched by economic collaboration and the weak would be made to feel secure as aggression is curbed. Soviet theorists will not accept the validity of the argument when applied to the United Nations, for they fear that a strong center could or would be used against the interests of the Marxian Socialist states, but they can accept it for their own system, which they conceive to be fully in accord with the needs of mankind. The end transforms the means, or put otherwise, the content transforms the form.

What emerges as novelty in the current Soviet writing on international law is that the arguments of Soviet federalism are being brought forward to support a strengthened community of states functioning within the framework of COMECON and the Warsaw Pact. In both the Soviet federation and what Nikita Khrushchev called the "Socialist Commonwealth" sovereignty is being redefined to emphasize the interests of the whole community as essential to preservation of the interests of its parts. This redefinition is putting the members of the commonwealth in a new legal relationship. Outsiders may now ask whether the result is not to create a new form of federation in law even though the term "federation" is not used.

Professor Tunkin has earlier written a book on the ideological struggle for the minds of men and its meaning for international law.<sup>18</sup> He seems to be keenly aware of the need for militancy in pressing the struggle. Readers will not be surprised, consequently, as they reach his last page in the 1970 volume, where he cautions readers against "falling into the bog of bourgeois normativism." He reminds them that they must not deny the

<sup>18</sup> G. I. Tunkin, *Ideologicheskaya Bor'ba i Mezhdunarodnoe Pravo* [The Ideological Struggle and International Law] (Moscow, 1967). See book review in 62 A.J.I.L. 208 (1968).

class character of the relationships existing between Socialist countries, and they must not slide down the road of impartiality (*"bezpartiinost"*). In short, principles of general and Socialist international law cannot be placed, in Tunkin's view, in parallel columns and compared as to their terminology alone. The purpose for which they are applied is determinative of their character, and those applied to foster the progress of Marxian Socialism are dissimilar from those applied to prevent its advance, even though the same words may be used in definitions.

The concept of determining the nature of law by the purpose to which it is put is by no means new to Soviet literature. The contemporary interest lies in the vigorous reassertion of the principle at this moment of history, together with the discussion of the nature of sovereignty as a specific example. The emphasis given to a new Socialist international law suggests a resurgence among Soviet scholars of a disquieting sense that inroads are being made by hostile ideas into a region which during the early 1960's had been thought secure.

JOHN N. HAZARD

## NOTES AND COMMENTS

### THE JURIDICAL EXPRESSION OF THE SACRED TRUST OF CIVILIZATION

#### I

On July 18, 1966, the International Court of Justice delivered its judgment in the second phase of the *South West Africa Cases (Ethiopia v. South Africa and Liberia v. South Africa)*.<sup>1</sup> The votes of the judges were equally divided, but by the President's casting vote the Court decided to reject the claims of the Empire of Ethiopia and the Republic of Liberia. It came to the conclusion that the Applicants could not be considered to have established any legal right or interest appertaining to them in the subject matter of the claims against the mandatory Power (South Africa) and that, accordingly, it had to decline to give effect to them. It is not intended in this brief inquiry to recall all the legal problems and arguments raised in the proceedings or to discuss the details of the judgment. Attention may, however, be drawn to one particular aspect of the cases, *i.e.*, the possibility of deriving from the principle of the sacred trust of civilization a legal right or interest in the conduct of the Mandate, with special reference to the Mandate for South West Africa. The Court drew a distinction between the "conduct" and the "special interest" provisions of the various instruments of the Mandate, and it asked the question whether a Mandatory (South Africa) had any direct obligation towards the other Members of the League of Nations individually (*e.g.*, Ethiopia and Liberia) as regards the carrying out of the "conduct" provisions of the Mandate for South West Africa. The judgment states as follows:

... [T]he Court must examine what is perhaps the most important contention of a general character that has been advanced . . . namely the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the "sacred trust" . . .<sup>2</sup>

The Court then proceeded to examine the meaning of this principle:

The sacred trust, it is said, is a "sacred trust of civilization". Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt;—but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal . . .

The Court had stated earlier that:

Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, how-

<sup>1</sup> *South West Africa Cases, Second Phase*, [1966] I.C.J. Rep. 6; 61 A.J.I.L. 116 (1967).

<sup>2</sup> *South West Africa Cases, loc. cit.* note 1 above, at 34.

ever, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an “interest” does not of itself entail that this interest is specifically juridical in character.

Thus (the Court proceeded) the sacred trust of civilization, in order to generate legal rights and obligations, must be given “juridical expression and be clothed in legal form.” It is in this connection that the Court made its most important pronouncement, for it said that “In the present case the principle of the sacred trust has as its *sole juridical expression*<sup>3</sup> the mandates system.” Thus the *locus standi* of the Applicants in the case must depend on the legal analysis of the various instruments of the Mandate. The Court also made it clear that “the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned operate *per se* to give rise to legal rights and obligations outside the system as a whole” and justify the existence of a justiciable legal interest in the violation of the Mandate by the Mandatory Power (South Africa).

In a case in which the votes of the judges are equally divided, the precarious balance of adjudication makes the opinions of the dissenting judges deserving of particular attention. Judge Forster, in his dissenting opinion, had this to say:

... [T]his same Court, which gave the three . . . Advisory Opinions in 1950,<sup>4</sup> 1955 and 1956 and which in 1962 delivered a judgment upholding its jurisdiction to adjudicate upon the merits of the dispute, this Court now declares the claim to be inadmissible and rejects it on the ground that Ethiopia and Liberia have no legal interest in the action.

This passes my understanding.<sup>5</sup>

A number of dissenting judges, including Judge Jessup (p. 324), Judge Koretsky (p. 245), and Judge Padilla Nervo (p. 453), made particular reference to the principle of the sacred trust of civilization. Judge Tanaka (p. 265) referred to the historical aspects of the principle and stated:

The idea that it belongs to the noble obligation of conquering powers to treat indigenous peoples of conquered territories and to promote their well-being has existed for many hundred years, at least since the era of Vitoria . . . .

Without tracing the antecedents of the mandate (and trusteeship) system to the period of the classic writers, which in itself would be a tempting proposition,<sup>6</sup> we may recall some of the fundamental details of the European-African confrontation in the nineteenth century, particularly the

<sup>3</sup> Emphasis supplied.

<sup>4</sup> Lord McNair in his separate opinion in the South West Africa Case of 1950 described mandates as valid *in rem* and thus permanent and capable of surviving the disappearance of the League of Nations. *International Status of South West Africa*, [1950] I.C.J. Rep. 128, at 156-157.

<sup>5</sup> *Ibid.* at 478.

<sup>6</sup> See, for instance, H. R. Wagner, *The Life and Writings of Bartolomé de las Casas* (1967); Wright, *Mandates Under the League of Nations* 2-23 (1930).



hundreds of *bilateral* treaties, by which European Powers assumed the protection of African countries or acquired their territory, and the general *multilateral* arrangement made by the Powers at the Berlin Conference of 1884-1885. As the American approach to African problems at this Conference differed to some extent from that of the European Powers, it would be particularly interesting to examine some of the details of United States participation in the Berlin proceedings. Such an examination may perhaps allow us to detect the existence of the principle of the sacred trust of civilization in 19th-century international law, and to discuss critically the restrictive view expressed by the International Court of Justice to the effect that the mandate system is the *sole juridical expression* of the principle.

## II

At the time of convening the Berlin Conference, the European-African confrontation had gradually gathered momentum, and a number of European Powers had already entered the African scene and established treaty relations with African Rulers and Chiefs. It has to be remembered that the African Continent then presented and now presents to the international lawyer a highly heterogeneous picture. The political organization of African states on the Mediterranean coast had to its credit a more ancient tradition than the remainder of African countries. Again, while the countries on the East African coast followed to some extent the pattern of Islamic states surrounding the Indian Ocean (particularly Zanzibar), the states and Chieftainships of West, Central and South Africa followed different patterns. But, however heterogeneous the political map of Africa might have been, African territory could not, any more than Asian territory, be treated as *terra nullius* by the European newcomer. Hence the need for negotiations with Rulers and Chiefs, which either led to the conclusion of treaties of protection or treaties of cession, or treaties of friendship and commerce. The purpose of the Berlin Conference was to sort out the ensuing conflicts and problems, particularly in the Congo Basin, and to establish a measure of uniformity in the policies of European Powers aiming at inter-European co-operation in Africa. It must also be emphasized that, though African Rulers were not represented at the Berlin Conference,<sup>7</sup> their rôle in the over-all African settlement was not entirely passive, for all European Powers pursued a consistent policy of reliance on treaties with Rulers and not on unilateral action by unilateral occupation of territory. The proceedings of the Berlin Conference showed clearly that the above treaties were considered as real treaties in the meaning of international law. Particularly as to treaties concluded between Germany and South West African Rulers, there is evidence in German legal literature that the treaties were classified as instruments of international law

<sup>7</sup> Zanzibar acceded later to the Berlin Act of 1885. Turkey, being the suzerain of a number of African dependencies, participated throughout in the Conference. See 29 H. R. Exec. Docs. (1884-1885), No. 247 (48th Cong., 2nd Sess.), p. 179 (hereinafter cited as H. R. Exec. Doc.).

transferring sovereignty over South West African territory from the Rulers to the German Empire.<sup>8</sup>

A discussion of the various types of African treaties has been attempted elsewhere<sup>9</sup> and does not call for repetition. Suffice it to say that among these treaties the treaty of protection was one of the leading instruments for introducing the African communities into the orbit of the law of nations. European Powers undertook in each case to secure to the African communities the benefits of European civilization without impairing their national and cultural identity. The principle of the sacred trust of civilization was implied in them; and when, at a later date, the nature of these treaties was discussed at the Berlin Conference, the existence of such a trust for the protection of the African communities was expressly acknowledged. It is with these considerations in mind that some of the relevant proceedings of the Conference and United States participation in them may be recalled.

### III

On October 11, 1884, the German Government, through its Minister in Washington, made propositions to the United States Government for the latter's participation in the future Berlin Conference, which had three main objectives: (1) liberty of trade in the Basin and in the Delta of the Congo; (2) application to the Congo and the Niger of the principles adopted by the Congress of Vienna of 1815 relating to freedom of navigation upon international rivers; and (3) definition of the formalities to be observed in order that any new occupation of territory upon the African coasts should be deemed to be effective. It is the third point which deserves attention. This principle extended to the African coasts in general and not merely to the Basin of the Congo. The term occupation, as the proceedings show, was not used in the meaning of unilateral occupation but as occupation in consequence of the acquisition from Rulers of titles to territory.<sup>10</sup>

Following the German invitation, Mr. John Adam Kasson, United States Minister in Berlin,<sup>11</sup> reported to the Secretary of State, Frederick T. Frelinghuysen, that the third German proposition relating to the acquisition of African territory was "restrictive and conservative of the rights of the native tribes [Rulers] against foreign encroachments." Mr. Kasson was subsequently appointed United States Delegate to the Berlin Conference.<sup>12</sup>

<sup>8</sup> See particularly the writings of Dr. Herman Hesse: *Schutzverträge* (1905), relating to South West African treaties of protection; and *Rechtsgültigkeit der Konzessionen* (1906), relating to the legal validity of concessions.

<sup>9</sup> Alexardowicz, "The Afro-Asian World and the Law of Nations," 123 *Hague Academy, Recueil des Cours* 117-124 (1968, I).

<sup>10</sup> H. R. Exec. Doc., *op. cit.* note 7 above, at 1-179.

<sup>11</sup> John Adam Kasson (1822-1910) had become, on President Lincoln's election, Assistant Postmaster General, in which position he was instrumental in convening the World Postal Congress in Paris in 1863. He was elected to Congress in 1862 but later entered the diplomatic profession. In 1877 he was appointed U. S. Minister to Vienna, and in 1884 to Berlin. See 10 *Dictionary of American Biography* 260-261 (1933).

<sup>12</sup> The reason for U. S. participation in the Berlin Conference was, apart from its interest in freedom of trade in Africa, its intimate connection with the Republic of

and he was to act with the assistance of two associate Delegates, Col. Henry S. Sanford, and Henry M. Stanley, the famous African explorer. In his address to the Conference on November 19, 1884, Mr. Kasson referred to Mr. Stanley as "[a]n American citizen, who was qualified by courage, perseverance, and intelligence [*sic*], and by a remarkable intrepidity and aptitude in exploration." He then added that

[i]t was the earnest desire of the United States that these [African] discoveries should be utilized for the *civilization* of the native races and for the abolition of the slave trade.<sup>13</sup>

And further: "An International Association of Americans and Europeans was formed under high and philanthropic European patronage [the King of the Belgians] to give reality to such a purpose. They obtained concessions and jurisdiction throughout the Basin of the Congo from the native *sovereignities* which were the sole authorities existing there and exercising dominion over the soil or the people . . . ." At the meetings of the Conference on December 15, 1884, and January 5, 1885, the question of acquisition of territory from African Rulers or Chiefs was further pursued, and it was stated that "the older assumption of rights by original discovery, apart from actual settlements is practically abandoned."<sup>14</sup> Neither was occupation by original title a feasible proposition, as the concept of *terra nullius* was not applicable to a politically organized continent.

The establishment of the principle of the sacred trust of civilization is strictly connected with the transfer by the African communities of their territory, their sovereignty, and their destiny to the European Powers, which, through the relevant transactions, assumed the rôle of guardians of these communities. Senate Report No. 393 (48th Congress, 1st Session),<sup>15</sup> referring to the work of the African International Association, stated as follows:

. . . [I]ts agents have made nearly one hundred treaties with the chiefs of the different tribes in the Congo country. In each of these treaties there are valuable commercial agreements and regulations touching law and order, and certain delegations of limited powers, all of which are intended for the better government of the country.

The powers are not ceded to a new and usurping sovereignty seeking to destroy existing Governments, but are delegated to a common agent for common welfare [trust]. In the language of the first treaty, concluded at Vivi June 13, 1880, and which is the plan after which nearly one hundred subsequent treaties have been modelled—"the aforesaid chiefs of the district of Vivi recognize that it is highly desirable that the *comité d'études* of the Congo [the predecessor of

---

Liberia, established thanks to the initiative of American colonization societies which settled free American Negroes on the West Coast of Africa. This colony of settlers under U. S. protection achieved independent statehood in 1847. See Mr. Kasson's reference to Liberia, in Exec. Doc., *op. cit.* note 7 above, at 14-18. In 1862 the United States concluded a treaty with Liberia. See 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909*, p. 1050 (1910).

<sup>13</sup> H. R. Exec. Doc., *op. cit.* note 7 above, at 7. Emphasis supplied.

<sup>14</sup> *Ibid.* at 10.

<sup>15</sup> *Ibid.* at 167.

the Association] should create and develop in their states establishments calculated to foster commerce and trade, and to assure to the country and its inhabitants the advantages [of civilization] which are the consequence thereof.

"With this object in view they cede and abandon, in full property . . . to the *comité d'études*, the territory comprised within the following limits . . ."<sup>16</sup>

The report further refers to the numerous treaties concluded by Great Britain<sup>17</sup> and France with African Rulers, and it concludes that "it can scarcely be denied that the native chiefs have the right to make [these] treaties."<sup>18</sup> The massive transfer of territorial sovereignty to the European Powers created, in the words of the French delegate to the Berlin Conference, "the necessity to manage as much as possible the acquired rights and the legitimate interests of the indigenous chiefs."<sup>19</sup> In this connection Mr. Kasson asked "if it would be agreed to affirm explicitly the intentions of the Conference to respect, in a general manner, the rights of the indigenous Chiefs . . . limited by these acts."

A review of documents in the principal collections of African treaties (among which E. Hertslet's collection is the most systematic) would reveal that the transfer of sovereign rights or titles by the African Rulers to the protecting European Powers was either expressly<sup>20</sup> or implicitly connected with the duty of civilization, *i.e.*, the task of the transferee to assist African communities in achieving a higher level of civilization before they re-entered the family of nations as equal sovereign entities. It may be recalled that prior to the Berlin Conference a Committee of the British House of Commons had in 1865 made a statement to the effect that

all further extension of territory or assumption of government, of new treaties offering any protection to native tribes, would be inexpedient; and that the object of our policy should be to encourage in the natives the exercise of those qualities which may render it possible for us more and more to transfer to them the administration of all the governments with a view to our ultimate withdrawal . . .<sup>21</sup>

<sup>16</sup> In 1884 the International Association of the Congo issued a declaration relating to the acquisition of territories from "the legitimate sovereigns in the Basin of the Congo." The U. S. Secretary of State recognized the flag of the Association in the same year. 1 Malloy, *op. cit.* note 12 above, at 327; 3 A.J.I.L. Supp. 5 (1909).

<sup>17</sup> The British Ambassador at the Berlin Conference, Sir Edward Mallet, declared at its session on Nov. 15, 1884, that "the welfare of the natives is not to be neglected." It must be remembered that they "are not represented at this Conference and that, nevertheless, the decisions of this body will be of the gravest importance to them." H. R. Exec. Doc., *op. cit.* note 7 above, at 34.

<sup>18</sup> *Ibid.* at 169.

<sup>19</sup> *Ibid.* at 157.

<sup>20</sup> 1 Hertslet, *The Map of Africa by Treaty* 49, 103, 345 (3d ed., 1909). See, for instance, the Treaty of 1877 between Great Britain and King Samoo Bullom for the promotion of "commerce and civilization" and the Treaty of 1885 between Great Britain and the King of Malin which was "to promote to his subjects the advantages of civilization." The Charter of the Imperial British East Africa Company of 1888 stated trade and good government and the advancement of civilization to be among the objectives of the Company. The General Act of the Conference of Berlin relates to trade and civilization. 2 Hertslet at 468.

<sup>21</sup> 3 Hertslet, cited above, at 780.

A report submitted by a commission of the Berlin Conference, charged to examine the project of the Declaration concerning liberty of commerce in the Basin of the Congo and its affluents refers in Article VI<sup>22</sup> to the indigenous populations

who, in the present state of affairs, are scarcely qualified to defend their own interests" and states that "the Conference has thought proper to assume the role of *official guardian* . . . [T]he duty to aid them to attain higher political and social status, the obligation to instruct and initiate them into the advantages of civilization are unanimously recognized . . . . No dissent manifested itself, nor could manifest itself, in this respect in the Commission.<sup>23</sup>

This multilateral statement on guardianship, made within the framework of the transactions of the Conference, must be considered as declaratory of the consensus of opinion of all civilized states. The Commission added these weighty words at the end of the statement: "It is the future of Africa which is here at issue."

The question may be asked whether it is possible, in view of the hundreds of *bilateral* treaties by which the African communities sought the protection of European Powers and in view of the *multilateral* statement of Powers united in a world conference, to assume that the principle of the sacred trust of civilization which found its expression in these nineteenth-century legal instruments nevertheless existed in a legal vacuum. Should the answer to this question be in the negative, it would not be possible to persist in the conviction that the mandates system is the sole *juridical expression* of the above principle. Its pre-mandatory legal reality is worthy of the attention of international lawyers.

#### IV

The General Act of the Berlin Conference contained two important principles in Articles 34 and 35. Article 34 laid down the principle of notification to the contracting Powers of any future taking of possession of any territory on the coasts of Africa. Article 35 embodied the principle of effective occupation of territory. While the principle of notification was extended to protectorates, the principle of effective occupation was not to be applied to them.<sup>24</sup> The protectorate as such was not defined in the two articles, and thus *prima facie* it must be assumed that reference had been made to the classic protectorate, which excludes the occupation of dependent territory and which implies no more than the transfer of the exercise of external sovereignty from the protected entity to the protector.<sup>25</sup> But in practice the African protectorate started degenerating into an instrument of annexation of territory, irrespective of the legitimate rights of the contracting Rulers or Chiefs.<sup>26</sup> It was for this reason, *inter alia*, that the United

<sup>22</sup> H. R. Exec. Doc., *op. cit.* note 7 above, at 83.

<sup>23</sup> Emphasis supplied.

<sup>24</sup> 2 Hertslet, *op. cit.* note 20, at 484-485; see also 3 A.J.I.L. Supp. 24 (1909).

<sup>25</sup> As to the views of certain writers to the contrary, see Hague Academy, *Recueil des Cours*, *op. cit.* note 9 above, at 194. <sup>26</sup> *Ibid.* at 193.

States did not ultimately ratify the final Act of the Berlin Conference. In this connection Mr. Kasson committed two observations to the protocol of the Final Act:

1. *Modern international law* steadily follows the road which leads to the recognition of the right of native races to dispose freely of themselves and of their hereditary soil. Conformably to this principle, my Government would willingly support a more extended rule—one which should apply to the said occupations in Africa—a principle looking at the voluntary consent of the natives, of whose country possession is taken in all cases where they may not have provoked the act of aggression.

2. I do not doubt the Conference is agreed upon the significance of the preamble. It only indicates the *minimum* of essential conditions to be fulfilled to justify a demand for the recognition of an occupation. It is always possible that an occupation may be made "effective" by acts of violence, which are outside of the principles of justice, of national and even of international right. Consequently, it ought to be well understood that it is reserved to the signatory powers respectively to appreciate all other conditions—of right as well as of fact—which must be complied with before an occupation can be recognized as valid.<sup>27</sup>

It is suggested that, among the other conditions, the capacity and readiness of the European Powers to fulfill their rôle as international trustees of civilization for the protection of African communities were essential. The proceedings of the Berlin Conference bear ample witness to a general awareness of the connection between transfer of sovereignty, whether through treaties of protection, treaties of cession or through conquest,<sup>28</sup> and the establishment of a trust of civilization in favor of the communities which became the concern of the Powers, assuming the rôle of collective guardianship, with the ultimate aim of reversion to sovereignty—a political and legal state of affairs which has been almost universally realized in the last ten or twenty years.

Among the non-European Powers which ratified the Berlin Act was the Ottoman Empire, which reserved at the Conference its rights in its African dependencies. The Sultan of Zanzibar acceded to the Berlin Act in 1886. The General Act of the Brussels Conference of 1890 counted among its non-European signatories Persia, Turkey and Zanzibar. Ethiopia and Liberia acceded to the Act in 1890 and 1892 respectively.<sup>29</sup> Though the Brussels Act was primarily concerned with the slave trade, it was in essence a continuation of the proceedings of the Berlin Conference which had been declaratory of the principle of the sacred trust of civilization.<sup>30</sup> Ethiopia and Liberia appear here as contracting parties and active participants in its development as a legal principle at the pre-mandatory stage—a circumstance which would justify or at least support their *locus standi* in the

<sup>27</sup> H. E. Exec. Doc., *op. cit.* note 7 above, at 177. Emphasis supplied.

<sup>28</sup> E.g., Southern Rhodesia under King Lobengula, or Madagascar. Hague Academy, *Recueil des Cours*, *op. cit.* note 9 above, at 195.

<sup>29</sup> 2 Hertslet, *op. cit.* note 20 above, at 488. See also 3 A.J.I.L. Supp. 29 (1909).

<sup>30</sup> M. F. Lindley, *The Acquisition and Government of Backward Territories in International Law* 333 (1926).

*South West Africa Cases.* The abrogation of the Berlin and Brussels Acts between the Powers which ratified the Convention of St. Germain-en-Laye of 1919 did not mean any change in the legal rights and duties of these Powers. Their commitments towards the African communities as trustees of civilization were in substance re-enacted by Article 11 of the Convention of 1919. In fact the latter extended the provisions of Article VI of the Berlin Act, which had been conceived in a spirit of international *guardianship*, to all the African territories belonging to the Powers concerned. Article 11 stated that "the Signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well-being" with the ultimate aim of self-government.<sup>31</sup>

The formulation of the mandate system within the framework of the League of Nations reflects the efforts of President Wilson to give full and unexceptional expression to the principle of trust. Paradoxically enough, General Smuts, who had inspired the adoption of the idea of a sacred trust of civilization within the mandate system, fought at the Peace Conference in 1919 for the annexation of South West Africa by the Union of South Africa.<sup>32</sup> President Wilson's reaction was that "he could not return to America with the world parcelled out by the great powers." He said that "the fundamental idea would be that the world was acting as trustee through a mandatory."<sup>33</sup>

The League of Nations mandatory system applied only to certain African, Pacific, and Asian territories which were taken over from Germany and the Ottoman Empire after World War I. But the principle of trust of civilization was not confined to these territories within the mandate system. It

<sup>31</sup> Lindley, *ibid.* at 334.

<sup>32</sup> The British Labor Party supported President Wilson's policy. See W. R. Louis, "The South-West African Origins of the Sacred Trust 1914-19," 66 *African Affairs* 20-39 (1967).

<sup>33</sup> See Louis, cited above, at 35, and *South West Africa Cases*, 4 I.C.J. Pleadings, Oral Arguments, Documents 235 (1966). The Applicants in the *South West Africa* case introduced "the organized international community" theory in the proceedings. This meant that the enforcement of the sacred trust became the responsibility of the organized international community, a concept distinct from that of the League of Nations. 5 I.C.J. Pleadings, etc. 36-37 (1966). While it is true to say that the international community, *i.e.*, the family of nations, is different from the League of Nations, it is not the former but the Conferences of Berlin (1885) and of Brussels (1890) which, prior to the mandate system, gave legal expression to the sacred trust of civilization. Through the Acts of these Conferences the contracting parties assumed the rôle of guardians of African communities from which they had acquired territory on the basis of bilateral treaties. Ethiopia and Liberia became contracting parties to the Brussels Act and thus acquired a legal interest in the conduct of the guardianship, of which the mandate system was a further legal expression. Ethiopia and Liberia did not refer in their pleadings to the official guardianship proclaimed at the Berlin Conference or to the consequences of their accession to the Brussels Act. But this did not justify the categorical statement of the Court that the mandate system is the sole juridical expression of the sacred trust of civilization and that the latter has no "residual juridical content."

applied also to other colonial territories which, prior to World War I or later, had come under the sway of the Powers.

Under Article 23(b) of the League of Nations Covenant, the Members of the League "... (b) undertake to secure just treatment of the native inhabitants of territories under their control; ...". Thus the British Government declared expressly in 1923 that in the administration of Kenya the interests of the African population must be paramount, as the latter are the beneficiaries of the sacred trust of civilization exercised on their behalf.<sup>84</sup> The same argument applies to all territories in Africa, the Pacific, or Asia in which a trust relationship had been established long before the days of the League of Nations. As witnessed at the Berlin Conference of 1885, this trust relationship must be deemed to be of a juridical character with all corresponding rights and duties attaching to the participating Powers. Moreover, Liberia and Ethiopia had, prior to the mandate system, joined as contracting parties to the Brussels Act of 1890 which, even if not directly relevant to the case, cannot be dismissed as a vital link in the chain of legal development.<sup>85</sup>

The Institute of International Law at its Cambridge meeting in 1931 made the remarkable statement that "[t]he communities under mandate are subjects of international law. They have a patrimony distinct from that of the mandatory State; they possess a national status, and they may acquire rights or be held to their obligations."<sup>86</sup> The collapse of the sovereignty of the colonial Powers over these communities marked the end of the era of trust relationships, which had existed legally since the nineteenth century, and the independence of most of the African countries. As such, they were able in a reorganized form to re-enter the family of nations and regain the territories ceded to the Powers in the past.

The General Assembly has now terminated the Mandate for South West Africa. Though such termination is not a right provided for in Article 22 of the Covenant of the League of Nations or the relevant Mandate Agreement, it may be considered as implied in the sacred trust of civilization.<sup>87</sup>

<sup>84</sup> Lindley, *op. cit.* note 30 above, at 335.

<sup>85</sup> S. F. Bemis, *Diplomatic History of the United States* 576 (4th ed., 1955), states that the principle of trust, as envisaged by the Berlin Conference of 1885, carries the "germ of the idea of international mandate." Art. 6 of the Berlin Act states that "All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being . . . ." The Brussels Act of 1890 refers to "assuring to that vast continent the benefits of peace and civilisation . . . ." The author of a League of Nations publication on the mandate system, which was referred to in the proceedings before the I.C.J., states that while the Brussels Act created legal obligations as to the slave trade and other matters, there are no legal obligations in the Berlin Act, a view not reconcilable with the term "bind" in the Berlin Act. See 4 I.C.J. Pleadings, etc., *op. cit.* note 33, at 233, citing League of Nations, *The Mandates System; Origins—Principles—Application* 9, 10 (League of Nations Pub. 1945, V.I.A. 1.).

<sup>86</sup> See 26 A.J.I.L. 91, note 6 (1932), and J. G. Starke, *Introduction to International Law* 164 (1967).

<sup>87</sup> John Dugard, "The Revocation of the Mandate for South West Africa," 62 A.J.I.L. 78-97 (1968).



Whatever the legal character of this important step taken by the United Nations, it creates a situation which is awkward from the political as well as legal point of view. When the General Assembly at its 21st Session in 1966 considered the draft resolution introduced by 54 African and Asian states condemning the administration of the mandated territory of South West Africa by the Republic of South Africa and proposing its termination and take-over by the United Nations, most Members expressed disappointment in the ruling of the International Court of Justice of 1966.<sup>38</sup>

The purpose of the above observations has not been to deal with this disappointment from the political point of view. It has rather been to point to the fact that the majority judges failed to explore the historical background of the sacred trust of civilization, which might have tipped the precarious balance of the votes in a different direction. Even if it is admitted that the jurisdiction of the Court was confined to the consideration of the case from the point of view of the mandate system only, the statement of the Court relating to "the sole juridical expression of the sacred trust of civilization" is highly doubtful if not untenable in international law.<sup>39</sup>

CHARLES H. ALEXANDROWICZ \*

#### TAX TREATIES BETWEEN THE UNITED STATES AND DEVELOPING COUNTRIES: THE NEED FOR A NEW U. S. INITIATIVE

The effort of the United States to conclude a series of bilateral tax treaties with developing countries has reached a virtual stalemate. Of the twenty-two conventions for the avoidance of double taxation of income currently in force between the United States and other nations, only two treaties, with Pakistan and Trinidad and Tobago, exist with members of the so-called "Third World." The remaining conventions are with economically more advanced countries, primarily European.<sup>1</sup>

<sup>38</sup> See, *e.g.*, the remarks of the representatives of Ghana, Iraq, Ceylon, and the United Arab Republic, General Assembly, 21st Sess., 1419th Meeting, U.N. Doc. A/PV. 1419 (1966).

See also General Assembly Resolutions 2498 (XXIV), Oct. 31, 1969, 2517 and 2518 (XXIV), Dec. 1, 1969, General Assembly, 24th Sess., Official Records, Supp. No. 30, at 65 and 68, U.N. Doc. A/7630 (1970), in which the General Assembly, relying on earlier Security Council resolutions, condemned the Government of South Africa for its refusal to withdraw its administration from Namibia (South West Africa).

<sup>39</sup> See R. Higgins, "The International Court and South West Africa: The Implications of the Judgment," 42 *International Affairs* 573 (1963).

\* Visiting Professorial Fellow, École Pratique des Hautes Études, Sorbonne.

<sup>1</sup> Income tax treaties have been concluded between the United States and Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Sweden, Switzerland, Trinidad and Tobago, and the United Kingdom. In addition, the following newly independent nations have assumed the terms of tax treaties already existing between their former colonial rulers and the United States: Barbados, Burundi, Congo (Kinshasa), Gambia, Jamaica, Malawi, Nigeria, Rwanda, Sierra Leone and Zambia. United States Department of State, *Treaties in Force* (1970). The United States

The dearth of agreements in this field between the United States and the developing countries stands in contrast to the success of other industrialized nations in concluding tax treaties with less developed nations. Sweden, for example, has entered into income tax treaties with thirteen developing nations in various parts of the world.<sup>2</sup> Japan has concluded eight such agreements with developing nations, primarily Asian.<sup>3</sup>

The United States has attempted to extend its network of tax treaties to developing countries, but its efforts have been repeatedly frustrated by the attitude of the Senate. In negotiating agreements with such countries the U. S. Treasury Department has recognized that special provisions not found in treaties with developed countries are appropriate to tax treaties with developing nations. This recognition has led to the inclusion within several treaties negotiated by the Treasury of provisions for tax-sparing credits. Such credits would permit a United States investor to subtract from his tax owed to the United States Government with respect to income earned abroad not only taxes paid to the country in which such income was earned, but also taxes which such foreign country gave up through tax concessions. Provisions for tax-sparing credits were included in agreements signed with Pakistan, India, Israel and the United Arab Republic. The Pakistan treaty was ratified and took effect, but without the tax-sparing credit which the United States Senate refused to approve. The other three treaties failed to receive Senate approval and were withdrawn by the President in 1964.<sup>4</sup> Subsequent to the withdrawal of these treaties the United States Government concluded agreements with Brazil and Thailand, and a second agreement with Israel, providing for extension of the domestic investment credit to investments by U. S. taxpayers in these developing countries. The Brazil treaty was approved by the United States Senate, but consent to the investment credit provision of the treaty was withheld. Neither the convention signed with Brazil nor the two agreements signed in 1965 with Thailand and Israel have yet entered into effect.

In the midst of this impasse, the United Nations has taken the initiative in organizing meetings of experts to analyze the special issues presented by tax treaties between developed and developing countries. The first such conference was held in Geneva in December, 1968, and the report of the

---

concluded a tax treaty with Honduras in 1957. The treaty was terminated by Honduras as of December 31, 1966. Instruments of ratification of the treaty with Trinidad and Tobago were exchanged at Port of Spain on Dec. 30, 1970. It is very doubtful that this agreement will serve as a model for future U. S. treaties with developing countries. The agreement omits any measure designed to promote investments of U. S. capital, such as a tax-sparing credit or investment credit. The Trinidad and Tobago Government argued strongly for such a provision, but agreed to forgo its demands for the time being, pending further negotiations after ratification of the basic treaty.

<sup>2</sup> Sweden has treaties with Argentina, Brazil, Ceylon, India, Israel, Liberia, Morocco, Pakistan, Peru, Singapore, Thailand, Tunisia and the United Arab Republic. Martin Norr, Claes Sandels and Nils G. Hornhammar, *The Tax System in Sweden* 54 (1969).

<sup>3</sup> Japan has treaties with Pakistan, India, Singapore, Thailand, Malaysia, Brazil, Ceylon and the United Arab Republic. Tax Bureau, Japanese Ministry of Finance, *An Outline of Japanese Taxes* 203-204 (1969).

<sup>4</sup> 110 Cong. Rec. 16091 (1964).

conference proceedings was published late in 1969.<sup>5</sup> The *ad hoc* group of experts was created by the Secretary General of the United Nations under a resolution adopted on August 4, 1967, by the U.N. Economic and Social Council. The group was composed of twenty-three members from eight developed and ten developing nations. Although the members attended in their personal capacities, they were nominated by their respective governments and many were high-level officials. Most of the leading industrial nations named members to the *ad hoc* group. The United States sent Stanley S. Surrey, then Assistant Secretary of the Treasury for Tax Policy, and Nathan Gordon, the Treasury's Director for International Tax Affairs.

The resolution of the Economic and Social Council directing the creation of such a panel of experts gave the group

the task of exploring, in consultation with interested international agencies, ways and means for facilitating the conclusion of tax treaties between developed and developing countries, including the formulation, as appropriate, of possible guidelines and techniques for use in such tax treaties . . . .<sup>6</sup>

To the extent that the group's purpose was to reach agreement on model provisions for inclusion in tax treaties between developed and developing nations, the panel was not notably successful. The experts were able to agree on a few provisions appropriate for such treaties. In general, however, the report reflects a failure to achieve consensus on most of the important issues raised during the discussions. The disagreements recorded in the report are not only between members from developed and developing countries. There are also frequent differences of opinion among members from the developed nations and among members from developing countries.

Of the topics dealt with by the group, probably the most relevant to the formulation of current United States policy is the question of incentives for investment in developing countries. The experts from developing countries pointed out that concessions made by such countries to attract investments through tax holidays and similar measures are frustrated unless the capital-exporting countries either exempt from tax income from such investments or grant a credit to their taxpayers for taxes given up by the developing countries. If the investor's home country grants a credit only for taxes actually paid, as under current United States law, the reduction of income tax burdens by developing countries may serve merely to increase the revenue accruing to the investor's home country. The investor receives no benefit from the concessions, unless he is willing to retain the profits in a foreign corporation and thereby defer taxation by his own country.

Despite strenuous arguments often made to the effect that tax incentives are an inefficient and excessively expensive means of attracting foreign investment, the report reveals that such concessions are still considered indis-

<sup>5</sup> United Nations Department of Economic and Social Affairs, *Tax Treaties between Developed and Developing Countries*, U.N. Doc. E/4614/ST/ECA/110 (1969).

<sup>6</sup> Economic and Social Council Res. 1273 (XLIII), Economic and Social Council, 43d Sess., Official Records, Supp. No. 1 (E/4429), p. 5.

pensable by a number of developing countries. The members from the developing countries appeared unanimous in urging capital-exporting nations to frame their legislation so as to preserve the incentive effects of tax concessions granted by developing countries. Their position was supported by a number of experts from developed nations who agreed that measures such as the tax-sparing credit and the exemption of direct investment income from developing countries are essential to place foreign investors in such countries in a competitive position with other investors who can take full advantage of tax concessions. In opposition to this point of view, one member from a developed country insisted that equal treatment should be viewed from the perspective of the investor's home country, and that exemption or tax sparing could result in a considerably lighter tax burden for some of the country's investors than for others. He also pointed out that a capital-exporting country might encourage investments in developing nations through devices other than tax sparing or exemption of investment income. No general consensus could be reached on the issue of tax incentives, although the report indicates that most of the members favored the adoption by the capital-exporting nations of tax measures to encourage investment in developing countries.

Much of the attention of the group was devoted to a consideration of rules allocating taxing authority between an investor's home country and the foreign jurisdiction within which his income-producing activities are carried on. The panel adopted as the basis for discussion a Draft Model Convention prepared by the Organization for Economic Co-operation and Development.<sup>7</sup> Several members contended that the OECD draft, having been drawn up by experts from developed countries, could not even serve as a basis for discussing solutions to the particular problems involved in tax treaties between countries of greatly different levels of economic development. They contended that the primary right of the country in which income has its source to tax such income must be recognized in treaties between developed and developing countries and that the OECD draft fails to adhere to this principle. Despite this objection, a majority of the experts supported the proposal to base discussions on the OECD Model Convention, but there was general agreement that modifications in the draft are necessary for treaties between developed and developing nations.

The panel's discussions indicate a wide variety of views as to allocation rules appropriate to the treatment of particular forms of income. With regard to shipping profits, for example, several members from developed countries strongly urged retention of the OECD provision assigning exclusive taxing rights to the country in which the management of the shipping company is located. One expert from a developing country expressed himself in favor of this view, while several others asserted the importance to their countries of the revenue available from foreign shipping lines. One expert proposed that developed and developing countries agree to share taxation of shipping profits on a fifty-fifty basis. There was also a

<sup>7</sup> Organization for Economic Co-operation and Development, Draft Double Taxation Convention on Income and Capital (1963), OECD Doc. C (63) 87 (1967).

variety of views expressed as to how profits attributable to operations of an international shipping company within any one country could be calculated. No general conclusions were reached.

Despite the multiplicity of views expressed, general agreement was reached on several points. A draft provision on taxing income from professional services and similar independent activities, submitted by a member from Israel and modified by a participant from India, was approved by the group in lieu of the corresponding provision of the OECD Model Convention. A limited number of provisions of the OECD draft were accepted by the group without controversy. On several points the experts agreed to general principles without elaborating precise guidelines. With regard to the taxation of interest, for instance, general consent was given to the principle that neither the source country nor the investor's home country should have an exclusive right to tax such income, but no agreement was reached on a formula for sharing the tax base. Perhaps as useful as the agreements reached was the elaboration of a range of possible solutions to problems considered by the panel. With respect to taxation of income arising from building, construction or assembly projects, for example, guidelines were proposed for determining under what circumstances the country in which such projects are carried out can tax the profits resulting to non-residents.

The great diversity of views on the allocation of taxing power is explicable in part by the particular trade and investment relations maintained by the various nations which sent participants to the *ad hoc* group. A developing country with no facilities for international shipping could not be expected to be as concerned about the right of countries with such facilities to tax shipping profits as about other provisions of tax treaties more relevant to its economic situation. A developed nation with substantial trade relations with developing nations but few direct investments might feel no hesitation in offering tax concessions for direct investment income received by its residents, as such concessions would mean little in terms of revenue. The multiplicity of viewpoints expressed by the experts is therefore not to be taken as evidence that the conclusion of treaties between developed and developing countries faces insuperable obstacles. It is only reasonable that such treaties should be tailored to the particular pattern of economic relationships existing between the two contracting parties. The provisions of each treaty may be expected to reflect a balance of concessions by each side, determined by the particular transactions, whether they be trade, shipping, sharing of technology or direct investment, which dominate economic relations between the two countries. For the purpose of facilitating negotiation of such treaties, conferences such as that organized by the United Nations can play an important rôle in clarifying the relevant issues and in presenting possible solutions to problems. Consideration should also be given to the suggestion of an Israeli member of the *ad hoc* group that an international panel of tax experts be established from whom countries could seek technical advice on the negotiation of tax treaties.

The importance of a flexible approach to negotiating provisions of tax treaties between developed and developing countries is suggested by a survey of existing tax treaties prepared by the United Nations Secretariat and submitted to the *ad hoc* panel of experts.<sup>8</sup> The report analyzes the extent to which existing treaties either conform to or deviate from the rules contained in the OECD Model Convention. The study focuses not only on agreements between developed and developing nations, but also on the provisions of treaties concluded between developed nations. The survey reveals that there is considerable diversity in the provisions found in both types of treaties and that departures from the Model Convention are common for both. Some provisions, such as those relating to consultation procedures and exchanges of information between contracting states, have been adopted in nearly all recent treaties between developed and developing countries. The study comments that provisions for exchange of fiscal information may represent the most important advantage of a tax treaty for a developing country, as such provisions put at the disposal of the revenue authority of the developing nation data gathered by the relatively more extensive information-collecting facilities of the developed nation. A developing nation may obtain information concerning income and expenses of enterprises operating within its jurisdiction but controlled from the developed country. It may also obtain information relating to its own residents' financial activities in the developed country. The advantages gained from such information-sharing will compensate to some extent, concludes the report, for the revenue sacrificed by developing countries as a result of limitations imposed by other provisions of tax treaties on their right to tax income received by non-residents.

Despite considerable uniformity of provisions on consultation procedures, information exchange and a few other topics, in general the agreements concluded between developed and developing nations show significant variations from one another and from the OECD draft. The departures from the OECD provisions are often in the direction of increasing the jurisdiction of the source country to tax income earned by non-residents. With regard to interest income paid to non-residents, for instance, Article 11 of the OECD draft restricts the source country to a withholding tax not in excess of 10 percent, unless the debt from which the interest arises is effectively connected with a permanent establishment located in the source country. Out of nearly 50 treaties reviewed in the report, only a handful were as restrictive as the OECD provision on the source country's taxing authority. In a number of treaties the developing country retains full right to tax interest income at its usual withholding rates. In a large number of other agreements the source country agrees to limit its withholding tax rate, but at rates higher than the 10 percent limit of the OECD provision. Full taxation of interest by the recipient's home country combined with full exemption by the country of source, a common provision in agreements

<sup>8</sup> The study, prepared by the Secretariat with the assistance of consultants from outside the United Nations, is printed as part of the U.N. Doc. E/4614/ST/ECA/110, p. 33 *et seq.*

between developed countries, is found in only a few treaties between developed and developing nations.

With regard to measures adopted by capital-exporting countries to give incentives for investment in developing countries, the Secretariat's report views with equal favor the exemption by developed countries of income from developing countries and the adoption of a tax-sparing credit provision in conjunction with a credit for foreign taxes paid. The report points out that, if a developed country adopts a general exclusion of all foreign-source income, the result may be to encourage investments in developed rather than developing nations. The study suggests instead that selective exemption of foreign income by means of treaties between developed and developing nations can be relied upon to channel the desired capital into the developing countries.

The observations contained in the Secretariat's report may be of particular relevance to United States policy in the light of recent suggestions of fundamental changes in U. S. taxation of foreign-source income. Assistant Secretary of the Treasury Edwin S. Cohen revealed, in a speech of November 19, 1969, that the Treasury Department is weighing the advisability of either eliminating deferral of taxes on undistributed profits earned by foreign subsidiaries of United States corporations or, alternatively, exempting from U. S. taxation income received from direct investments in foreign countries.<sup>9</sup> The first alternative, subjecting all income of foreign subsidiaries to U. S. taxes in the year earned, would eliminate the incentive which tax concessions given by developing countries still offer to U. S. investors, who are currently able in many cases to postpone U. S. taxes by reinvesting abroad profits earned by foreign corporations. The Assistant Secretary's language indicated, however, that far more serious consideration is being given to the second alternative, exemption of direct investment income regardless of whether or not it is distributed to U. S. shareholders. This policy could also have important repercussions on investment in developing countries. In one sense, U. S. exemption could make tax concessions offered by developing countries more attractive to U. S. investors, as the low rates would not be eliminated by U. S. taxes on profits distributed to investors. Some have argued, on the other hand, that complete exemption would have adverse consequences to total investment in developing countries, as it would remove an incentive to retention of profits by foreign subsidiaries. Exemption might even, as suggested by the U.N. Secretariat's report, stimulate investment in developed rather than developing countries. The report points out that, once tax concessions expire, tax rates in developing countries are often quite high. Exemption might, therefore, act primarily as an incentive to investment in developed countries with rates lower than rates existing in the United States or numerous developing countries.

Although the impact of unqualified exemption of foreign direct investment income on the flow of U. S. capital to developing countries is not easy to predict, the consequences would be less open to doubt if a modification,

<sup>9</sup> Treasury Release K-277.

outlined by Mr. Cohen as a possible exception to the exemption privilege, were adopted. The Assistant Secretary suggested that exemption might be denied to income earned in a country whose rates do not reach a minimum standard to be established by U. S. law. Exemption might be denied, for instance, to income earned in countries with rates beneath 35, 40 or 45 percent. On the assumption that tax concessions currently offered by a number of developing countries result in effective tax rates beneath these minimum levels, the result would be that income earned by U. S. taxpayers from investments in such countries would be subject to full U. S. taxation (with a credit given for foreign taxes as now), while investment in other countries, including developed countries, would enjoy the full benefit of rates lower than U. S. levels but still above the stipulated minimum. Such a policy could seriously affect the tax incentive program currently offered by a number of developing countries. It seems likely that such a change in United States taxation of foreign investment income would create an incentive to shift the flow of overseas investments toward other developed countries and away from investment in less developed nations. Regardless of whether or not Assistant Secretary Cohen's envisioned changes are actually adopted, his statement casts doubt on the willingness of the United States Government to take account of the special needs of the developing nations in formulating new policies toward taxation of income from overseas investments.

The remarks of Mr. Cohen were, of course, directed toward possible changes in United States legislation rather than tax treaties. In the treaty field, however, there has been no new initiative by the Treasury to break the existing stalemate with regard to treaties with developing countries. Such an initiative is greatly needed. In formulating new policies to meet the particular requirements of the developing nations, the United States Government should consider carefully which of the alternative methods of facilitating investments in developing countries will have the most favorable long-term impact. Although tax-sparing and other methods which the United States might adopt to preserve the full impact of tax relief granted by capital-importing nations are often eagerly sought after by such countries, there are good reasons to conclude that such provisions are not the most appropriate means to stimulate the desired investment. The chief reason is that such provisions adopted by the investor's home country place maximum pressure on the developing nations to forego sorely needed tax revenues by granting tax holidays and other concessions. For the purpose of stimulating investment in developing countries without undermining their fiscal resources, some sort of tax incentive by the capital-exporting nation tied to the act of investing itself would seem more desirable. Such a measure would not increase pressure on developing nations to reduce tax rates and would relate the incentive directly to the action which it is intended to encourage: capital investment rather than repatriation of profits.

One objective in the drafting of any treaty provision granting tax relief tied to capital investment should be to restrict the tax benefits as much as



possible to that increment of total investment which would not have been made in the absence of the incentive provision. The tendency to grant tax concessions for investments which would have been made even without special incentives is a familiar one and often makes tax incentives extremely expensive in comparison to the added benefits which they produce.<sup>10</sup> A related objective should be to formulate incentive provisions which apply only to the specific types of investments which it is desired to encourage. It might be desirable to restrict tax concessions to investments in certain industries or regions of the country, depending upon the development plans of the particular capital-importing country with which a treaty is being concluded. Care must also be taken to avoid provisions which stimulate transactions detrimental to the economic growth of the developing nations.<sup>11</sup>

Clearly a new initiative by the United States is required to break the current stalemate in efforts to reach accord with developing countries on treaties to promote trade and development through harmonizing tax laws. Such treaties are important not only in preventing double taxation and promoting co-operation between tax administrators of the contracting nations. They also serve to create a climate of confidence among investors, who can feel assurance that the basic rules determining their tax liabilities have been agreed upon and that channels of consultation exist in case of disputes. It has been suggested that this climate of confidence may be as important as any specific provisions of tax treaties in promoting investments in developing countries.<sup>12</sup> It is to be hoped that the recent exchanges of views stimulated by the United Nations will pave the way for a successful effort by the United States to reach agreements with developing countries in this important field.

PATRICK L. KELLEY \*

#### NEUTRALIZATION OF ISRAEL

In the April, 1970, issue of *Foreign Affairs*<sup>1</sup> Dr. Nahum Goldmann, President of the World Jewish Congress, advances the novel proposal that, as a solution to the crisis in the Middle East, Israel be made a permanently neutralized state along the lines of Switzerland. In Dr. Goldmann's view

<sup>10</sup> See Stanley S. Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures," 83 *Harvard Law Review* 705 (1970).

<sup>11</sup> The West German Development Aid Tax Law, for example, grants concessions to German exporters of finished and semi-finished goods to developing countries, even though the effect may be to impair the competitive ability of producers of such goods located within the developing countries. Dietrich von Boetticher, "A New Approach to Taxation of Investments in Less Developed Countries," 17 *A. J. Comp. Law* 529, 557 (1969).

<sup>12</sup> See Martin Norr, "Less Developed Country Treaties," in Practising Law Institute, *U. S. Taxation of Foreign Operations* 161, 164 (1968).

\* Teaching Fellow and Research Associate, International Tax Program, Harvard Law School.

<sup>1</sup> "The Future of Israel," 48 *Foreign Affairs* 443 (1970).

the success of this solution would depend on the two preconditions of a cease-fire between Israel and the Arab states and settlement of the Arab refugee problem. He argues that neutralization of Israel would appeal to the Arab states because it would quiet their fears of Israeli territorial expansion and eliminate a major obstacle to a united Arab policy. Both the United States and the Soviet Union would support such a proposal, Dr. Goldmann believes, because neither state desires a wider war and both wish to avoid a confrontation over the Arab-Israeli conflict. From the Israeli perspective, Dr. Goldmann contends, neutralization with effective international guarantees would enhance its security and allow Israel to divert some of its resources now applied to military requirements to economic, cultural and spiritual efforts. Dr. Goldmann believes that an "effective" guarantee of the neutrality of Israel might require stationing of a permanent symbolic international force in Israel, as well as retention of Israeli armed forces, but that, if the guarantee were coupled with a control of arms deliveries to the Middle East, Israel would gradually be able to shift its resources from the military to civilian areas of its society.

Dr. Goldmann himself admits that his proposal "may appear to hard-boiled politicians today as a quixotic vision." Indeed, the feasibility of neutralization of Israel would depend upon resolution of a number of difficult political and psychological problems, a discussion of which is beyond the scope of this note.<sup>2</sup> Nonetheless, it may be useful at this time to consider some of the legal issues which neutralization of Israel would involve: What would be the purpose of such a neutralization? How might it be accomplished and what would be the rights and duties of Israel and other states? In what ways, if at all, are the experiences of Switzerland, Belgium and Luxembourg, Austria, and Laos, all instances of permanent neutralization, relevant to these problems?

The primary objective of neutralization in international law has been to promote the avoidance or management of conflict.<sup>3</sup> To this end parties to neutralization arrangements have sought the creation of "buffer states" to stabilize balance-of-power rivalries and/or the removal of a state as a focal point of international conflict. The neutralizations of Switzerland, Belgium and Luxembourg are examples of attempts to fulfill the first objective, and those of Austria and Laos the second. These objectives are not mutually exclusive, however. One of the purposes of neutralization of Switzerland was to protect it from the expansionist designs of various European Powers, especially France.

Since Israel is not in any sense a "buffer state," the purpose of its neutralization would be to remove the territory of Israel as a focal point of international conflict. But the preliminary and fundamental problem is: What territory makes up the state of Israel? Sharm el Sheikh? The Golan Heights? The Gaza Strip? Jerusalem? As a first step, it would be neces-

<sup>2</sup> For an excellent and exhaustive study of the political, as well as many of the legal problems of neutralization, see Black, Falk, Knorr and Young, *Neutralization and World Politics* (1968).

<sup>3</sup> See, generally, Black, *op. cit.* note 2 above; 1 Whiteman, *Digest of International Law* 342-364 (1963); Kunz, "Austria's Permanent Neutrality," 50 A.J.I.L. 418 (1956).

sary to resolve this issue before proceeding to the neutralization of the territory of Israel.

Neutralization, as distinguished from a policy of neutrality, can be brought about only by treaty and not by unilateral declaration.<sup>4</sup> Under present international law and practice the procedure would be to conclude a treaty of neutralization between Israel and other interested states or entities, with Israel's consent. It is no longer supportable for the great Powers by treaty among themselves to impose the status of neutralization upon weaker states, as the European Powers did in the nineteenth century with regard to Belgium and Luxembourg.

The parties to a treaty neutralizing Israel would at a minimum have to include Israel, the Arab states, the United States, and the Soviet Union, *i.e.*, the primary protagonists in the Middle East crisis. In addition, it would seem desirable and perhaps indispensable to include the United Kingdom, France and the United Nations as parties, because of the rôle they might play in maintaining and guaranteeing the neutralization of Israel.

What could be expected to be the duties of Israel as a neutralized state? The neutralized state, in the historic model, is required to abstain from going to war except in self-defense and to avoid policies and actions that might involve it in hostilities, such as adherence to a treaty entailing a political commitment, especially a defensive alliance, a treaty of guarantee, or a collective security arrangement. If a war or armed conflict breaks out between other states, the neutralized state may be required to remain neutral in the strict, classic sense. Its duties include refraining from joining an international military action, whether it be under the aegis of the United Nations or any other international organization, and from allowing passage of troops of a belligerent through, or the flying of a belligerent's planes over, its territory. At the same time neutralization does not necessarily mean demilitarization. On the contrary, the neutralized state not only has a right but an obligation to defend its neutrality, if need be by armed force. The success of Swiss neutrality is due in large part to the strength of the military establishment of that country.

Fulfillment of these obligations would not be an onerous burden for Israel. Israel is not presently a member of any alliance that, at least argu-

<sup>4</sup> A distinction is usually drawn between "neutralization" and "neutrality." Neutrality is defined as a voluntary policy that a state may adopt in time of war with respect to belligerents. Neutralization, on the other hand, refers to a permanent status, acquired by agreement with other states, which cannot be relinquished without their consent. "Permanent neutrality" is often used in the same sense as neutralization. See I. White-man, *op. cit.* note 3 above, at 342-343.

Arguably, Austria should be classified as an example of neutrality instead of neutralization because the State Treaty with Austria contains no reference to Austria's neutralization. Rather, the terms of Austria's neutralization are found in a Constitutional Federal Statute enacted by the Austrian Parliament. It has been contended, however, that the Austrian statute is more than a unilateral declaration of policy because (a) it was enacted pursuant to an international obligation, the so-called Moscow Memorandum of April 15, 1955, between Austria and the Soviet Union, and (b) the neutralization of Austria has been generally recognized by states members of the international community. See Kunz, *loc. cit.* note 3 above, at 419-422.

ably, might jeopardize its independence of political action, nor has it permitted the establishment of foreign military bases. And it has shown itself highly capable of defending the inviolability of its territory.

On the other hand there could be substantial disagreement as to whether Israel would be precluded from joining customs or economic unions or required to maintain any kind of ideological neutrality. Both Switzerland and Austria have applied for association with the European Economic Community, but the Soviet Union has strongly objected to Austria's application as a violation of its neutrality.<sup>5</sup> There might also be a question whether continued Israeli membership in the United Nations would be compatible with its status as a neutralized state.<sup>6</sup> All of these questions would have to be resolved in the treaty of neutralization.

As for the other parties to the treaty, should they be required simply to recognize the neutralization of Israel or to guarantee it as well? <sup>7</sup> A state recognizing the neutrality of another country is normally obliged to refrain from taking any action that might violate that neutrality. Thus the recognizing state is required to respect the independence and territorial integrity of the neutralized state. It must not directly or indirectly interfere in the internal affairs of the neutralized state or use the territory of the neutralized state for interference in the internal affairs of other countries. It must not introduce troops or establish military bases in the territory of the neutralized state, nor attempt in any way to induce the neutralized state to enter into military alliances. Above all, it must not resort to the use of force or threat of force, or take any other measure which might impair the peace of the neutralized state.<sup>8</sup>

Israel, however, would be strongly concerned with the defense of its neutrality, and recognition of permanent neutrality does not oblige the recognizing state to defend the neutralized state's neutrality. Only a guarantee of the neutralization of a state gives rise to an obligation to defend it. Such a guarantee can be given by states severally or collectively.<sup>9</sup> If it is collective, the guarantors must act as a body; but if the guarantee is given by states severally, each state is under a duty to act which is

<sup>5</sup> In 1961 the Soviet Union repeatedly warned the Austrian Government that its application for association with the European Economic Community would be regarded as a violation of Austrian neutrality and the prohibition of the Austrian State Treaty against political or economic union with Germany. The Austrian Government rejected these protests on Oct. 2, 1961, in a note to the Soviet Union. 1 Whiteman, *op. cit.* note 3 above, at 352-353.

<sup>6</sup> Switzerland has consistently refused to become a Member of the United Nations on the ground the collective security system, operating through the Security Council, might require it to take positions incompatible with its permanent neutrality in the event of armed conflicts. On the other hand, for a view that there are no legally valid objections to the membership of a neutralized state in the United Nations, see Verdross, "Austria's Permanent Neutrality and the United Nations Organization," 50 A.J.I.L. 61 (1956).

<sup>7</sup> See 1 Whiteman, *op. cit.* note 3 above, at 350.

<sup>8</sup> For a draft model treaty of neutralization, see Black, Falk, Knorr and Young, *op. cit.* note 2 above, at 191-195.

<sup>9</sup> 1 Oppenheim, International Law 966-967 (8th ed., Lauterpacht, 1955).

peculiar to it. In light of the unhappy historical experience with unanimity voting requirements, it is likely that Israel would insist that the guarantee be several or collective and several. Also, Israel would require substantial assurances that its security would be enhanced rather than endangered by neutralization before it would consider, as part of the bargain, giving up such strategically important areas as the Gaza Strip, Sharm el Sheikh, the Golan Heights, and the West Bank of the Jordan.

Until the three-member Commission for Supervision and Control of Laos, established under the Geneva Agreement of 1954, was assigned the task of enforcing the neutralization of Laos, there was no provision in international law or practice for the establishment of control machinery to ensure the maintenance of a treaty of neutralization. The Commission, however, has proven ineffective in controlling repeated interventions by several guarantor states, largely for such reasons as lack of access to parts of the country controlled by Communist forces, dissension among the members of the Commission, and the unanimity requirement for decisions whether a violation of the agreements has occurred. Moreover, as an instrument of the guarantor states, the Commission has not been able to play an independent rôle in determining whether these states are fulfilling their obligations.<sup>10</sup>

Israel would surely demand a more impartial commission with more effective powers. To ensure impartiality, such a commission might be established under United Nations auspices with members selected from states not parties to the treaty of neutralization. The commission would have the responsibility of investigating cases in which, in the opinion of a majority of the members of the commission, there are reasonable grounds for assuming that a violation of the treaty has occurred. Israel and the other parties to the treaty would be under an obligation to provide the commission with the resources and authority necessary to carry out its duties. In particular, the commission would have to be granted free access to all parts of the territory of Israel, as well as adequate transportation and communication facilities.

The United Nations experience with peacekeeping operations and the experience in Laos indicate that the parties would be unlikely to agree that the commission itself should have power to decide whether a violation of the treaty has occurred. Rather, the functions of the commission would probably be limited to observation, fact-finding, and the submission of reports to a plenary meeting of the parties or to the United Nations for further action. At any rate, some provision should be made for decisions as to whether a violation of the treaty has occurred, and this decision should be made by a majority, or perhaps a two-thirds vote not subject to veto.

Any treaty of neutralization for Israel should provide for periodic review of its provisions, and meetings to consider revisions in the treaty should be called within a certain period after the receipt of a request for such a meeting from any party to the treaty. However, no modification or

<sup>10</sup> See Dommen, *Conflict in Laos: The Politics of Neutralization* 247-250 (1964), for a discussion of the failure of the Commission to control the conflict.

abolition of the status of neutralization could be made in the absence of the consent of all parties to the treaty, including Israel.

As indicated at the outset, the political and psychological problems that neutralization of Israel would face are outside the scope of this note. It may be stated parenthetically, however, that the political climate for neutralization is not favorable at this time. The success of neutralization depends in large part upon a convergence of interests in resolving or avoiding conflict between the guarantor states and between the guarantor states and the neutralized state. No such convergence of interests presently exists in the Middle East. On the contrary the polarization between the parties to the conflict has never been greater. Unless and until there is a substantial change in the attitudes of the parties, therefore, the chances for a successful neutralization of Israel would seem slim.

JOHN F. MURPHY \*

REGIONAL CONFERENCE OF THE SOCIETY, CHICAGO: THE LEGAL  
EFFECTS OF "WARS OF LIBERATION"

The contemporary significance of "wars of liberation" and their manifestation in Southeast Asia and the Middle East demonstrates the need to explore their legal significance and effects. This was the subject of a regional meeting of the Society in Chicago, April 6, 1970, co-sponsored by DePaul University College of Law.

To lay the definitional and philosophical foundation of the question, Professor Edward M. Wise of Wayne State opened the conference with his views on "What Is a War of Liberation?" The classification of conflicts as "wars of liberation" depends on the legal consequences of designating a situation as constituting a "war." A great variety of conflicts may be considered as "wars of liberation." The paradigm case was armed hostilities even though between a metropolitan Power and an ethnically distinct people seeking to cast off colonial rule. Soviet doctrine treats a "war of liberation" in every sense as an international war. One corollary of the Soviet view is that "wars of liberation" are subject to all the rules that govern armed conflicts between two states; but this consequence must be discounted, because laws of war assume conditions of mutuality that do not hold, by and large, for "wars of liberation." The crux of the Soviet doctrine lies rather in the assertions that "wars of liberation" constitute a permissible use of armed force; and that third parties are therefore at liberty to intervene on behalf of the colonial people. The second assertion, however, does not necessarily follow from the first; there is considerable danger in allowing individual governments to act on their own in deciding which of two contestants is in the right. The first assertion assumes that international law recognizes a right of self-determination and that this right ranks in importance with the Charter's limitation on the use of force except in self-defense. Wise was skeptical about the validity of either of these two as-

\* Associate Professor of Law, Kansas University.

sumptions. There is danger in allowing governments to characterize the conflict and to decide whether to intervene unilaterally.

Professor John N. Moore of Virginia discussed "The Control of Foreign Intervention in Internal Conflict" and adverted to the magnitude of the threat to world order. He suggested three useful perspectives in responding to the issues raised by intervention problems: (1) an international legal perspective: "When is intervention consistent with community common interest?"; (2) a political perspective: "When is intervention which is consistent with community common interest also justified by the national interest?"; and (3) a strategic perspective: "When is intervention, which is otherwise justifiable, likely to be successful?" In exploring the international legal perspective, Professor Moore discussed the intellectual confusion about intervention resulting from inadequate problem-solving tools and the limitations of the customary law of non-intervention. An alternative approach would be to recognize explicitly the value element in questions of intervention and to achieve a balance of emphasis between institutional and normative concerns. He recommended a detailed set of normative standards, a set of contextual guidelines for policy-makers, and several proposals for institutional change, including a multilateral treaty for the international reporting of military assistance, an international agency for observation and disclosure, and a restructuring of the national foreign policy process to include an international legal perspective in decision-making.

The luncheon speaker was Professor R. R. Baxter of Harvard, who discussed "Prisoners of War in Wars of Liberation." The afternoon session was devoted to the two contemporary conflicts which have been asserted to be "wars of liberation." Professor Samuel Bleicher of Toledo spoke on "Vietnam and the Definition of Aggression." He examined the impact of the Viet-Nam experience upon the traditional definitions of aggression, which are based upon prohibition of the use of force across international boundaries. North Viet-Nam is said to have violated this proscription but has not been condemned as an aggressor by world public opinion, as was the Soviet Union for invading Czechoslovakia. North Viet-Nam's posture can be distinguished on the following bases: (1) the artificiality of the international boundary between North and South Viet-Nam, (2) the relatively low level of force employed by North Viet-Nam, (3) the negative attitude of the South Vietnamese régime toward human rights, (4) the cultural estrangement of the South Vietnamese Government from the masses, (5) the absence of an effective economic reform program in South Viet-Nam, and (6) the autocratic nature of the South Vietnamese Government.

In situations in which these six factors are present, acts by an interested party which could be defined as aggression will not be treated as such because they are, in fact, acceptable to much of the international community. A new definition of aggression, therefore, should recognize this reality of international behavior.

The concluding paper by Professor W. Thomas Mallison, Jr., of George Washington University, addressed itself to "The Palestinian War of Libera-

tion." Reviewing the history of Zionism, its claims to the area and gradual take-over, Mallison retraced the present conflict in the Middle East to Zionist roots. Examining the early development of the question, he emphasized the incompatibility of European-born Zionism with Arabism (as conflicting doctrines) and showed the gradual expansion of Zionist control over Palestine. Asserting the legitimacy of the Palestinian people's claim to their homeland, he concluded that the law of war is applicable between Palestinians and Israelis. He asserted that Israel's non-compliance with United Nations resolutions and international law had led to the present state of affairs, and concluded that a peaceful solution can be attained by compliance with United Nations resolutions.

M. CHERIF BASSIOUNI \*

#### REGIONAL MEETING OF THE SOCIETY IN IOWA CITY, IOWA

Global pollution was the subject of an American Society of International Law regional meeting on February 27-28, 1970, at Iowa City, Iowa. Co-sponsors of this public symposium were the Stanley Foundation; the University of Iowa Student Senate, Graduate College, Center for International Studies, and Action Studies Program; the Iowa Student Bar Association; the Council on International Relations and United Nations Affairs, Iowa City Chapter; the United Nations Association, Iowa City Chapter; Boise-Cascade Corporation; Wheelabrator Corporation; and the League of Women Voters, Iowa City Chapter.

David D. Dominick, Commissioner of the Federal Water Pollution Control Administration, Department of the Interior, was the keynote speaker for the meeting. Mr. Dominick's talk, "Pollution, Rights, and the United States," was delivered Friday evening, February 27. The morning and afternoon sessions on Saturday, February 28, featured talks delivered by Robert E. Stein, Office of the Legal Adviser, Department of State, on "Pollution, Rights, and Military Activities," and by Abel Wolman, Professor Emeritus of Sanitary Engineering, The Johns Hopkins University, on "Pollution, Rights, and Economic Development."

Presiding as chairman of the symposium was Albert E. Utton, Professor of International Law, University of New Mexico, and editor of *The Natural Resources Journal*. The speakers received questions and comments from the audience and from panels consisting of: Richard B. Bilder, Professor of Law, University of Wisconsin; George E. Brosseau, Professor of Zoology, University of Iowa; and Marvin Kalkstein, Professor of Political Science and Sociology, State University of New York, Stony Brook, for the Saturday morning session; and Richard G. Bond, Professor and Director of Environmental Health, University of Minnesota; John Morey Maurice, Attorney, Boise-Cascade Corporation, Boise, Idaho; Edward Lee Rogers, General

\* Professor of Law, DePaul University; 1970 Fulbright-Hays Professor of International Criminal Law (Germany) and visiting Professor of Law, University of Freiburg.



Counsel, Environmental Defense Fund, Stony Brook, New York; and Mr. Stein, for the Saturday afternoon session.

Banquets were given Friday and Saturday evenings for symposium participants, members of the University of Iowa Faculty and Administration, and students. Receptions were held both nights following sessions of the symposium, with students and the general public invited and attending.

Attendance figures totaled more than 400, including persons from distant Iowa towns and other States. The meeting was planned and presented by the Iowa Society of International Law, a student organization at the University of Iowa College of Law.

EDWARD J. LEMONS  
*Symposium Coordinator,*  
*Iowa Society of International*  
*Law*

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF  
HIS MOTHER AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the *Henry Wheaton* Prize (2,000 Swiss francs) to be awarded in 1973. The subject is the following: "*The status of diminutive States in international institutions.*"

The competition is open to anyone except members or associates or former members or associates of the Institute.

The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages corresponding to a printed octavo page of the same character as a page of the volume of the *Annuaire de l'Institut de Droit international*. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously in three copies. Each copy must be supplied with two mottoes. The same mottoes should be inscribed on an accompanying envelope containing the surname and first names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Acting Deputy Secretary General of the Institute (Professor Paul De Visscher, 82, avenue du Castel, 1200 Brussels, Belgium) not later than December 31, 1972.

The conditions of the Prize will be found in the *Annuaire de l'Institut de Droit international* for 1967, Vol. 52, pp. 695-699.

E. H. F.

JOURNAL OF MARITIME LAW AND COMMERCE

A new periodical of interest to lawyers, particularly those engaged in the practice of maritime law and international law, has appeared within the last year or so. It is the *Journal of Maritime Law and Commerce*, the first English-language periodical on maritime law. The Editor is Professor David M. Sassoon of Georgetown University Law Center. The

Associate Editor and Case Editor is John P. McMahon of the New York Bar, and the Book Review Editor is Professor David Suratgar of Georgetown University Law Center. The other members of the editorial board are Professors Albert H. Garretson, Nicholas J. Healy and Andreas F. Lowenfeld of New York University Law School, Joseph C. Sweeney and Ludwik A. Teclaff of Fordham University Law School, Allan I. Mendelsohn of the D. C. Bar, and Eileen M. Teclaff of Brooklyn, N. Y. The Advisory Board of Editors consists of distinguished jurists and professors in this country and abroad.

The most recent issue, that for October, 1970, contains articles on arbitration clauses and choice of forum clauses in bills of lading and the Hague Rules of 1924; the "container clause" in the 1968 Protocol to the Hague Rules; general average in the container age; the American trade embargo of China; proposed amendments to the U. S. Merchant Marine Act of 1936; the World Bank and port development; the Ecuador fisheries dispute; and the outer boundary of the Continental Shelf. There are a number of notes on recent cases in maritime law, as well as book reviews on subjects in the field. A section of Texts and Documents contains the Declaration of Montevideo on the Law of the Sea.

The *Journal of Maritime Law and Commerce* is an innovation in the English-speaking world and should attract many readers. It is published quarterly by the Jefferson Law Book Company, 933 Gist Avenue, Silver Spring, Md. 20910. The subscription price is \$20 in the United States, Canada and Mexico; \$21.50 in Europe, Central and South America; and \$22.50 in Asia, Africa and Australia. Subscriptions should be sent to the publication office of the *Journal* at the above address. Manuscripts and correspondence should be addressed to the Editor, at 4632 Reservoir Road, N. W., Washington, D. C. 20007.

ELEANOR H. FINCH

#### 65TH ANNUAL MEETING OF THE SOCIETY

The Society will hold its 65th annual meeting from April 29 to May 1, 1971, at the Statler-Hilton Hotel in Washington, D. C. The meeting will open on Thursday morning, April 29, and close on Saturday afternoon, May 1, 1971. The dinner will be held on Friday evening, April 30. Following the business session on Saturday morning, at 9:30 a.m., for election of officers and transaction of other business, there will be a luncheon with the Section on International and Comparative Law of the American Bar Association at 12:00 o'clock noon. Ewell E. Murphy, Jr., Chairman of the A.B.A. Section, will preside. The speaker at the luncheon will be Constantin A. Stavropoulos, Under Secretary General and Legal Counsel of the United Nations.

The first session on Thursday morning, April 29, at 10:30 a.m., will be devoted to a panel discussion of Chinese participation in the United Nations. On Thursday afternoon, at 2:15 p.m., the session will consist of two panels and a round-table discussion. One panel will deal with self-deter-

mination and settlement of the Arab-Israeli conflict; the other, with new developments in the law of international aviation: the control of aerial hijacking. The latter discussion is jointly sponsored with the Canadian Branch of the International Law Association and the Canadian Society of International Law. The round-table discussion is entitled: "The Social Scientist Looks at the International Law of Conflict Management."

On Thursday evening, at 8:15 p.m., there will be panels on the future of South West Africa (Namibia) and on conflicting approaches to the control and exploitation of the oceans. The oceans panel is jointly sponsored with the American Branch of the International Law Association. At the Thursday evening session there will also be a round-table discussion of the rôle of Congress in the making of foreign policy.

On Friday morning, April 30, at 9:15 a.m., two panels will consider, respectively, procedures for protection of civilians and prisoners of war in armed conflicts, Southeast Asian examples, and conflicting assumptions about international trade: neo-protectionism or reasonable accommodation of national interests? A round table on the dilemma of foreign investment in South Africa will be jointly sponsored with the Association of Student International Law Societies.

On Friday afternoon, at 2:15 p.m., there will be a panel discussion of the future of the International Court of Justice, a discussion group on the teaching of international aspects of human rights, and a round table on new proposals for increasing the rôle of international law in government decision-making.

On Saturday afternoon, at 2:30 p.m., the Philip C. Jessup International Law Moot Court Competition finals will be held. There will also be a round-table discussion, jointly sponsored with the German Society for International Law, of the *Barcelona Traction* and *Aris Gloves* cases, under the rubric, "Toward More Adequate Diplomatic Protection of Private Claims."

Professor John Norton Moore of the University of Virginia School of Law, Charlottesville, Virginia, is Chairman of the Committee on the Annual Meeting, which is arranging the program. The program outlined is tentative, and further details will be supplied in the Society's *Newsletter* for February. Registration and reservation cards for the meeting will go out to the members shortly. They are urged to make hotel room reservations as soon as possible. As in previous years, a block of rooms will be held at the Statler-Hilton for members attending the meeting.

ELEANOR H. FINCH

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, attorney in the Office of the Legal Adviser, Department of State, with the assistance of other attorneys in the Departments of State and Justice.

The references in the headings are to sections of the *Digest of International Law* prepared by Marjorie M. Whiteman (1963 to date) dealing with the same subject matter as the material presented.

### BOUNDARIES AND RELATED MATTERS

#### *Postwar Territorial Settlements* (3 Whiteman's *Digest*, Ch. VI, *passim*)

On August 12, 1970, the Federal Republic of Germany and the Union of Soviet Socialist Republics concluded a bilateral treaty on the renunciation of force. In connection with the signing of that treaty, the Government of the United States transmitted to the Government of the Federal Republic the following note, dated August 11, 1970:<sup>1</sup>

The Government of the United States has the honor of informing the Government of the Federal Republic of Germany that it has received the note transmitted by the Government of the Federal Republic of Germany on August 7, 1970, containing the following text:

The Government of the Federal Republic of Germany has the honor to report the following in connection with the imminent signing of a treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics.

The Federal Minister of Foreign Affairs has stated in connection with the negotiations the viewpoint of the Federal Republic concerning the rights and responsibilities of the Four Powers in relation to Germany as a whole and Berlin.

Since the settlement of a peace treaty is still outstanding, both sides take the position that the agreement under consideration does not affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America.

On August 6, 1970, the Federal Minister of Foreign Affairs stated in this connection:

"The question of the rights of the Four Powers has no connection with the treaty that the Federal Republic of Germany and the USSR intend to conclude and will not be affected by it."

The Foreign Minister of the Union of Soviet Socialist Republics has made the following statement:

"The question of the rights of the Four Powers was not a subject of the negotiations with the Federal Republic of Germany.

<sup>1</sup> The statement of Secretary of State Rogers with respect to the conclusion of the treaty is reprinted at 63 Dept. of State Bulletin 275 (1970).

"The Soviet Government took the position that this question should not be discussed.

"The question of the rights of the Four Powers will also not be affected by the treaty which the USSR and the FRG intend to conclude.

"This is the position of the Soviet Government in this question."

The Government of the United States takes full cognizance of this note, including the declarations made by the Foreign Minister of the Federal Republic of Germany and the Foreign Minister of the Union of Soviet Socialist Republics as part of the negotiations prior to the initialing of the treaty which is to be concluded between the Federal Republic of Germany and the Soviet Union.

For its part, the Government of the United States also considers that the rights and responsibilities of the Four Powers for Berlin and Germany as a whole, which derive from the outcome of the Second World War and which are reflected in the London agreement of November 14, 1944, and in the quadripartite declaration of June 5, 1945, and in other wartime and postwar agreements are not and cannot be affected by a bilateral treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics, including the present treaty.

(Dept. of State Press Release No. 238, Aug. 12, 1970; reprinted at 63 Dept. of State Bulletin 275 (1970).)

#### LAW OF THE SEA

##### *Seabeds Beyond the Limits of National Jurisdiction* (4 Whiteman's Digest, *passim*)

The United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction met in Geneva during the month of August, 1970. On August 3, the United States Delegation tabled, as a working paper, a Draft United Nations Convention on the International Seabed Area.<sup>1</sup> The following summary of the provisions of that draft was prepared by John R. Stevenson, The Legal Adviser of the Department of State:

#### SUMMARY OF PROVISIONS OF DRAFT "UNITED NATIONS CONVENTION ON THE INTERNATIONAL SEABED AREA"

On May 23, 1970, President Nixon announced a new oceans policy for the United States and stated that the United States would make specific proposals at the U.N. Seabeds Committee in August with regard to the proposed regime for the seabeds beyond national jurisdiction which he set forth in broad outline in his announcement.<sup>2</sup> The submission of a draft "United Nations Convention on the International Seabed Area" to the Seabeds Committee as a working paper for discussion within that committee

<sup>1</sup> U.N. Doc. A/AC.138/25. The statements of John R. Stevenson, The Legal Adviser, and U.S. Representative Christopher H. Phillips introducing the draft convention are reprinted at 63 Dept. of State Bulletin 209, 210 (1970).

<sup>2</sup> The President's statement is reprinted at 64 A.J.I.L. 930 (1970).

as well as with other governments and within the United States, implements the President's announcement. The draft convention and its appendices raise a number of questions with respect to which further detailed study is clearly necessary and do not necessarily represent the definitive views of the United States Government.

The basic structure of the convention reflects the President's proposals that states should by international agreement renounce their sovereign rights in the seabed under the high seas<sup>3</sup> beyond a water depth of 200 meters; establish an international regime for the area beyond with certain basic principles and general rules applicable throughout this area; authorize coastal states as Trustees for the international community to carry out the major administrative role in licensing the exploration and exploitation of natural resources from the limit of coastal state national jurisdiction to the edge of the continental margin, and to share in the international revenues from the Trusteeship Area which they administered; and establish international machinery to perform similar functions in the area beyond the continental margin.

### *Basic Principles*

Among the basic principles which would become applicable to the entire International Seabed Area (including the International Trusteeship Area) under the convention would be the following:

The International Seabed Area would be the common heritage of mankind and no state could exercise sovereignty or sovereign rights over this area or its resources or, except as provided in the convention, acquire any right or interest therein.

The International Seabed Area would be open to use by all states without discrimination, except as otherwise provided in the convention, and would be reserved exclusively for peaceful purposes.

Provision would be made for the collection of revenues from mineral production in the Area to be used for international community purposes including economic advancement of developing countries and for promotion of the safe, efficient and economic exploitation of the mineral resources of the seabed.

Exploration and exploitation of the natural resources of the Area must not result in unjustified interference with other activities in the marine environment, and all activities in the Area must be conducted with adequate safeguards against pollution and for the protection of human life and the marine environment.

A contracting party would be responsible for insuring that those authorized by it (as Trustee in the Trusteeship Area) or sponsored by it (in the area beyond) complied with the convention. Contracting parties would

<sup>3</sup> The President also referred to the U.S. proposals to fix the boundary between the territorial sea and the high seas at a maximum of 12 nautical miles with free transit through international straits and carefully defined preferential fishing rights for coastal states on the high seas.

also be responsible for any damage caused by those authorized or sponsored by them.

The general rules would be as follows:

#### *Mineral Resources*

All exploration and exploitation of the mineral deposits in the Area would be licensed by the appropriate Trustee in the Trusteeship Area and by the International Seabed Resource Authority in the area beyond, subject to general provisions relating to the terms of licenses included in appendices forming part of the convention, a number of which allow greater discretion to the Trustee State in the case of the Trusteeship Area. The contracting parties would have primary responsibility for inspecting activities licensed or sponsored by them. The International Seabed Resource Authority would also have authority to inspect and determine if a licensed operation violates the convention. Licenses would be revoked only for cause and in accordance with the convention. Expropriation of investments made, or unjustifiable interference with operations conducted pursuant to a license, would be prohibited.

#### *Living Resources of the Seabed*

All contracting parties would have the right to explore and exploit these resources (e.g., king crab) subject to necessary conservation measures and the right of the Trustee in the Trusteeship Area to decide whether and by whom such resources should be exploited.

#### *Protection of the Marine Environment, Life, and Property*

The International Seabed Resource Authority would be authorized to prescribe rules to protect against pollution of the marine environment and injury to persons and resources resulting from exploration and exploitation and to prevent unjustifiable interference with other activities in the marine environment.

#### *Scientific Research*

Each party would agree to encourage, and to obviate interference with, scientific research and to promote international cooperation in scientific research.

#### *International Trusteeship Area*

The provisions of the convention relating to the International Trusteeship Area would define the outer limit of this area as a line beyond the base of the continental slope where the downward inclination of the seabed reaches a specified gradient. Such gradient would be determined by technical experts who would take into account, among other factors, ease of determination, the need to avoid dual administration of single resource deposits, and the avoidance of including excessively large areas in the Trusteeship Area. Other provisions would limit the Trustee's rights to those set forth in the convention. These rights of the Trustee State would include the issuing,

suspending and revoking of mineral exploration and exploitation licenses subject to the rules set forth in the convention and its appendices, full discretion to decide whether a license should be issued and to whom a license should be issued, exercise of criminal and civil jurisdiction over its licensees, and retention of a portion (a figure between 33 $\frac{1}{3}$  percent and 50 percent is suggested for consideration) of the fees and payments required under the convention for activities in the Area. The Trustee State would also be able to collect and retain additional license and rental fees to defray its administrative expenses and to collect other additional payments, retaining the same portion as indicated above of such other additional payments.

#### *International Seabed Resource Authority*

The principal organs of the proposed International Seabed Resource Authority would be an Assembly of all contracting parties; a Council of 24 members, including the six most industrially advanced contracting states, at least 12 developing countries and at least two landlocked or shelf-locked states; and a Tribunal of from five to nine judges elected by the Council.

The Assembly, which would meet at least once every 3 years, would elect members of the Council, approve budgets proposed by the Council, approve proposals of the Council for changes in allocation of net income within the limits prescribed in an appendix to the convention, and make recommendations.

The Council, which would make decisions only with the approval of a majority of both the six most industrially advanced contracting states and of the 18 other contracting states, would appoint the commissions provided for in the convention, submit to the Assembly budgets and proposals for changes in the allocation of net income within the limits prescribed in an appendix, and could issue emergency orders at the request of a contracting party to prevent serious harm to the marine environment.

The Tribunal would decide all disputes and advise on all questions relating to the interpretation and application of the convention. It would have compulsory jurisdiction in respect of any complaint brought by a contracting party against another contracting party for failure to fulfill its obligations under the convention, or whenever the Operations Commission, on its own initiative or at the request of any licensee, considered that a contracting party or licensee had failed to fulfill its obligations under the convention. If the Tribunal found the contracting party or licensee in default, such party or licensee would be obligated to take the measures required to implement the Tribunal's judgment. The Tribunal would have the power to impose fines of not more than \$1,000 for each day of an offense as well as to award damages to the other party concerned. Where the Tribunal determined that a licensee had committed a gross and persistent violation of the provisions of the convention and within a reasonable time had not brought its operations into compliance, the Council could either revoke the license or request the Trustee Party to do so. Where a contracting party failed to perform the obligations incumbent on it under a judgment of the Tribunal, the Council, on application of the other party to the



case, could decide upon measures to give effect to the judgment, including, when appropriate, temporary suspension of the rights of the defaulting party under the convention (the extent of such suspension to be related to the extent and seriousness of the violation). In addition, any contracting party, and any person directly affected, could bring before the Tribunal the question of the legality of any measure taken by the Council, or one of its commissions, on the ground of violation of the convention, lack of jurisdiction, infringement of important procedural rules, unreasonableness, or misuse of powers; and the Tribunal could declare such measure null and void.

The convention also provides for the establishment of three commissions, each of from five to nine members. The Rules and Recommended Practices Commission would consider and recommend to the Council adoption of annexes as described below. The Operations Commission would issue licenses for mineral exploration and exploitation in the area beyond the International Trusteeship Area and supervise the operations of licensees in cooperation with the Trustee or sponsoring party, but not itself engage in exploration or exploitation. The International Seabed Boundary Review Commission would review the delineation of boundaries submitted by the contracting parties for approval in accordance with the convention, negotiate differences among the parties and if the differences were not resolved initiate appropriate proceedings before the Tribunal, and render advice to contracting parties on boundary questions.

The members of the Rules and Recommended Practices Commission and the International Seabed Boundary Review Commission would not be full-time employees of the Authority.

The Secretariat of the Authority would consist of a Secretary General appointed by the Council and a staff appointed by the Secretary General under the general guidelines established by the Council.

Any amendment of the convention or the appendices would require the approval of the Council and a two-thirds vote of the Assembly and would come into force only when ratified by two-thirds of the contracting parties, including each of the six most industrially advanced contracting states.

Appendices, which are integral parts of the convention, are included in the draft convention by way of example only, as they require extensive consideration of the questions involved by technically qualified experts.

The illustrative appendices included in the draft convention relate to (a) terms and procedures applying to all licenses in the International Seabed Areas; (b) terms and procedures applying to licenses in the International Seabed Area beyond the International Trusteeship Area; (c) terms and procedures for licenses in the International Trusteeship Area; (d) division of revenue; and (e) designation of members of the Council representing the six most industrially advanced states.

Appendix A, applicable to the entire International Seabed Area, would provide for non-exclusive *exploration* licenses not restricted as to area authorizing geophysical and geochemical measurements and bottom sampling and exclusive *exploitation* licenses including the right to undertake deep

drilling which would expire at the end of 15 years if no commercial production were achieved. Deep drilling for purposes other than exploration or exploitation of seabed minerals would be authorized under a permit issued at no charge by the Authority, provided the proposed drilling would not pose an uncontrollable hazard to human safety and the environment. Appendix A also provides for certification by the Trustee or sponsoring party of the operator's technical and financial competence. Minimum and maximum limits on required license fees (the applicable fee to be specified in an annex to the convention with authorization to the Trustee or sponsoring party to impose additional fees within specified limits to help cover its administrative costs) are set out. Provision is also made for the categories of minerals and areas covered by licenses and relinquishment of part of the licensed area when production commences. Maximum and minimum required rental fees prior to and after attaining commercial production (the applicable fee to be specified in an annex to the convention) and minimum annual work requirements are provided for. Submission of work plans and data under exploitation licenses prior to commercial production and submission of production plans and reports are required. Rules are set forth with regard to unit operations. Appendix A further contains minimum and maximum required payments on production, the applicable amount to be specified in an annex to the convention (such payments to be percentages of the gross value at the site of oil and gas or minerals, to be proportional to production, and to be in the nature of payments ordinarily made to governments under similar conditions). The levels of payments on production and work requirements would be graduated to take account of probable risk and cost to the investor, including such factors as water depth, climate, volume of production, vicinity to existing production, or other factors affecting the economic rent that can reasonably be anticipated from mineral production in a given area. Finally, the operator and the authorizing or sponsoring party, as appropriate, would be liable for damage to other users of the environment, and operators would be required to subscribe to an insurance plan or provide other means of guaranteeing responsibility.

Appendix B, applicable to the area beyond the International Trusteeship Area, would permit contracting parties to obtain exploration and exploitation licenses from the Authority if they designate a specific agency to act as operator on their behalf and to authorize persons they sponsor to apply for licenses. It would require the sponsoring party to certify as to the technical and financial competence of the operator and would require the Authority to grant licenses on proper application unless another application for the same block had been received at the monthly intervals at which applications were opened. If more than one application had been received, the license would be awarded in accordance with competitive bidding among the applicants. There would also be provision for award of a license by competitive bidding in the event of termination, forfeiture, or revocation of an exploitation license or sale of a block contiguous to a block on which production had begun, or of a block from which hydrocarbons or other

fluids were being drained. Appendix B would authorize transfer of an exploitation license with the approval of the sponsoring party and the Authority and the payment of a transfer fee. It would provide limits on the duration of exploitation licenses and would set out minimum and maximum work requirements, the applicable amount of such work requirements to be stipulated in an annex to the convention.

Appendix C, applicable solely to the International Trusteeship Area, would reaffirm the Trustee's exclusive right, in its discretion, to approve or disapprove applications for exploration and exploitation licenses and to use any system for this purpose. It would establish the term of the exploitation license and conditions, if any, under which it might be renewed, provided that continuance after the first 15 years is contingent upon achieving commercial production. Finally, appendix C would impose proration and set work requirements above the minimums specified in appendix A.

Appendix D would provide that the net income, after administrative expenses of the Authority, would be devoted to the economic advancement of developing states parties to the convention and would be divided among a list of stipulated international and regional development organizations, the list to indicate the percentages assigned to each organization.

Appendix E would stipulate the formula for determining the six most industrially advanced contracting parties for purposes of designation to the Council.

Annexes to the convention would be prepared by the Rules and Recommended Practices Commission, submitted for comments to the contracting parties and to the Council for adoption and would come into force unless more than one-third of the contracting parties disapproved within 3 months. In addition to fixing the level, basis, and accounting procedures for determining international fees and other forms of payment within the ranges specified in appendix A and establishing work requirements for the area beyond the Trusteeship Area within the ranges specified in appendix B, annexes could establish criteria for defining the technical and financial competence of applicants for licenses and would assure that all exploration and exploitation activities and deep drilling would be conducted with strict and adequate safeguards for the protection of human life and safety, the marine environment, and living marine organisms. Annexes would be drawn up to prevent or reduce to acceptable limits interference arising from exploration and exploitation activities with other uses and users of the marine environment, assure safe design and construction of fixed exploration and exploitation installations and equipment, and other related matters. Any contracting party believing that a provision of an annex could not be reasonably applied to it because of special circumstances might seek a waiver from the Operations Commission.

The convention would provide for due protection of the integrity of investments in the International Seabed Area made prior to the coming into force of the convention. Authorizations by a contracting party to exploit mineral resources of the International Seabed Area granted prior to July 1, 1970, would be continued without change after the coming into force

of the convention, with the contracting parties being obligated to pay the production requirements provided under the convention. New activities under such authorizations would be subject to the regulatory requirements of the convention relating to pollution and unjustifiable interference with other uses of the marine environment. With respect to authorizations granted after July 1, 1970, the authorizing contracting party would be bound either to issue a new license in its capacity as Trustee or, in the area beyond, to sponsor the licensee's application for a new license from the International Seabed Resource Authority. A new license issued by a Trustee would include the same terms and conditions as the previous authorization, and the Trustee would be responsible for compliance with the increased obligations resulting from the application of the convention. Moreover, any contracting party authorizing activities after July 1, 1970, would be required to compensate the licensee for any investment losses resulting from the application of the convention.

(63 Dept. of State Bulletin 213 (1970).)

#### NATIONAL JURISDICTION

*Judicial Assistance: Letters Rogatory* (6 Whiteman's Digest, Ch. XIV, §12)

On April 24, 1970, the Department of State transmitted to all Embassies in Washington a note concerning the processing of letters rogatory. The following are excerpts from that note:

The Secretary of State presents his compliments to Their Excellencies and Messieurs the Chiefs of Mission and has the honor to bring to their attention certain requirements in connection with requests for the taking of testimony and the service of legal process through the instrumentality of letters rogatory. These requirements are being established to facilitate assistance to courts outside of the United States desiring these services.

With respect to the taking of testimony from witnesses in the United States, it will be very much appreciated if letters rogatory can be accompanied by written interrogatories which can be posed by the Commissioner who is appointed to elicit the information. In lieu of written interrogatories, letters rogatory should include a comprehensive summary of the case and explain exactly what information is desired by the court. One or the other of these actions is necessary for the guidance of the Commissioner. The letters rogatory as well as the written interrogatories and accompanying documents must be translated into the English language.

Under the judicial system of the United States, the United States Marshal must leave a copy of the document which is served with the person on whom service is effected. Therefore, it is necessary that two copies of the document for service be submitted to the Department for transmittal to the Department of Justice. A description of and a summary of the document for service together with the name of the Government agency re-

questing service should be included in the covering letters rogatory. The letters rogatory and all accompanying documents must be translated into the English language and the appropriate translation appended to the pertinent document.

It has been noted on occasion that requests for service of legal process are received in the Department after the date of appearance or the scheduled trial date. In the United States such a circumstance prevents timely service and no action can be taken on the request unless the requesting tribunal specifies that under its procedures service after the fact constitutes no legal barrier.

Similar procedures will be prescribed under the Convention on the Service of Judicial and Extrajudicial Documents to which some of the addressees of this note are participating parties. This will be the subject of a separate note.

#### NATIONALITY

##### *Dual or Multiple Nationality; Loss of Nationality* (8 Whiteman's Digest, Ch. XXI, §§8, 21)

The following Memorandum was prepared by the Office of the Legal Adviser, Department of State, for the guidance of officers of the Department in responding to inquiries on dual nationality:

Dual or multiple nationality is a status applicable to many citizens of the United States as well as many citizens of other countries. Dual nationality results from the fact that there is no uniform rule of international law relating to the acquisition or loss of nationality. International law recognizes the right of each country to determine how its nationality may be acquired or lost. Each country has its own laws on the subject and its nationality is conferred upon individuals or divested on the basis of its own independent domestic policy. Individuals may be clothed with more than one nationality not by preference on their part but by reason of the operation of these different laws. The United States nationality laws confer United States nationality both by birth in the United States, and by birth outside the United States if one or both parents are American citizens and certain other conditions are met.

Probably the largest category of dual nationals is comprised of immigrants to the United States who, after the required period of residence, acquire United States citizenship but do not thereby lose the citizenship of their country of origin under that country's laws. It is extremely difficult to divest oneself of the nationality of many countries by reason of those countries' laws on loss of nationality. In such countries the voluntary acquisition of another nationality may not automatically result in loss of the nationality of the country of origin. There are approximately 300,000 immigrants to the United States each year and most of these subsequently acquire United States citizenship through naturalization.

Another large category of dual nationals consists of children born in one country of parents who are nationals of another country. For example, children born in the United States acquire United States citizenship even though neither parent is a United States citizen. Similarly, many children born abroad of parents one or both of whom are United States citizens, in addition to acquiring United States citizenship, acquire the citizenship of the country in which they are born.

Dual nationality also occurs when a child who is a national of one state becomes a national of another state by reason of his parents' naturalization or when another nationality is automatically acquired with no application therefore by the individual concerned, such as by marriage to an alien.

Another example of nationality acquired without application may be found in Israel where an undetermined number of Jews have become citizens of Israel through operation of Israeli law without specifically applying for citizenship. The Law of Return of Israel accords to every otherwise qualified Jew the right to immigrate to Israel. This right is accorded to those Jews who express the desire to settle in Israel either by the issuance of an immigrant visa or, if the person is in Israel in some other status, by his adjustment of status to that of a permanent resident of Israel. Regardless of their origin, Jews settling in Israel by these procedures become Israeli nationals under the Israeli Nationality Law by reason of their "return." Such Jews may avoid becoming nationals of Israel if they take affirmative action to declare that they do not desire to become Israeli nationals in connection with their entry as immigrants or before their status as permanent residents becomes final. In view of the above, those United States citizen Jews who have traveled to Israel on an immigrant visa or have adjusted their status to that of permanent residents of Israel without taking affirmative action to decline Israeli nationality are automatically considered Israeli nationals by Israel and may therefore be holders of both Israeli and United States passports. (Indeed, the U.S. requires that persons it considers United States citizens use a U.S. passport to enter or leave the United States, regardless of what other nationality they may have. Israel has a corresponding requirement.) Such persons are not considered to have lost their United States nationality because they did not apply for naturalization as Israeli citizens and because their omission in not taking affirmative action to decline Israeli nationality is not considered to amount to voluntary relinquishment of United States citizenship.

(Memorandum on file in the Office of the Legal Adviser,  
Department of State.)

#### ARMED CONFLICT

##### *Prohibited Weapons* (10 Whiteman's *Digest*, Ch. XXIX, §14)

On August 19, 1970, the President submitted to the Senate for its advice and consent to ratification the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological

Methods of Warfare (Geneva Protocol) signed at Geneva, June 17, 1925.<sup>1</sup> The President's letter of transmittal, and the accompanying report of the Secretary of State, were as follows:

PRESIDENT NIXON'S MESSAGE

*To the Senate of the United States:*

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva June 17, 1925. I transmit also the report by the Secretary of State which sets forth the understandings and the proposed reservation of the United States with respect to the Protocol.

In submitting this Protocol for approval, I consider it desirable and appropriate to make the following statements:

—The United States has renounced the first-use of lethal and incapacitating chemical weapons.

—The United States has renounced any use of biological and toxin weapons.

—Our biological and toxin programs will be confined to research for defensive purposes, strictly defined. By the example we set, we hope to contribute to an atmosphere of peace, understanding and confidence between nations and among men. The policy of the United States Government is to support international efforts to limit biological and toxin research programs to defensive purposes.

—The United States will seek further agreement on effective arms-control measures in the field of biological and chemical warfare.

Today, there are 85 parties, including all other major powers, to this basic international agreement which the United States proposed and signed in 1925. The United States always has observed the principles and objectives of this Protocol.

I consider it essential that the United States now become a party to this Protocol, and urge the Senate to give its advice and consent to ratification with the reservation set forth in the Secretary's report.

RICHARD NIXON

THE WHITE HOUSE,  
August 19, 1970.

SECRETARY ROGERS' REPORT

AUGUST 11, 1970

THE PRESIDENT: I have the honor to submit to you, with the recommendation that it be transmitted to the Senate for advice and consent to ratification, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva June 17, 1925. The United States proposed the Protocol in 1925 and submitted it to the Senate in 1926. Although the Senate never voted

<sup>1</sup> 94 League of Nations Treaty Series 65; 25 A.J.I.L. Supp. 94 (1931); reprinted at 61 Dept. of State Bulletin 541 (1969); 64 A.J.I.L. 387 (1970).

on the question of ratifying the Protocol, which was returned to the President in 1947, the United States has always supported its principles and objectives and has pledged itself internationally to observe these principles. At present there are 85 parties to the Protocol, the most recent of which, Japan, became a party on May 21, 1970. The United States is the only major military power which is not a party.

Recent support of the principles and objectives of the Protocol was given by the United States in 1966, 1968 and 1969 at the United Nations. The United States has voted in the General Assembly for resolutions which called for "strict observance by all States of the principles and objectives of the Protocol" and invited "all States to accede to" the Protocol.

The Protocol prohibits the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices and bacteriological methods of warfare. The Protocol is the basic international agreement in this field, and its principles have been observed in almost all armed conflicts since 1925 by parties and non-parties alike.

While the Protocol itself speaks in terms of flat prohibitions on the use of chemical and bacteriological agents in war, thirty-nine States (including France, the Union of Soviet Socialist Republics, and the United Kingdom) have ratified or acceded with reservations. The reservations of most of the reserving States assert that the Protocol is binding on them only with respect to other parties to the Protocol and limit the prohibitions to no first use.

It is proposed that the Senate give its advice and consent to ratification subject to a reservation as follows:

That the said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol.

This reservation would permit the retaliatory use by the United States of chemical weapons and agents, but would not limit in any way the Protocol's prohibition with respect to biological weapons.

Ratification of the Protocol as qualified by the proposed reservation would put the United States in the following position:

—unlike France, the Union of Soviet Socialist Republics, the United Kingdom, and most other reserving States, the United States would not assert by reservation a limitation of its obligations under the Protocol to the Parties thereto.

—like France, the Union of Soviet Socialist Republics, the United Kingdom, and other reserving States, the United States would reserve the right to use the prohibited chemical agents in retaliation against any enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol.

—unlike France, the Union of Soviet Socialist Republics, the United Kingdom, and all but one other reserving State, the United States would



not assert by reservation the right to use bacteriological methods of warfare in retaliation.

The United States considers that the term "bacteriological methods of warfare" as used in the Protocol encompasses all biological methods of warfare and the use in warfare of toxins however produced.

It is the United States understanding of the Protocol that it does not prohibit the use in war of riot-control agents and chemical herbicides. Smoke, flame, and napalm are also not covered by the Protocol.

The subject of arms control as it relates to chemical warfare and biological warfare is of continuing and increasing importance in the international field. At the 1969 summer session of the Conference of the Committee on Disarmament, the United Kingdom presented a draft convention establishing a comprehensive ban on the development, production, stockpiling, and use of biological methods of warfare. In accordance with your announcement of November 25, 1969 that the United States would associate itself with the principles and objectives of that draft convention, we have taken an active role in its negotiation.<sup>1</sup> Other proposals on the subject of chemical and biological warfare have also been introduced in the United Nations General Assembly and the Conference of the Committee on Disarmament by other Governments.

Members of the Conference of the Committee on Disarmament have indicated the need for universal adherence to the Protocol as a condition precedent to agreement on more comprehensive measures.

The United States should become a party to the Protocol to strengthen the general prohibitions on the use of chemical warfare and biological warfare and to facilitate our participation in the formulation of new arms control provisions in this area.

Respectfully submitted,  
WILLIAM P. ROGERS

(Sen. Ex. J, 91st Cong., 2d Sess. III, V (1970); reprinted at 63 Dept. of State Bulletin 273 (1970).)

#### THE UNITED NATIONS

*Promotion of International Economic and Social Co-operation: International Co-operation in Economic, Social, Cultural and Humanitarian Fields* (13 Whiteman's Digest, Ch. XXXIX, §10)

On October 1, 1970, the United States Delegation to the United Nations Commission on Narcotic Drugs submitted for consideration by that body a working paper, the text of which is as follows:

#### THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961

##### —ITS WEAKNESSES AND SUGGESTED AMENDMENTS

The continuous and appalling increase in the abuse of narcotic drugs requires a close look at the principal treaty designed to prevent illicit

<sup>1</sup> For text of President Nixon's statement of Nov. 25, 1969, see 61 Dept. of State Bulletin 541 (1969) and correction at 62 Dept. of State Bulletin 272 (1970).

traffic—the Single Convention on Narcotic Drugs, 1961. In spite of the newness of that Convention—it was adopted in 1961 and has been in force as an international instrument since December 13, 1964—the illicit traffic in drugs and their widespread abuse continue to increase. The United States is convinced that the Single Convention should be amended to curb, and eventually, to prevent entirely the over-production of opium and manufactured drugs having similar effects.

The Convention's weaknesses may be summarized under three general headings:

1. It rests essentially upon faithful cooperation by all parties in the context of their national decisions rather than upon effective international measures.

2. The limited authority given the international control bodies—the Commission on Narcotic Drugs and the International Narcotics Control Board—is apparently inadequate to halt or even to slow down the increasing illicit traffic.

3. The Convention lacks a precise obligation, machinery and incentives for preventing over-production of drugs.

Looking at these three general shortcomings in a closer perspective it can be seen that they are inherent in the provisions of the Convention, especially with respect to opium and its derivatives, such as heroin.

First, the efforts made in the 1953 Protocol to limit the production of opium to seven named countries were rejected by the provisions of the Single Convention. Instead of continuing the international effort to limit the number of countries permitted to produce opium for export, the 1961 Convention permits any country to do so—with certain limitations. Instead of firm international commitments limiting the production of opium the Convention leaves the determination of such matters to the individual parties. Important decisions, such as whether manufacture and trade in the most dangerous drugs, heroin for example, will be permitted is left entirely to the opinion of each individual party. Whether a Party will initiate the production of opium or increase its existing production is left to the discretion of that Party subject to only very general guidelines regarding over-production.

Second, the powers of the international control bodies are essentially to make recommendations. Aside from the authority of the Commission to add new drugs to the Schedules annexed to the Convention or transfer a drug from one Schedule to another, the Commission may only *consider* matters pertaining to the aims of the Convention, call certain matters to the attention of the Board, make recommendations regarding the implementation of the Convention, and draw the attention of non-parties to decisions and recommendations made under the Convention.

The Board's authority is similarly limited. It may study, ask questions about and make determinations with respect to estimates submitted on drug requirements and make recommendations thereon. It may make recommendations to the Parties that they stop the import of drugs, the export of drugs, or both from a country or territory. It may also notify

countries to stop exports to a country which has imported drugs exceeding its estimates. It is powerless, however, to conduct on the spot investigations unless invited to do so. Its sources of information rest almost completely upon governments. There are very limited possibilities for checking of the accuracy or completeness of information submitted.

Third, the Convention provides neither the effective machinery nor the incentive to prevent over-production which feeds the illicit traffic in opium and its derivatives. The requirements for reporting are such that except for imports and exports of drugs and poppy straw—which must be reported quarterly—at least a year elapses before the Board can be aware of an over-production of opium or of synthetic drugs having the same effects. Such over-production becomes a source and pressure for illicit traffic.

### *Suggested Amendments*

The amendments being considered by the United States have two basic objectives: (1) to establish enforceable controls and control machinery to assure the necessary limitations, both on producers and manufacturers, and (2) to provide inducements to parties to faithfully perform all their treaty obligations as well as assistance so that they can take the necessary steps to limit the production of opium and operate effective domestic narcotic control systems. These objectives would be accomplished by the following measures:

1. A new Annex to the Single Convention would specify quotas not only for the cultivation of the opium poppy and the production of opium, but also for the manufacture and export of opium derivatives and synthetic substances having effects similar to opium or its derivatives;

2. The Commission would be authorized (a) to decide annually the quotas for the following opium year; (b) to collect and verify information required for performing its functions, including the authority to send inspectors into a State or territory producing opium or manufacturing narcotic drugs to investigate conditions therein; (c) to adopt remedial measures if a State seriously exceeds an approved quota; (d) to administer a fund to provide significant assistance to Governments desiring to limit opium production or to improve domestic control systems; and (e) to collaborate with and assist other international organizations and Governments in the prevention of addiction and in therapeutic measures such as education, rehabilitation and social programs. It is recognized that an Implementation Assistance Fund under the Single Convention may not be necessary if the proposed Special United Nations Fund for Drug Control is established and becomes operative.

The United States believes that these new measures of control, which apply equally to producers and manufacturers, and these special inducements would be highly effective in curbing, if not completely eliminating, surpluses and illicit sources which are the bases of the illicit traffic. There might well be differences of opinion regarding the need or acceptability of some of the proposed amendments. This should not prevent such com-

mon agreement as is essential for success in the struggle against the illicit traffic.

The United States considers the illicit traffic in opium and similar substances to be one of the most dangerous and urgent of the threats facing the world. Recognition of the need for closing all gaps in the existing international co-operation to prevent drug abuse is apparent in the scheduling of the conference in Vienna in January 1971 for the adoption of an international instrument to control psychotropic substances. We expect in the near future to request the Secretary-General of the U.N. to transmit formal amendment proposals to all parties to the Single Convention and to ECOSOC pursuant to Article 47 of the Single Convention. The United States believes that ECOSOC should call as quickly as possible for a plenipotentiary conference to consider those amendments.

(U.N. Doc. E/CN.7/L.341.)

## JUDICIAL DECISIONS

ALONA E. EVANS

*Act of state—expropriation—Cuba—Hickenlooper Amendment—Cuban Assets Control Regulations—claims against Cuba under the International Claims Settlement Act, 1949—the law of the United States*

BANCO NACIONAL DE CUBA v. FIRST NATIONAL CITY BANK OF NEW YORK. 431 F.2d 394.

U.S. Court of Appeals, 2d Cir., July 16, 1970. Cert. granted, No. 846 (Jan. 25, 1971); remanded for reconsideration without opinion on the merits.

Banco Nacional de Cuba (Banco Nacional) sought to recover proceeds realized from the sale of assets pledged to The First National City Bank (Citibank) as collateral for a loan assumed by Banco Nacional. Citibank counterclaimed and asserted a right to set off against the proceeds an amount up to the value of its Cuban properties allegedly expropriated by the Cuban Government in violation of international law.

Relying on the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*,<sup>1</sup> the Second Circuit held unanimously that the act of state doctrine precluded the Judicial Branch from examining the validity under international law of the taking by Cuba of Citibank properties within Cuban territory. The court concluded that the Hickenlooper Amendment,<sup>2</sup> which qualifies the act of state doctrine, did not apply to the Citibank counterclaim because the Amendment is only applicable to actions involving claims of title or other right to property (or its proceeds) which was allegedly expropriated by a foreign government within its territory in violation of international law, and which was subsequently marketed (or attempted to be marketed) in a transaction occurring in some respect in the United States. Moreover, allowing Citibank to recover would, the court also concluded, contravene the Executive and Congressional policy of blocking

\* Case report by Peter D. Trooboff, Esq.

<sup>1</sup> 376 U.S. 398 (1964); 58 A.J.I.L. 779 (1964).

<sup>2</sup> The pertinent part of the Hickenlooper Amendment reads as follows: "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection . . ." 22 U.S.C. §2370(e)(2) (Supp. V, 1970), Foreign Assistance Act of 1965, Pub. L. 89-171, §301(d)(2) (Sept. 6, 1965), re-enacting with amendments Foreign Assistance Act of 1964, Pub. L. 88-633, §301(d)(4) (Oct. 7, 1964). See also 59 A.J.I.L. 98, 899 (1965).

Cuban assets in the United States and of permitting United States persons having claims against the Cuban Government to submit them for validation and determination of amount by the Foreign Claims Settlement Commission.

In 1960 Banco Nacional, the Cuban Government's central bank, assumed a \$15 million loan for which it had previously pledged assets as security. In July, 1960, after repaying \$5 million of the loan, Banco Nacional renegotiated the remaining debt with Citibank as a new \$10 million loan. Citibank released one third of the pledged collateral and agreed not to demand repayment of the new loan for one year.

In September, 1960, the Cuban Government occupied and nationalized Citibank's eleven branch offices in Cuba. Citibank immediately sold the collateral securing the \$10 million Banco Nacional loan. The amount realized on the sale, between \$11.8 and \$12.4 million, exceeded the principal sum of the Banco Nacional debt plus interest. The parties stipulated that the value of Citibank's nationalized property exceeded the amount of the excess collateral.

In the District Court Judge Bryan recognized that the act of state doctrine as applied in *Banco Nacional de Cuba v. Sabbatino* precluded "inquiry into the legality *vel non* of the [Cuban] expropriations . . . involved" <sup>3</sup> in the Citibank counterclaim. But he held that the *Sabbatino* decision had been legislatively overruled "for all practical purposes" by the Hickenlooper Amendment. Proceeding to the merits, as he held that the Hickenlooper Amendment required, Judge Bryan determined that the Cuban nationalization of Citibank's properties violated international law because adequate compensation was not provided and because the nationalization was a reprisal evincing discrimination against nationals of the United States.<sup>4</sup> For these reasons the District Court granted summary judgment to Citibank.

On appeal the Second Circuit agreed with the District Court that the Cuban nationalization of Citibank properties was a "taking of property" within the meaning of the *Sabbatino* opinion <sup>5</sup> and that the decision in that case precluded the Judicial Branch from examining the validity of the Cuban taking of Citibank's properties on the ground that the taking violated customary international law.

Turning to the Hickenlooper Amendment, Chief Judge Lumbard in his opinion for the court reviewed extensively the facts before the Court in *Sabbatino* and the legislative history of that Amendment. He explained that "[i]t is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarly related to the facts of the *Sabbatino* case." <sup>6</sup> According to the court, legislative statements by both supporters and opponents of the Amendment indicate that the legislation was narrowly drafted to apply to cases in which property was nationalized abroad

<sup>3</sup> *Banco Nacional de Cuba v. The First National City Bank*, 270 F.Supp. 1004, 1007 (S.D.N.Y., 1967); 62 A.J.I.L. 182 (1968).

<sup>4</sup> 270 F.Supp. at 1007-1010.

<sup>5</sup> 431 F.2d at 399, quoting 376 U.S. at 428.

<sup>6</sup> *Ibid.* 400.

in violation of international law and the property itself (or its traceable proceeds) came to the United States. The court noted that Senator Hickenlooper himself emphasized in introducing the Amendment that its purpose was to prevent the United States from becoming a "thieves' market" for expropriated property. The Second Circuit concluded that the Amendment was not designed to provide recovery to any person whose property was expropriated by a foreign government and who either was in possession of or could find some assets of the expropriating government in the United States to serve as a jurisdictional basis for claiming before an American court that the foreign expropriation was in violation of international law. The court referred to an unsuccessful attempt to broaden the Amendment to provide for claims such as the one by Citibank, which had failed to win Congressional approval.

The Second Circuit concluded that the Hickenlooper Amendment abrogated the act of state doctrine only "when some other entity attempted to market . . . American firms' expropriated property and some aspect of such an attempted transaction took place in this country."<sup>7</sup> The court found "no basis for holding that . . . [Citibank's counterclaim against Banco Nacional was] one 'in which a claim of title or other right to property . . . [was being] asserted by [Citibank] . . . based upon (or traced through) a confiscation or other taking . . .'"<sup>8</sup>

In addition, Chief Judge Lumbard stated that the interpretation sought by Citibank would be contrary to the Federal policy implemented through the Cuban Assets Control Regulations<sup>9</sup> and the 1964 and 1965 amendments to the International Claims Settlement Act of 1949.<sup>10</sup> Under the Regulations all Cuban assets in the United States were blocked as of July 8, 1963, and could not be released without a license from the Treasury Department. According to the court, Citibank avoided these blocking provisions by selling the Banco Nacional assets before the Cuban Regulations became effective and recovered "dollar-for-dollar on the loan transaction . . ."<sup>11</sup> By its counterclaim, the court concluded, Citibank sought to recover "something more"<sup>12</sup>—amounts claimed for expropriation of its Cuban properties.

Under the 1964 and 1965 amendments to the International Claims Settlement Act, the Foreign Claims Settlement Commission has authority to validate and determine the amount of claims United States persons have against the Cuban Government. The Second Circuit found that the purpose of this procedure is to permit at some future date an equitable distribution of Cuban assets which are now blocked and might ultimately be vested in the United States Government for use by the Commission to pay validated claims against the Cuban Government. The court concluded that if it permitted Citibank to recover on its counterclaim, it might, in effect, be giving Citibank both a preference over persons who have pre-

<sup>7</sup> *Ibid.* 402.

<sup>8</sup> *Ibid.*

<sup>9</sup> 31 C.F.R. §515 *et seq.* (1970), promulgated under the Trading with the Enemy Act of 1917, as amended, 50 U.S.C. App. §5(b) (1964).

<sup>10</sup> 22 U.S.C. §§1643-1643k (Supp. V, 1970), as amended by Pub. L. 89-262, §1 (Oct. 19, 1965).

<sup>11</sup> 431 F.2d 404.

<sup>12</sup> *Ibid.*

sented claims against the Cuban Government to the Commission and a large financial windfall. The court's action, allowing Banco Nacional to recover from Citibank (in an amount to be determined by the district court on remand), increases the blocked assets potentially available to all United States claimants against the Cuban Government.

*Jurisdiction—judicial determination of whether commercial arbitration should be held in United States or abroad—Treaty of Friendship, Commerce and Navigation with Federal Republic of Germany, 1954*

BATSON YARN AND FABRICS MACHINERY GROUP, INC. v. SAURER-ALLMA GmbH-ALLGAUER MASCHINENBAU. 311 F. Supp. 68.

U.S. Dist. Ct., South Carolina, March 27, 1970.

Plaintiff, a South Carolina corporation which was the exclusive distributor in the United States of machinery manufactured by defendant, a West German corporation, brought an action for damages for an alleged breach of contract. The defendant moved to dismiss the action on the ground that plaintiff had failed to submit the claim to arbitration, as provided in the contract, and in the alternative, defendant sought an order staying the action until the cause could be submitted to arbitration. The contract provided for arbitration of disputes according to the rules of the International Chamber of Commerce if proceedings were instituted outside the United States, or according to the rules of the American Arbitration Association if proceedings were to be conducted in the United States, unless the parties agreed in the latter situation to follow the rules of the International Chamber of Commerce. The defendant sought to stay plaintiff's Requests for Admission and answers to Interrogatories pending arbitration in Paris before the International Chamber of Commerce.<sup>1</sup> Plaintiff filed a counter-motion to stay the proceedings abroad and to institute arbitration proceedings in the United States before the American Arbitration Association.<sup>2</sup> The District Court granted defendant's motion and denied plaintiff's motion.

Judge Russell said:

... I am convinced the position of the defendant represents the proper solution of the conflicting claims of the parties over the arbitration proceedings. The contract required a choice to be made between two agencies for conducting such proceedings. Absent any order of priority in such choice, it would appear that the party first demanding arbitration should have the right to exercise the right of choice of such arbitrating agency and designate the arbitrating agency to resolve the dispute.<sup>3</sup>

There was no question as to the power of the court to grant a stay pending arbitration under Section 3 of the Federal Arbitration Act, "... whether the arbitration is to be in the United States or in a foreign country."<sup>4</sup> The court continued:

<sup>1</sup> 9 U.S.C. §3. Cited by court.

<sup>3</sup> 311 F. Supp. 68 at 74-75.

<sup>2</sup> *Ibid.*, §4. Cited by court.

<sup>4</sup> *Ibid.*



There is another compelling reason in this case why plaintiff's objection to a stay pending arbitration abroad cannot be sustained. Under an existing Treaty of "Friendship, Commerce and Navigation" between the United States of America and the Federal Republic of Germany, signed October 29, 1954, and entered into force July 14, 1956, it is provided:

"Contracts entered into between nationals or companies of either party and nationals or companies of the other party that provide for settlement by arbitration of controversies shall not be deemed unenforceable within the territories of such other party merely on the grounds that the place designated for arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other party. Awards duly rendered pursuant to any such contracts which are final and enforceable under the laws of the place where rendered shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." 7 U.S.T. 1840 at p. 1845.<sup>5</sup>

This provision, incorporated in a treaty duly ratified, has the force of law and "is, of course, 'the supreme Law of the Land.'" *Samann v. Commissioner of Internal Revenue* (4th Cir. 1963) 313 F.2d 461, 463. To hold in this case that arbitration abroad of a dispute under a contract entered into between a German national or company and an American company cannot be had would nullify the plain terms of this Treaty.<sup>6</sup>

*Trading with the Enemy Act—protection of interest of United States firm in trademarks registered by firm in German Democratic Republic*

D. M. & ANTIQUE IMPORT CORP. v. ROYAL SAXE CORP. 311 F. Supp. 1261.

U.S. Dist. Ct., Southern Dist., New York, Nov. 14, 1969; Supplemental Opinion April 22, 1970, as modified, April 22, 1970.

Plaintiff, United States distributor for an East German china and porcelain manufacturer, sought to bar the defendant from asserting rights to the use of two registered trademarks consisting of crossed swords and crossed swords within a shield, the crossed swords motif having long been associated with porcelain manufactured in Meissen, Germany (now in the German Democratic Republic). Plaintiff asked for a declaratory judgment that defendant had no rights in the trademarks and that the Patent Office should cancel these trademarks, for an injunction restraining defendant and its United States distributor from interfering with plaintiff's import business, and for damages for defendant's allegedly false statements made in registering said trademarks and in describing the origin of goods which it sells. The District Court granted plaintiff's motions for summary judgment, for the declaratory judgment, and also for injunctive relief.

<sup>5</sup> Art. VI(2); 273 U.N. Treaty Series 3. The text of Art. VI, par. 2, as quoted in the opinion of the court, is inaccurate in a number of respects.

<sup>6</sup> 311 F. Supp. 68 at 76.

Defendant argued *inter alia* that plaintiff had no standing to bring this action under 8 C.F.R. §507.46(a),<sup>1</sup> a regulation implementing the Trading With the Enemy Act (50 U.S.C. App. §5(b)). This argument was founded on the theory that plaintiff was asserting the rights of V.E.B.-S.P. (Staatliche Porzellan Manufaktur), successor to the original manufacturer of Meissen porcelain or acting as its assignee. Judge Lasker held that "In the absence of any showing that D.M. is acting 'by or on behalf' of East German nationals—the type of transaction to which 8 C.F.R. §507.46(a) applies—Royal Saxe cannot rely on that provision to bar this action."<sup>2</sup> It was established to the satisfaction of the court that plaintiff had no relationship with S.P. apart from the purchase of merchandise from the latter for resale in the United States.

*Aliens—inheritance by foreign heirs of decedent in United States—proof of identity of foreign heirs—Consular Convention with Italy, 1878*

IN RE ESTATE OF SCARDIGLI. 467 Pac.2d 841.

Supreme Court, Washington, April 16, 1970.

An appeal was taken from an order issued by the Pierce County (Washington) Superior Court approving the final report and subsequent decree of distribution issued with regard to the settlement of claims to the estate of Attilio Scardigli who had died intestate. The estate was valued at \$150,000. Appellants, who were first cousins once removed of the decedent, challenged the admissibility of evidence establishing the identity of decedent's heirs in Italy, who as first cousins would have prior claim to the estate. The Italian Consul at Seattle, acting on behalf of the heirs resident in Italy, had supplied the court with a copy of the "family status" or official genealogical report on the family, together with a letter from the Mayor of the town of residence of the Italian heirs which established them as first cousins of the decedent. The consul translated this evidence and authenticated it in accordance with the provision of Article X of the 1878 Consular Convention with Italy.<sup>3</sup> Appellants argued that the convention provided for authentication by an American rather than an Italian consul and that the authentication furnished by the Italian Consul only consti-

<sup>1</sup> 8 C.F.R. §507.46(a) provides: "Any transaction, transfer, or the exercise of any right, power or privilege by or on behalf of or pursuant to the direction of Germany, or nationals of Germany with respect to any trademark or trade-name, or rights or interests therein or related thereto, which was in or registered in the United States on December 31, 1946, is prohibited, unless authorized by or on behalf of the Attorney General or the Director, Office of Alien Property." Quoted by the court. 311 F. Supp. 1261 at 1266. The court added that according to Sec. (b) the regulation applies only to East Germany. Footnotes by court omitted.

<sup>2</sup> *Ibid.* 1267.

<sup>3</sup> 20 Stat. 725. Art. X provides in part: "Copies of papers relative to such contracts and official documents of all kinds, whether originals, copies or translations, duly authenticated by the Consuls General, Consuls, Vice-Consuls and Consular Agents and sealed with the seal of office of the Consulate, shall be received as evidence in the United States and Italy." Quoted by court.

tuted a certification of the translation of the "family status." They also objected to admission of the Mayor's letter.

The Supreme Court found that in the matter of authentication of documents, the convention referred to consuls of the country of origin of the documents, hence the Italian Consul here. The court agreed that the letter from the Mayor did not qualify as an official document within the terms of the convention. The court remanded the case to the trial court for a determination of a question as to whether there were other first cousins of the decedent in Italy in addition to the respondents.

With regard to the function of the Italian Consul under the convention, Associate Justice Finley said:

Throughout the Convention the subject is the authority of Italian consular officials in this country and United States consular officials in Italy. We are convinced that the phrase refers to the power of Italian consular officials to authenticate Italian documents which shall then be introduced as evidence in courts of this country. Of course, it would not require a treaty to allow the introduction of documents authenticated by officials of the United States. We are also convinced that the consul did authenticate the document and translation, sealing it with the seal of his office. Any question about the sufficiency of the certificate is removed by the testimony of the consul in the trial court. The Consular Convention had the standing of a treaty, and as such was part of the "supreme law of the land," by which the "Judges in every State shall be bound." U.S. Const. art. VI. See *Vergnani v. Guidetti*, 308 Mass. 450, 32 N.E.2d 272 (1941).<sup>4</sup>

*Aliens—jurisdiction—claim based upon injury abroad while employed by United States corporation—forum non conveniens*

FIORENZA v. UNITED STATES STEEL INTERNATIONAL, LTD. 311 F. Supp. 117.

U.S. Dist. Ct., Southern Dist., New York, Dec. 17, 1969.

Plaintiff, an Italian national and a resident of Grand Bahama Island, brought an action for damages for injuries allegedly sustained while he was employed on Grand Bahama Island by United States Steel International, Ltd., a Delaware corporation with its principal place of business in New York. The present action followed plaintiff's unsuccessful attempts to sue the present defendant together with United States Steel International (N.Y.), Inc., as well as the latter separately. The first action was dismissed on jurisdictional grounds by the District Court for the Southern District of Florida in 1968. United States Steel International (N.Y.), Inc., was granted a motion for summary judgment in the second suit by the same court in 1969. In the present action, defendant moved for dismissal on the ground of *forum non conveniens*. The District Court denied the motion.

In a memorandum opinion, Judge Croake observed that the grounds for determining whether the principle of *forum non conveniens* is applicable

<sup>4</sup> 467 Pac.2d 841 at 844.

in a particular case were enunciated by the United States Supreme Court in *Gulf Oil Co. v. Gilbert*:

*The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. (Emphasis added; footnotes omitted.) . . . 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1946).<sup>1</sup>*

In support of its motion, defendant contended that the action should be brought in the Bahamas as all parties, witnesses, and evidence were there and as Bahamian law was applicable to the dispute. Defendant also urged that plaintiff was forum shopping with a view to harassing defendant. Plaintiff argued that he had no financial resources with which to bring a suit in the Bahamas and as there is no contingent fee system there, he would consequently be effectively barred from prosecuting his action there. He also suggested that there was some question as to the jurisdiction of the Bahamian courts over a suit brought by an alien against a foreign corporation.

Upon analysis of the arguments of both parties, Judge Croake said:

We find that the factor of the prospective unavailability of the alternate forum in the Bahamas outweighs the above factors relied on by defendant. The Supreme Court clearly indicated in *Gilbert* that the doctrine of *forum non conveniens* presupposes the existence of the alternate forum in which suit can be brought. 330 U.S. at 506-507, 67 S.Ct. at 842. When that alternate forum is not truly available for any reason, as in the instant case, the doctrine of *forum non conveniens* will not be applied to dismiss the action.<sup>2</sup>

*Jurisdiction—arbitration of maritime dispute—choice of law*

G. B. MICHAEL v. S.S. THANASIS. 311 F. Supp. 170.

U.S. Dist. Ct., Northern Dist. Cal., March 2, 1970.

Plaintiffs, German nationals, brought an action *in rem* and *in personam* for alleged damage to cargoes of copra which they owned. The cargoes, which were to be transported from the Philippines to Germany, were allegedly damaged by a fire on board the S.S. *Thanasis* while the vessel was in the Philippines. The vessel was owned by a Panamanian corporation, registered in Liberia, and under charter to a Philippine company. The charter party, which was executed in England, provided for arbitration of differences in London and also that all bills of lading should be subject to the provisions of the United States Carriage of Goods by Sea Act (46 U.S.C. §1300 *et seq.*)<sup>3</sup> After the complaint was filed, the vessel was taken into

<sup>1</sup> 311 F. Supp. 117 at 119-120.

<sup>2</sup> *Ibid.* 121. The court pointed out the similarity between the facts in this case and those in *Odita v. Elder Dempster Lines, Ltd.*, 286 F. Supp. 547 (S.D.N.Y., 1968), in which dismissal on grounds of *forum non conveniens* was denied. 63 A.J.I.L. 143 (1969).

<sup>3</sup> Footnote by court, 311 F. Supp. 170 at 175. Other footnotes by court omitted.

custody and then released to the owners' protection and indemnity underwriters on a letter of undertaking agreeing to satisfy any final decree up to \$100,000, together with interest and costs, or any lesser amount settled between the parties without entry of a final decree. Defendants then moved to stay the present proceedings pending arbitration of the dispute. Plaintiffs opposed this motion. The District Court granted defendants' motion and ordered that arbitration be held in London and be governed by United States law.

The defendants submitted two questions to the court: whether the provisions of the charter party, including the arbitration clause, were incorporated by reference into the bills of lading purchased by plaintiffs, and if so, whether such incorporation implicitly included the law governing the charter party. Judge Levin found that the charter party and the arbitration provision were incorporated into the bills of lading and binding upon the parties if they chose to arbitrate their dispute. An examination of the terms of the transaction between the parties, however, led the court to conclude that the law governing the execution of the charter party was not incorporated into the bills of lading; consequently, the arbitration provision of the charter party would be governed by the law governing the execution of the bills of lading. The plaintiffs, who did not wish to submit the dispute to arbitration, contended that the claim for damages was governed by English law because the charter party had been executed in England. The District Court disagreed on the ground that neither the charter party nor the bills of lading referred to the use of English law in regard to the settlement of disputes between the parties, and stated that the court could not properly incorporate English law implicitly into the terms of agreement where the parties had not done so explicitly.

Holding that the plaintiff's claim was an arbitrable one, the court had to determine the applicable law. The choices included the law of the Philippines, where the bills of lading were executed, where the damage occurred, and where the most contacts relevant to the dispute could be shown to exist; the law of Liberia, the flag state, which also governed residual matters according to the terms of the bills of lading; and the law of the United States, explicitly incorporated into the bills of lading (*i.e.*, Carriage of Goods by Sea Act) and which was also the law of the forum. The court ruled out Philippine and Liberian law as neither had been pleaded nor proved in the present case. It followed that American law applied, and under American law plaintiff's claim for damages was an arbitrable one.

With regard to plaintiffs' argument that English law applied and that the issue would not be arbitrable thereunder, Judge Levin, in a learned examination of relevant case law and authorities, concluded that arbitration would not be barred under current interpretations of English law, despite a contrary holding in *Savannah Sugar Refining Corp. v. S.S. Hudson Deep*, 288 F. Supp. 181 (S.D.N.Y., 1968). However, the present dispute was governed by American, not English law. Plaintiffs' attempt to show that defendants had waived their right to arbitration was not substantiated in the view of the court. Judge Levin also refused to dismiss the action on defendants' suggestion of *forum non conveniens* on the ground that, given

"the relative convenience of the parties and the best interests of justice,"<sup>4</sup> the court should retain jurisdiction over the case.<sup>5</sup>

*Territorial jurisdiction—status of Canal Zone as "foreign country"—smuggling of marijuana into United States*

UNITED STATES v. MATTHEWS. 427 F.2d 992.

U.S. Court of Appeals, 5th Cir., June 15, 1970.

The defendant was convicted of knowingly importing and bringing into the United States a quantity of marijuana in violation of 21 U.S.C. §176a. He appealed on two grounds: transportation of marijuana from the Canal Zone to Florida did not constitute "importation" within the meaning of the statute and the trial court's instructions to the jury regarding possession were not in accord with the Supreme Court's interpretation of §176a in *Leary v. United States*, 395 U.S. 6 (1969). The Court of Appeals held that there was some direct evidence of importation but reversed and remanded on the erroneous instruction.

With regard to the status of the Canal Zone in relation to the United States, the defendant contended that the Canal Zone is a territory of the United States and hence a part of this country, because "United States" as defined for purposes of §176a includes "the several States and Territories, and the District of Columbia";<sup>1</sup> consequently, no "importation" could occur "within" the United States so defined. Circuit Judge Dyer pointed out, however, that the Supreme Court had said in *Luckenbach S.S. Co. v. United States* that

for purposes connected with importation, immigration and ocean transportation between the United States and the Canal Zone, Congress required that ports in the latter be regarded as foreign ports.<sup>2</sup>

Judge Dyer continued:

This language further reinforces our own conclusion that in matters relating to transportation between the Canal Zone and a state in the United States the Canal Zone is to be regarded as a foreign country unless there is a specific provision to the contrary. Cf. *Ares v. S/S Colon*, D. Canal Zone 1967, 269 F. Supp. 763,<sup>3</sup> relying on *Luckenbach* and holding that although Canal Zone ports might be considered as ports of the United States for some purposes, a Panamanian corporation furnishing supplies to foreign ships in those ports was not an "American supplier" to whom the priority of the Ship Mortgage Act, 46 U.S.C.A. §951 was afforded. Similarly, while it may be that for some purposes in 21 U.S.C.A. §176a the Canal Zone is a territory or part of the United States over which Congress has legislated concerning the inflow of marijuana and drugs, it is not a part of the United States for purposes of determining whether or not goods transported

<sup>4</sup> *Ibid.* 182.

<sup>5</sup> Citing *Gkias v. Steamship Yiosonas*, 387 F.2d 460, 462, 464 (4th Cir., 1967); 62 A.J.I.L. 976 (1968).

<sup>1</sup> 21 U.S.C.A. §171(b). Quoted by court, 427 F.2d 992 at 993.

<sup>2</sup> 280 U.S. 173 at 180-181. Quoted by court, 427 F.2d 992 at 995.

<sup>3</sup> 62 A.J.I.L. 509 (1968).

from there to a state in the United States are "imported" into the United States.<sup>4</sup>

*Act of state—Canadian regulations respecting trading with enemy—  
New York courts may not adjudge validity of order vesting title to  
shares of stock in Custodian of Department of Secretary of State  
of Canada—sovereign immunity*

OLINER v. CANADIAN PACIFIC RAILWAY COMPANY. 311 N.Y.S.2d 429.  
Supreme Court, App. Div., First Dept., New York, June 9, 1970.

Plaintiff sought a judgment declaring him to be the rightful owner of 124 shares of ordinary capital stock issued by the Canadian Pacific Railway Company, a Canadian corporation licensed to do business in New York State. The second defendant was the Bank of Montreal Trust Company, a New York corporation which was stock transfer agent for Canadian Pacific. The stock certificates were originally issued to two Czech nationals. The Canadian Government vested the certificates in the Custodian of the Department of the Secretary of State of Canada pursuant to that Government's Regulations Respecting Trading with the Enemy which were enacted in September, 1939, and all dividends thereon were paid to the Custodian after 1939. In 1937 title to the certificates was transferred to the Zivnostenska Banka, a Czech institution, which deposited them with the First National Bank in New York City. The Zivnostenska Banka was nationalized in 1950. Thereafter, the State of New York appointed a permanent Receiver to take control of the assets of the Czech bank located in New York, including the certificates for the 124 shares of stock. The Receiver tried to acquire title to the certificates, but the Custodian refused to transfer title. In January, 1968, the Receiver sold these and other certificates to plaintiff for \$150 "... without warranty or representation . . . as to value, title or marketability."<sup>1</sup> When plaintiff found that he could not register his ownership of the principal certificates because title to them was vested in the Custodian, he brought the present action.

The defendants, anticipating the possibility of facing double liability, undertook to bring the Custodian into the case, so that all necessary parties would be before the court. The Custodian did not appear but commenced instead an action against plaintiff and defendants in the Exchequer Court of Canada in which he sought a declaration that title to the certificates was vested in him. Plaintiff and defendants were served in that action, but plaintiff did not appear. In November, 1969, plaintiff was granted an order vacating a previous order staying prosecution of plaintiff's action for a year and restraining defendants from transferring the certificates until the issue of ownership was decided. This order was not entered as plaintiff did not furnish the necessary surety bond. Defendants then moved to dismiss the present action on grounds of the absence of a necessary party, i.e. the Custodian, and of *forum non conveniens*. The motion was denied

<sup>4</sup> 427 F.2d 992 at 995.

<sup>1</sup> 311 N.Y.S.2d 429 at 431.

by the Supreme Court, New York County. On appeal, the Appellate Division reversed this order and granted defendants' motion to dismiss.

At the outset, plaintiff argued that a New York court had jurisdiction to determine title to the certificates because they were physically located in this State. Justice Capozzoli pointed out, however, that Section 8-106 of the Uniform Commercial Code provides: "The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer."<sup>2</sup> The court continued:

Where the question is one of ownership of the certificates the situs is the domicile of the issuer. This is settled Canadian law. (*Braun v. The Custodian*, [1944] Ex.C.R. 30) (Exchequer Court of Canada) *aff'd* [1944] S.C.R. 339 (Supreme Court of Canada); *Hunt v. The Queen*, [1968] S.C.R. 323 (Supreme Court of Canada.)<sup>3</sup>

As the issuer here was a Canadian corporation, plaintiff's right to title to the shares was governed by Canadian law. The court added:

The conclusion reached by the Canadian Courts conforms with the law in the United States and New York State. (*Jellenik v. Huron Copper Mining Company*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1899); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746 (2d Cir. 1922); *Holmes v. Camp*, 219 N.Y. 359, 114 N.E. 841 (1916).)<sup>4</sup>

Justice Capozzoli then considered the issue of whether the New York courts could inquire into the Canadian Government's vesting order. He said:

It must be recognized that the action of the Canadian Government in providing that the shares vested in the Custodian was an act of state and not subject to the scrutiny of our courts as to whether that action was proper or not.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, at p. 416 of the opinion, 84 S.Ct. 923, at p. 934, 11 L.Ed.2d 804, there is the following:

"The classic American statement of the act of state doctrine . . . is found in *Underhill v. Hernandez*, 168 U.S. 250, where Chief Justice Fuller said for a unanimous Court (p. 252, 18 S.Ct. 83, 42 L.Ed. 456):

"Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

In *M. Salimoff & Company et al. v. Standard Oil Company of New York*, 262 N.Y. 220, at p. 224, 186 N.E. 679, at p. 681, our Court of Appeals said:

"The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries."

In view of what has been above stated, the conclusion is inescapable that the real dispute is between the plaintiff and the Custodian. The

<sup>2</sup> *Ibid.* 432. Quoted by court.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 433.



Custodian has not seen fit to become a party to this action and there is no way to subject him to the jurisdiction of our courts because he is entitled to sovereign immunity. (Federal Motorship Corp. v. Johnson & Higgins, 192 Misc. 401, 77 N.Y.S.2d 52 (Sup.Ct. 1948), *aff'd* without opinion, 275 App.Div. 660, 86 N.Y.S.2d 667 (1st Dept. 1949), motion for leave to appeal dismissed, 299 N.Y. 673, 87 N.E.2d 63 (1949), appeal dismissed 299 N.Y. 793, 87 N.E.2d 686 (1949).)

Therefore, it is clear that this action should not proceed in the absence of the Custodian, because our courts cannot grant an effective judgment without his presence and it would necessarily result in serious prejudice to the defendants. This is so because, not only would the defendants be subjected to the danger of double financial liability, but also to possible criminal liability under Canadian law.<sup>5</sup>

*Jurisdiction—recognition of foreign judgments—res judicata—presumption of regularity—Mexican divorce decree—the law of New York State*

RAMM v. RAMM. 310 N.Y.S.2d 111.

Supreme Court, Appellate Div., 2d Dept., New York, April 13, 1970.

Plaintiff brought an action for a declaratory judgment as to the invalidity of a Mexican divorce decree. It appeared that the parties were married in New York in 1938 and that defendant obtained a divorce in Juarez, Mexico, in 1960. Plaintiff did not appear in this action, and she denied that she was served with process. Soon after the divorce, defendant remarried in Connecticut. Plaintiff then commenced an action for a declaratory judgment as to the invalidity of the Mexican divorce. Two months later she executed a "Defendant's Special Power of Attorney" in which she submitted to the jurisdiction of the Mexican court and accepted the divorce as valid, apparently in order to obtain \$15,000 being held in escrow on order of the defendant pending her execution of this document. She also discontinued the action for a declaratory judgment. Acting on the power of attorney, a Mexican attorney submitted a petition to the Mexican court stating plaintiff's submission to the jurisdiction and her acceptance of the decree and requesting that the judgment of divorce be declared *res judicata* and invulnerable to attack by the parties or any other person. The Mexican court granted the petition. Plaintiff then commenced the present action for a declaration that the divorce decree was invalid on grounds that a Mexican court has no authority to reopen a decree and that plaintiff had not personally appeared in connection with the proceedings to reopen or the decision thereon. The Supreme Court, Queens County, held that the Mexican decree was valid and dismissed the action. On appeal, the Appellate Division affirmed but modified the judgment below by striking the dismissal.

The court, in a memorandum opinion, said:

Plaintiff is in error when she assumes that resurrection of a void decree is the *sine qua non* of recognition in this case. We are here recognizing and applying Mexico's law of *res judicata*—not divorce. By her voluntary submission to the jurisdiction of the Mexican court,

<sup>5</sup> *Ibid.* 434.

plaintiff foreclosed herself, as well as strangers to the decree, from attacking the decree in the rendering jurisdiction. "While 'we are under no constitutional compulsion to give full faith and credit' to the judgment of a court of a foreign nation . . . , we frequently recognize such a judgment 'as a matter of comity'" (Schoenbrod v. Siegler, 20 N.Y.2d 403, 408, 283 N.Y.S.2d 881, 883, 230 N.E.2d 638, 640). There are situations in which we may decline to give final effect to judgments of foreign nations (Schoenbrod v. Siegler, *supra*; De Pena v. De Pena, 31 A.D.2d 415, 298 N.Y.S.2d 188). However, where, as here, the underlying decree which thus becomes final is not obnoxious to our public policy and the procedures leading to the declaration of finality do not violate accepted standards of fair play and substantial justice, we conceive the mandates of sound jurisprudence and public policy to require that the decree be given that *res judicata* effect which it is accorded in the rendering jurisdiction.<sup>1</sup>

The court concluded:

Therefore, without determining the quantum of proof necessary to upset a judgment of a foreign nation which is otherwise regular on its face (cf. dissenting opinion of Judge Burke in Schoenbrod v. Siegler, 20 N.Y.2d 403, 410, 283 N.Y.S.2d 881, 886, 230 N.E.2d 638, 642, *supra*), we hold that plaintiff failed to come forward with proof sufficient to offset the presumption of regularity (Richardson, Evidence [9th ed.], §71; and cases cited therein).<sup>2</sup>

Justice Munder, dissenting, objected to the majority's rationale of their function as ". . . recognizing and applying Mexico's law of *res judicata*—not divorce" which he saw as ". . . simply an exercise in semantics." In his opinion the majority was

clearly applying the Mexican divorce law. In so doing, under the circumstances of this case, it is going contrary to a long line of New York cases which have held that where, as here, one of the parties to a foreign divorce action is not personally served with process and neither appears nor submits to the foreign jurisdiction the resulting decree is void.<sup>3</sup>

*Treaties—most-favored-nation clause—national treatment—discriminatory taxation—Treaty of Friendship, Commerce and Navigation with Ireland, 1950—Convention to Regulate Commerce with United Kingdom, 1815—General Agreement on Tariffs and Trade, 1947*

SCHIEFFELIN & Co. v. UNITED STATES. 424 F.2d 1396.

U.S. Court of Customs and Patent Appeals, April 23, 1970. Cert. denied, 91 S.Ct. 103, Oct. 19, 1970.

Appellants, importers of distilled spirits from Scotland and Ireland, appealed from a judgment of the United States Customs Court<sup>1</sup> overruling their protests against the levy of an internal revenue tax on their imports, consisting of below proof bottled distilled spirits, on a wine gallon rather than on a proof gallon basis. The tax levied under §5001(a)(1), Internal

<sup>1</sup> 310 N.Y.S.2d 111 at 115.

<sup>2</sup> *Ibid.* 115-116.

<sup>3</sup> *Ibid.* 116.

<sup>4</sup> Schieffelin & Co. v. United States, 294 F. Supp. 53 (1968).

Revenue Code of 1954 (26 U.S.C. §5001(a)(1)),<sup>2</sup> amounted to \$10.50 per wine gallon, whereas appellants claimed that it should have been levied at 86 percent of \$10.50 or \$9.03 per wine gallon. Appellants contended that the tax so levied discriminated against their imports from Ireland in violation of the Treaty of Friendship, Commerce and Navigation with Ireland of 1950,<sup>3</sup> and against their imports from Scotland in violation of the Convention to Regulate Commerce with the United Kingdom of 1815,<sup>4</sup> and that such tax cannot be levied in these circumstances according to §7852(d) of the Internal Revenue Code (26 U.S.C. §7852(d)).<sup>5</sup> They pointed out that Article XVI of the Treaty with Ireland provided for national and most-favored-nation treatment of products of the signatories in respect to internal taxation, while Article XXI defined "national treatment" as according treatment within the territory of one party to nationals or products of the other party upon a basis no less favorable than that accorded to the nationals or products of the territorial state. It was urged that the most-favored-nation provisions of the Treaty with the United Kingdom encompassed the benefits provided in the Irish Treaty. The Customs Court agreed that the British products were entitled to the same tax treatment accorded to the Irish products.

On the basis of the decision of the Court of Customs and Patent Appeals in *Bercut-Vandervoort & Co. v. United States*, 46 CCPA 28, C.A.D. 691 (1958), cert. den., 359 U.S. 953 (1959), the Customs Court overruled the protests. The Court of Customs and Patent Appeals affirmed this decision.

Appellants conceded that §5001(a)(1) was comparable to the provisions of the Internal Revenue Code of 1939 which were before the Court of Customs and Patent Appeals in *Bercut* and that the national treatment clause of the Irish Treaty had a counterpart in the General Agreement on Tariffs and Trade,<sup>6</sup> which was also considered in that case. Moreover, they admitted that §5001 was apparently non-discriminatory in that the tax rate on classifications of proof (and above proof) spirits and below proof spirits applied equally to foreign and domestic products. They argued, however, that the requirements that the tax be determined when the spirits were withdrawn from bond (§5006(a)(1), Internal Revenue Code, 1954), that spirits cannot be bottled in bond below 100 proof (§5233, Internal Revenue Code, 1954), and that only bottled spirits may be sold to the consumer (27 U.S.C. §206(a)), provisions of law which were not considered in *Bercut*, showed that §5001 was discriminatory in fact as applied here as well as in *Bercut*. It was urged that these several provisions

<sup>2</sup> Sec. 5001(a)(1) provides in part: "(a) Rate of tax—(1) General.—There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of \$10.50 on each proof gallon or wine gallon when below proof. . . ." Quoted by court, 424 F.2d 1396 at 1398. Some footnotes by court omitted, others renumbered.

<sup>3</sup> 1 U.S. Treaties 785, 206 U.N. Treaty Series 269.

<sup>4</sup> 8 Stat. 228.

<sup>5</sup> Sec. 7852(d) provides: "(d) Treaty obligations.—No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title." Quoted by court, 424 F.2d 1396 at 1398.

<sup>6</sup> 55-61 U.N. Treaty Series.

showed that domestic bottled spirits could not be below proof when the tax was imposed, hence that the tax in effect applied only to imported bottled underproof spirits and so was discriminatory. The Government of the United Kingdom, submitting a brief in support of the appeal as *amicus curiae*, argued *inter alia* that the decision in *Bercut* violated the provision of Article III(1) of GATT in that "... internal taxes should not be applied to imported or domestic products so as to 'afford protection to domestic production.'"<sup>7</sup> The *amicus* also pointed out that American use of the wine gallon basis for the imposition of the excise tax on imported bottled spirits had been protested by the United Kingdom, Canada, and by members of the Common Market as violative of Article III of GATT.

Judge Baldwin said:

We think the Customs Court was plainly correct in regarding the decision in *Bercut* as compelling the conclusion it reached here. Not only is the language in Sec. 5001 equivalent to that in Sec. 2800 of the 1939 Act considered in the earlier case but the covenants in the Irish treaty are no more restrictive than those of GATT which were considered in *Bercut*.<sup>8</sup>

Attempts of appellants and *amicus* to show that some officials in the Executive Branch had urged Congress to eliminate the wine gallon provision of the Internal Revenue Code in order to ensure compliance with GATT and to encourage international trade co-operation were not regarded by the court as persuasive evidence of the alleged discriminatory nature of this basis of taxation. Judge Baldwin observed:

It is significant to note that there is no history of the GATT negotiations of record to show that that treaty was regarded as compelling the abrogation of a United States tax provision having a long prior history.<sup>9</sup>

The court concluded:

Referring specifically to the present case, the classification of spirits for internal revenue purposes in the two categories of proof gallon and wine gallon amounts but to a continuation of a practice long established at the time Congress passed the 1954 Internal Revenue Act specifically continuing it. The Irish treaty was already in force at that time. It is apparent that Congress had knowledge through the hearings on the Customs Simplification Act of 1951, discussed at length by appellants and *amicus*, of the controversy relating to the application of the wine gallon tax to bottled imported underproof spirits. In those circumstances, we cannot conceive that Congress, in including in the 1954 Internal Revenue Code, Sec. 7852(d), denying effect to provisions "contrary to any treaty obligation," intended it to apply to the express provision for the wine gallon rate in Sec. 5001.<sup>10</sup>

<sup>7</sup> 424 F.2d 1396 at 1401.

<sup>8</sup> *Ibid.* 1402.

<sup>9</sup> *Ibid.* 1403. As noted in *Bercut*, the classifications of spirits at proof (or above proof) gallon and wine gallon "were established by the Congress in 1868 for purely domestic purposes and have been retained in substance each time the Congress has considered this subject. 15 Stat. 125 (1868); Rev. Stat. §3251 (1875); 40 Stat. 1105 (1919) as amended, 26 U.S.C. §2800(a)(1)." Footnote by court, *ibid.*

<sup>10</sup> *Ibid.*

*Jurisdiction—territorial principle—protective principle—nationals abroad—whether Federal Bankruptcy Act reached nationals in Canada—whether necessity for personal service upon nationals abroad—the law of the United States*

STEGEMAN v. UNITED STATES. 425 F.2d 984.  
U.S. Court of Appeals, 9th Cir., April 22, 1970.

Appellants were convicted on two counts of knowing and fraudulent transfer and concealment of assets in violation of the Bankruptcy Act (11 U.S.C. §25(a)(8); 18 U.S.C. §152). It was established that they had transferred certain assets from Oregon to Canada in contemplation of the filing of involuntary petitions for bankruptcy against them in the United States District Court for the District of Oregon and that after the filing of these petitions they had concealed other assets in Oregon which belonged to their bankruptcy estates. The appeal was brought on grounds that the trial court had erred by refusing an instruction to the jury which had been requested by the accused and by admitting evidence to which they had objected. The Court of Appeals affirmed the decision of the District Court. With reference to the issue of jurisdiction, appellants argued that it

was error for the district court to refuse to instruct the jury that because the Stegemans were in Canada beyond the territorial jurisdiction of the district court from the date of the institution of the bankruptcy proceedings until the Stegemans were extradited to this country for prosecution, they had no duty to disclose their assets but only to refrain from affirmative acts of concealment within the District of Oregon.<sup>1</sup>

They contended that the duty of a bankrupt to disclose assets was not required by 18 U.S.C. §152 but rather by a provision of the Bankruptcy Act (11 U.S.C. §25(a)(8)), which would apply to a bankrupt only if he were personally served in the jurisdiction of the court in which the proceeding had been filed (11 U.S.C. §41(a)). Circuit Judge Browning said that "No prior personal service upon the Stegemans was required to compel their obedience to 18 U.S.C. §152."<sup>2</sup> The question was whether, following the rule of *Blackmer v. United States*, 281 U.S. 421 (1932), it could be shown that Congress had intended §152 to have extraterritorial application.<sup>3</sup> The court said:

It is sometimes said that Congress is presumed to intend its enactments to apply only within the geographic limits of the United States.

<sup>1</sup> 425 F.2d 984 at 985.

<sup>2</sup> *Ibid.* "Section 18(a) of the Act, 11 U.S.C. §41(a), provides for service of an involuntary petition by publication 'in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien . . . ' where personal service 'cannot be made' within ten days." Footnote by court, *ibid.* 987. Other footnotes by court omitted.

<sup>3</sup> In *Blackmer*, the Supreme Court said: "The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them." Quoted by court, *ibid.* 985, from 284 U.S. 421 at 438. Reprinted in 26 A.J.I.L. 611 (1932).

But the question is always one of statutory construction. And when the nature of the offense is such that the consequence of limiting its *locus* "to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home . . . Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." *United States v. Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 41 (1922). "Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country though there be no express declaration to that effect." *Skiriotes v. Florida*, 313 U.S. 69, 73-74, 61 S.Ct. 924, 928 (1941).

These general principles suggest the proper construction of 18 U.S.C. §152. That section was enacted to serve important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct. It reflects the exercise by Congress of an "all-inclusive power, through the bankruptcy grant, to enact any legislation reasonably framed and related to the subject of bankruptcies, which in turn is indissolubly linked to commerce and credit." 1 *Collier on Bankruptcy* 5 (14th ed. 1968).

Section 152 contains no limitation in terms of the place where the act or omission occurs, and "is capable of perpetration without regard to . . . locality." Moreover, the adverse effect of the prohibited concealment will be precisely the same, and will, in the vast majority of cases, be felt principally within the United States, whether the debtor is within the country or outside it.

To exclude concealments by debtors outside the United States from the statute's coverage would frustrate the statute's purpose by creating an obvious and readily available means of evasion.

Consequently, we conclude that section 152 applied to the Stegemans in Canada.<sup>4</sup>

*Jurisdiction—wholly foreign business transaction and claim—forum non conveniens*

*TRANSOMNIA v. M/S TORYU*. 311 F. Supp. 751.

U.S. Dist. Ct., Southern Dist., New York, Feb. 24, 1970.

Plaintiff, a Swiss corporation, sued defendants, consisting of two Japanese corporations, a South Korean corporation, and a Panamanian corporation, for the loss of a cargo of ore concentrates as the result of the foundering of the *M/S Toryu*, a vessel of Panamanian registry, while on a voyage between the Philippines and South Korea. Plaintiff was consignee of the cargo. Defendants moved for dismissal on the ground of *forum non conveniens*. The District Court granted the motion.

Judge Cooper pointed out that where all features of the case, including the law governing the bill of lading, the origin and destination of the voyage, the place where the vessel was lost, the residences of the defendants and witnesses, were located in the Far East, the relationship to

<sup>4</sup> 425 F.2d 984 at 986.

the New York forum based upon initiation of discovery proceedings by plaintiff and its attachment of funds belonging to one defendant were too tenuous to warrant retention of jurisdiction by the District Court.

## CURRENT DEVELOPMENTS, 1970

- Bellei v. Rusk*, 296 F. Supp 1247 (D.D.C., Feb. 28, 1969), 63 A.J.I.L. 819 (1969); cert. granted sub nom. *Rogers v. Bellei*, 396 U.S. 811 (Oct. 13, 1969); restored to calendar for reargument, 397 U.S. 1060 (April 27, 1970); motion of appellant to remove case from summary calendar granted and time allotted for oral argument, 398 U.S. 935 (June 1, 1970).
- Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y., Nov. 7, 1968), 63 A.J.I.L. 636 (1969); plaintiff's motion to dismiss anti-trust misuse defense in trademark infringement case granted, 298 F. Supp. 1309 (S.D.N.Y., March 12, 1969).
- Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Association, Ltd.*, 417 F.2d 1030 (5th Cir., Sept. 23, 1969), 64 A.J.I.L. 695 (1970); cert. denied, 397 U.S. 911 (Feb. 24, 1970).
- Feliciano v. United States*, 422 F.2d 943 (1st Cir., March 11, 1970), 64 A.J.I.L. 963 (1970); cert. denied, 91 S.Ct. 44 (Oct. 12, 1970).
- Goldstein a/k/a Pietraru v. Cox*, 299 F. Supp. 1389 (S.D.N.Y., Dec. 18, 1968), 64 A.J.I.L. 417 (1970); cert. granted, 394 U.S. 996 (1969); appeal dismissed on ground of lack of jurisdiction in Supreme Court to review District Court's interlocutory order which involved no question of preliminary injunctive relief, 396 U.S. 471 (Jan. 26, 1970).
- Sayne v. Shipley*, 418 F.2d 679 (5th Cir., Nov. 10, 1969), 64 A.J.I.L. 427 (1970); cert. denied, 398 U.S. 903 (May 18, 1970).
- Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir., May 29, 1968), 64 A.J.I.L. 175 (1970) and rehearing *en banc*, 405 F.2d 215 (2d Cir., Dec. 30, 1968), 64 A.J.I.L. 177 (1970); cert. denied sub nom. *Manley v. Schoenbaum*, 395 U.S. 906 (May 19, 1970).
- Van Engelbrechten v. Galvanoni & Nevy Bros., Inc.*, 300 N.Y.S.2d 239 (Civil Ct., City of New York, New York County, Trial Term, April 30, 1969), 64 A.J.I.L. 433 (1970); motion to vacate previous determination and judgment dismissing complaint or, in alternative, order directing new trial, denied, 302 N.Y.S.2d 691 (Civil Ct., City of New York, New York County, Trial Term, Part 12, July 18, 1970).

## BOOK REVIEWS AND NOTES

LEO GROSS

*Book Review Editor*

*International Law, Being the Collected Papers of Hersch Lauterpacht* Q.C., LL.D., F.B.A. Systematically Arranged and Edited by E. Lauterpacht, Q.C. New York and Cambridge: Cambridge University Press, 1970. Vol. I: *The General Works*. pp. xxiii, 539. Index. \$37.50 in U.S.A.

To edit the Collected Papers of so prolific a scholar as the late Judge Sir Hersch Lauterpacht is a formidable task; it is fortunate that the task has been taken in hand by a skilled international lawyer in his own right—Hersch Lauterpacht's son. The editor, in a comprehensive Preface to Volume I, describes what he is including and what will be omitted, although the eventual number of volumes is not clear. Some selectivity is of course essential and the editor indicates his criteria. This first volume is entitled *General Works* and includes a newly written "General Part" which Lauterpacht had prepared between 1954 and 1959 for a projected ninth edition of Oppenheim; an English text of his 1937 lectures at the Hague Academy of International Law, which, in accordance with the practice at that time, were delivered and published in French; and the *Survey of International Law* which, at the request of Dr. Yuen-li Liang of the United Nations Secretariat, he wrote in 1948 to launch the International Law Commission on its career of codification.

This writer admits that he finds the reviewer's task also formidable. Hersch Lauterpacht's views on all problems of international law have been expounded in critical appreciation and revaluation since his death on May 8, 1960, by such devoted and skilled friends as Dr. C. Wilfred Jenks and Judge Sir Gerald Fitzmaurice.<sup>1</sup>

Since the materials in these three selections included in this volume all deal with many of the same topics, it would be tempting to compare the respective statements in 1937, 1948–1949 and 1959. One might continue, in comparative vein, to adduce the evidence from the separately published volumes on *Recognition*, on *Human Rights*, on *Private Law Sources and Analogies*, on the *Function* and on the *Development of International Law*, from the eighth edition of Oppenheim, *et cetera*. For the three selections in this Volume I of the Collected Papers, that task would be facilitated by

<sup>1</sup> Jenks, "Hersch Lauterpacht—the Scholar as Prophet," 36 Brit. Yr. Bk. Int. Law 1–103; Fitzmaurice, "Hersch Lauterpacht—the Scholar as Judge," 37 *ibid.* 1–71; 38 *ibid.* 1–83; 39 *ibid.* 133–188. In the editor's acknowledgment in the Preface of these and other tributes, there seems to be a line omitted on p. ix, causing some confusion about the respective contributions of Jenks and Fitzmaurice in the Yearbook.



the excellent index. But all of this would be, in the writer's view, rather the task of a literary biographer, and one would hesitate to embark upon it until he had studied all of the volumes still to appear. This reviewer will venture to make some comparisons, but in general he would hope rather to generalize and in doing so to reveal some of the richness of this scholarship, of this intellect, and of this moral spirit which was Hersch Lauterpacht's.

An American reader will mark the difference between the materials relied upon by the author as revealed in his footnotes and in the selected bibliographies at the end of each chapter, and those of leading contemporary scholars in the United States. Lauterpacht did not generally call upon psychology,<sup>2</sup> sociology, semantics, mathematics, anthropology and other branches of learning. Yet his erudition was immense and, had he considered the other subjects necessary or relevant to legal study and exposition, he would have mastered and invoked them. His sources are drawn from many languages, for he was master of many. Roman law, civil law and common law were all equally at his command. As the intellectual progenitor of the *International Law Reports*, which he first published in 1929 (in collaboration) as the *Annual Digest of Public International Law Cases*, there seems to be no modern relevant jurisprudence which escaped his notice or his memory. Legal philosophy is constantly invoked.

Lauterpacht did not confuse *lex lata* with what he considered desirable or ideal, but he does not deviate from his insistence upon the legal character of international law. Frequently he points to weaknesses or defects in the international legal system as "transient." In deprecating postwar ideological extravaganzas, he found them revealing "the disquieting suspension, in this as in many other matters, of the normal operation of international law." (P. 404.) The existence of an "international community" is for him a prerequisite to the existence of international law; the "defects of the international community necessarily constitute a defect of international law. Like other shortcomings of international law, they must be regarded as temporary and not permanent." (P. 267. These two quotations are from the Hague Lectures of 1937; the same thought is in the 1959 manuscript at p. 29 of the volume under review.)

It is particularly in connection with his studies of human rights that Lauterpacht seems to this reviewer to bend his exacting legal discipline to the demands of his passionate zeal for justice. In these and in other writings he stressed the position of the individual as a subject of international law. In his eighth edition of Oppenheim he noted that "in the first three editions of this treatise the view was expressed that States only and exclusively are the subjects of International Law." (P. 19, note 2.) As early as 1927, however, Lauterpacht was challenging that thesis in *Private Law Sources and Analogies of International Law*. (E.g., at pp. 75-79.)

It is difficult to think of Hersch Lauterpacht as a "beginner," so to speak, but Lord McNair, in his then capacity as Professor, wrote in a Foreword to this first of Lauterpacht's notable books:

<sup>2</sup> But cf. the bibliography on international morality at p. 49.

It is difficult to be impartial in assessing the work of one who is a friend and was formerly a pupil; but I am hopeful that the reception of this book will confirm my opinion that Dr. Lauterpacht is a valuable recruit in the field of international law, and may be expected to make further contributions of high quality to its literature.

Never were expectations more abundantly fulfilled!

In 1959 Lauterpacht wrote that

recent developments have marked the beginnings of a significant change. Such developments consist in the recognition, by international agreement and otherwise, of fundamental human rights and freedoms. . . . The resulting addition of moral content to the body of international law cannot but strengthen its legal quality. For, as already stated, the essential and normal, though not exclusive, substance of all law is morality reduced to rules and principles of a sufficient degree of clarity, precision and enforceability. (Pp. 48-49; but *cf.* pp. 357-358: "It is common ground that law is not identical with morality." See also pp. 396-397.)

Thus he insists that "the principle of good faith . . . is an acknowledged part of international law." (P. 47.)

It is fully consistent with this general outlook of the author's that he lays so much stress upon what he considers the legal accomplishment of the General Treaty for the Renunciation of War (the Pact of Paris of 1928) in ending the lawfulness of resort to war. "That Treaty, whose validity is unaffected by its repeated violation, is an integral part of international law." (P. 18, but see note 2 on p. 344.) Before that treaty—and the Covenant of the League of Nations—states acquiesced "in the major juridical monstrosity of admitting war as an instrument for the enforcement of rights and as capable of creating rights." In his view, if a state now resorts to war in violation of the obligations in those instruments, "duress renders the treaty invalid." (P. 354.) The reviewer is not sure that this position can be completely reconciled, on a strictly juridical plane, with Lauterpacht's analysis of treaties as a source of international law. In the Hague Lectures, for example, he wrote: "No treaty can impose obligations upon a party which has not consented to it, unless it is a treaty which a court can fairly regard as being declaratory of custom." (P. 236 and *cf.* pp. 234 and 414.)

But Lauterpacht does assert that

in certain circumstances custom becomes a source of law even for those States which have not participated in it. . . . it is generally admitted that States who are newcomers to the international society are bound by customary rules although naturally they had no opportunity to participate in their creation or to agree to them. (P. 238.)

Here and elsewhere, he lends no support to the view of those states, new or old, which have a tendency to pick and choose—to accept customary rules which support their momentary position in a controversy and to reject those which are adverse. As to customary law, it does seem that Lauterpacht's views developed between 1937 and 1959 in regard to *opinio necessitatis juris*. In the Hague Lectures he wrote that "it is in this *opinio*

*necessitatis juris* that lies the distinguishing feature of custom as contrasted with usage and comity." (P. 238.) But in his 1959 manuscript he seems to regret that "there has been a tendency to attach an exacting interpretation to the second constituent of custom, namely *opinio necessitatis*." (Pp. 62-63.)

This reviewer enthusiastically records the development of Lauterpacht's views on treaty interpretation. In the eighth edition of Oppenheim he seemed constrained to attach importance to certain rules of construction. But in his memorandum for the International Law Commission he wrote: "The field of interpretation of treaties continues to be overgrown with the weed of technical rules of construction which can be used—and are frequently used—in support of opposing contentions." (P. 508.) In his Hague Lectures he had said: "... the only consideration that matters in the process of interpretation is to discover the intention of the parties thereto. The discovery of that intention may be hampered, instead of facilitated, by rules of interpretation." (P. 361.) This thesis was the battle cry of Charles Cheney Hyde and may be found in McNair, *The Law of Treaties*, p. 185 (1938)—a book undertaken on Hyde's initiative.

Lauterpacht's views on recognition are well known from his book on that subject. Although his arguments asserting the existence of a legal duty to recognize under certain circumstances seem to have been persuasive in British Government circles, this reviewer still begs to maintain his dissent from that position. The reviewer's own view is closer to that of the United States Government as reflected in Whiteman, *Digest of International Law*, Vol. 2, pp. 15-17 (1963), which is cited in a competent discussion by Brownlie, *Principles of Public International Law*, p. 85 (1966).

Of course there are also other points on which one international lawyer differs from another, but unlike the ordinary book review, one would not here attempt to point to minutiae which an author might wish to take into account in a later edition. This writer does venture to comment on Lauterpacht's *Survey* for the International Law Commission, since he was a member of the Committee on the Progressive Development of International Law and its Codification which in May-June, 1947, prepared the draft of the Statute of the International Law Commission for consideration by the General Assembly. It needs to be borne in mind that there were some rather fundamental differences between the views of the Soviet Union, as ably presented by that distinguished scholar—and later Judge—Professor Vladimir Koretsky, on the one hand, and those of the Anglo-American members, on the other hand. These differences are brought out in the authoritative study by Briggs, *The International Law Commission*, pp. 130 ff. (1965). Since the attempt was to produce a plan which could command early adoption and continuing support by all Members of the United Nations, some compromises were necessary between the two well-known concepts of the nature of "codification." But Lauterpacht was perhaps somewhat optimistic when he contemplated that the Commission might codify "the entire body of international law" in the course of a generation.

I wish it might have been my good fortune to serve with Hersch Lauter-

pacht on the bench of the International Court of Justice or of any other international tribunal. I had the privilege of conversing with him about the problems facing the international judge and I am an admirer and beneficiary of his numerous separate and dissenting opinions. I would conclude with applause for the concept of the filial editor of these Collected Papers, as expressed at p. vii of his Preface to this volume:

Although Lauterpacht's writing covered the full range of public international law, he never published a comprehensive treatise of his own. On looking at his work as a whole—and being anxious, in presenting his collected papers, to construct from them something which would serve both as a memorial to their author and as a work of lasting value to other international lawyers—it seemed to me that if the writings were assembled in a systematic form they might well stand as a substitute for the treatise that was never written. Each item has therefore been printed as if it were a chapter or a section of a comprehensive work covering the traditional divisions of international law—peace, disputes, war and neutrality. My hope is that, presented in this way, the whole will be greater than the sum of its parts.

PHILIP C. JESSUP

*The Future of the International Legal Order: Trends and Patterns.* Edited by Richard A. Falk and Cyril E. Black. Princeton, N. J.: Princeton University Press, 1969. pp. xiv, 618. Index. \$15.00.

Professors Black and Falk, eminent figures in their respective disciplines of history and international law, have organized a massive collaborative research effort by international lawyers and social scientists. This is the first fruit of that effort; it will be followed at annual or bi-annual intervals by four additional volumes entitled respectively: *Wealth and Resources*, *Conflict Management*, *The Structure of the International Environment* and *Towards an International Consensus*.\*

The precise temporal focus of the project is the near future, which may be defined roughly as the next two decades. Its objects are summarized as being "to stimulate research and provide an intellectual focus for the elucidation of the constructive role law can play in maintaining peace and improving welfare and dignity in the world."

By reference to law, the editors intend the widest range of connotation; all the normative processes of international society are their chosen arena of concern. At the very outset of this volume, Professor Falk announces his "unwillingness to accept a conservative interpretation of the province of legal authority as delimited by formal expression of consent by sovereign states." Following the insights of Harold Lasswell and Myres McDougal, he seeks to comprehend the full spectrum of expectations about authority and control which lend a certain stability to international affairs.

The stage is prepared for all that follows by Falk's luminous essay on "The Interplay of Westphalia and Charter Conceptions of International

\* The reviewer entertains the belief that his judgment has not been influenced by the fact that he is a contributor to one of the project volumes.

Legal Order." It provides not only an intellectual framework for the entire interdisciplinary enterprise, but also a clear account of the mood of the participants. That mood has two dominating characteristics. First, it is frankly teleological. The shared purpose is identification of points at which creative intervention in current processes may generate more pacific and just outcomes. Secondly, the authors consciously paddle between the shoals of mordant cynicism and unbridled utopianism. Postulated solutions to the riddle of international violence and injustice, world government in particular, are dismissed more or less benignly, but always firmly. As Professor Black puts it in his own graceful introduction:

A more immediate challenge than that of constructing an ideal world in theory is that of foreseeing and anticipating the practical problems confronting the international legal order a generation at a time, in an effort to achieve at least the degree of international consensus necessary to avoid violence and destruction. . . . It is to this task that these volumes are devoted.

The authors' methodologies are in felicitous concord with their shared purposes. Means-ends relationships and related contingencies and assumptions are specified with a rigor and candor which are not invariable concomitants of melioristic essays, particularly where the subject is peace. These qualities are exemplified in Ernst Haas's magisterial chapter on "Collective Security and the Future International System." Louis Henkin has noted aptly that the softest subjects demand the hardest thought. Haas masters the test. Drawing effortlessly on the social science models which have enhanced comprehension of domestic political phenomena, he persuasively adumbrates probable patterns of collective action during the next generation.

While this beautifully rigorous piece may be the volume's most eminent contribution, its companions are hardly overwhelmed. For all of them display similar qualities. They are studded with cutting insights and delightful provocations such as Morton Kaplan's observation: "The argument that the best way to build law is to act lawfully, *although not entirely incorrect*, obviously rests on a form of legal determinism that will not withstand serious analysis." (Emphasis added.)

Despite the varied subjectivities which shape them, the individual pieces relate effectively. This is not a mere *collection* of loosely related essays. It is unmistakably a book with powerful intellectual cohesion. Every chapter examines some distinctive features of "those structures and processes by which authority is created, applied, and transformed in international society." There is little overlap. In a project of this kind, the strength and aesthetics of the edifice must be a function of the editors' zeal and clarity. It is a pleasure to acknowledge their achievement.

This volume and its successors should have a profound impact on pedagogy and scholarship in the whole field of international affairs. Among other things, it may deal a final blow to the primitive forms of "balance-of-power" or "interests" analysis which yet lurk in the academic garden and may still enjoy an ascendancy in the halls of Foggy Bottom. Dis-

missal of norms as mere rationalizations of the "realities of power" was always an intellectually puerile gesture. And exactly how it ever enjoyed a vogue is itself a subject worthy of organized speculation. There was, of course, no intrinsic reason why a vital normative concern could not be sustained within an interests analysis, unless one naively assumed that governments were destined to discount radically and perpetually the virtues of stability or the perils immanent in precedent-shattering behavior.

Perhaps what made it possible largely to ignore the rôle of stable patterns of expectation and control was a pronounced tendency to dichotomize domestic and international arenas for purposes of political analysis. Once the international arena was perceived as a *society*, the normative perspective was bound to receive its proper place at the table of scholarly concern. Professors Falk and Black and their distinguished collaborators have rendered to the subject a most fitting homage.

TOM J. FARER

*International Law in Historical Perspective.* By J. H. W. Verzijl. Vol. III: *State Territory*. Leiden: A. W. Sijthoff, 1970. pp. x, 634. Index. Fl. 72.50.

Volume III of Professor Verzijl's projected nine-part treatise follows the pattern of the first two volumes.<sup>1</sup> It is erudite, opinionated, clearly, even charmingly, written, challenging and in the highest traditions of mature scholarship. It is also miserably indexed and (perhaps unavoidably) rather Europe-centered.

High spots would include the discussion of the *North Sea Continental Shelf* case<sup>2</sup> at pp. 87-92—a fine condensation and analysis. Summary comments accompany long alphabetical lists of bits of territory that have been the subject of international controversy,<sup>3</sup> making the volume extremely useful as a starting place for esoteric research, although, as must happen, the lists are incomplete despite containing some surprising minutiae. Perhaps the most valuable section is the detailed survey of international arrangements concerning rivers. Beginning with a long historical analysis of the legal régime of the Rhine (pp. 126 *et seq.*; an *excursus* beginning on p. 173 is a frankly argumentative brief for the Netherlands' position against Germany regarding Rhine navigation), Professor Verzijl treats at some length the Danube, Congo and Niger, Weser, Elbe, Oder, Scheldt, Meuse and Moselle. In discussions of navigation, conditions of crews, pilotage, fishing, diversion, pollution and many other things, references are made to treaty provisions governing other rivers (such as the St. Lawrence) of equal importance, but perhaps of less interest and less complex history.

Other sections, while less carefully detailed, contain many useful analyses of more than minor interest. For example, the discussion of Zones of Influence or Interest (pp. 494-500), while rather vague and incomplete

<sup>1</sup> Reviewed in 64 A.J.I.L. 448 (1970). The work received the annual award of the American Society of International Law at the Society's 1970 meeting.

<sup>2</sup> [1969] I.C.J. Rep. 3; 63 A.J.I.L. 591 (1969).

<sup>3</sup> E.g., islands, pp. 29 *et seq.*; lakes, pp. 95 *et seq.*; boundary adjudications, pp. 610 *et seq.*

with regard to Asian conflicts, shows clearly the European formal legal framework for imperialism in Africa. The compilation of state practice with regard to mountain frontiers (pp. 530-537) must make it increasingly embarrassing for India to continue to assert that watersheds are somehow blessed by customary law as the only correct boundary with her Tibetan neighbor, although the current boundary disputes in that area are not directly mentioned. It is also possible to regret that Professor Verzijl did not have the advantage of reading D. P. O'Connell's essay on French territorial claims of 1648 and Elizabeth Evatt's paper on the British acquisition of Australia and New Zealand, recently published.<sup>4</sup>

It may be concluded that Volume III of Professor Verzijl's treatise lives up fully to the standard of the first two volumes. We can only count ourselves fortunate that, in his own words in the Foreword (p. vii), "the vastness of the canvas" was not fully revealed to Professor Verzijl until it became "too late for repentance!"

ALFRED P. RUBIN

*United Nations Peacekeeping 1946-1967. Documents and Commentary.* Vol. II: *Asia*. By Rosalyn Higgins. New York, London, Bombay, Karachi: Oxford University Press, 1970. pp. xviii, 486. Index. 90 s.; \$12.50.

This is the second of three volumes which continues the approach and format used by the author in Volume I.<sup>1</sup> In Volume II the author considers the following cases: United Nations Observers in Indonesia, 1947-50; United Nations Observers and Security Force (UNSF) in West Irian, 1962-3; United Nations Enforcement Action in Korea, 1950-3; United Nations Military Observer Groups in India and Pakistan (UNMOGIP), 1949 —; and United Nations India-Pakistan Observation Mission (UNIPOM), 1965-6.

Here, as in Volume I, the documents and commentary in each of the cases are brought under 13 headings, including annexes which contain a checklist of United Nations General Assembly and Security Council documents, and a selected bibliography relating to the case in question.

The author, in the Korean case, ends her account with the Armistice Agreement of July 27, 1953. Since a good deal of significant peacekeeping activity followed the signing of the Armistice, one is puzzled why the account stops where it does.

As safeguards against the resumption of hostilities, the Korean Armistice provided for: (1) a demilitarized zone; (2) a Military Armistice Commission made up of representatives of both sides responsible for the execution of the armistice and for settling any violation thereof; and (3) a Neutral Nations Supervisory Commission (NNSC) comprised of four senior officers from neutral nations,<sup>2</sup> two from each side. The mission of the NNSC was

<sup>4</sup> In C. H. Alexandrowicz (ed.), *Grotian Society Papers 1968* (Nijhoff, 1970).

<sup>1</sup> Reviewed in 64 A.J.I.L. 985 (1970).

<sup>2</sup> The term "neutral nations" was defined in the Agreement "as those nations whose combatant forces have not participated in the hostilities in Korea."

to carry out the functions of supervision, observation, inspection, and investigation of the arms control provisions of the Agreement and to report the results to the Military Armistice Commission. The U.N. Command chose Sweden and Switzerland, and the Commanders of the Korean People's Army and Chinese People's Volunteers jointly chose Poland and Czechoslovakia.

The documentation which depicts the work of the NNSC is highly instructive for the student of peacekeeping, and indeed for the student of arms control as well. The one-sided operations of the supervisory machinery was so frustrating that in May, 1956, the U.N. Command suspended operations of the NNSC inspection teams in South Korea. And the following month, the teams were withdrawn from both North and South Korea.

In August, 1957, the U.N. Command proceeded with the rearmament of South Korea in order to maintain a relative military balance in Korea and thus to preserve the stability of the Armistice. In its report to the General Assembly (Doc. A/3631, August 13, 1957) the U.N. Command pointed out the failure of the North Koreans to comply with paragraph 13(d) of the Armistice Agreement, which obliged both sides to cease the introduction into Korea of reinforcing combat aircraft, armored vehicles, weapons, and ammunition, with provision for replacement of worn-out equipment. In the circumstances, the U.N. Command contended it was entitled to be relieved of corresponding obligations under paragraph 13(d) "until such time as the relative military balance has been restored" and North Korea by its actions had demonstrated its willingness to comply.

As a consequence of the U.N. Command's unilateral suspension of the arms control provisions, the NNSC ceased to have any function, but continues to exist to this day on a skeletal basis.

If the experience of the NNSC provides lessons to avoid, that of the UNMOGIP is to be acclaimed and respected. For here is an operation which has, but for a brief period, helped to keep the peace between India and Pakistan for over two decades and is still extant, even though the two parties remain far apart in a settlement of the Kashmir problem.

The written instrument upon which UNMOGIP rests is the Karachi Agreement between the military representatives of India and Pakistan regarding the establishment of a cease-fire line in the States of Jammu and Kashmir, signed on July 27, 1949. The Agreement brought an end to the initial hostilities between the two countries. While the Karachi Agreement is commonly referred to as a cease-fire, UNMOGIP's mission is essentially the supervision of an arms control arrangement. The techniques which UNMOGIP has developed for over 20 years of operation, while tailored to the special circumstances of Kashmir, are applicable to a broader range of arms control agreements.

UNMOGIP's operations have not attracted much attention. The paucity of published material derives from the sensitive nature of its work. Its reports are treated "Top Secret," as the author points out, and go only to the U.N. Secretary General; and only infrequently are the operations of UNMOGIP discussed in the U.N. Security Council.



In Volume II, as in Volume I, the compilation of documents, albeit in small print, is useful and will serve to save the student much time floundering "among the voluminous and unsifted documentation," to quote the author's words. Here, as in Volume I, the commentary links the documents, and this the author avows is her main aim. With this self-imposed limitation one should not quarrel. The reviewer, however, feels that the linking commentary could stand more body.

In this second volume, as in the first, the author has applied the same high level of scholarship we have come to expect from her.

DAVID W. WAINHOUSE

*La France en Guerre et les Organisations Internationales 1939-1945.* By Victor-Yves Ghebali. Paris and The Hague: Mouton, 1969. pp. xv, 273. Bibliography. Index. Gld. 20.

This is a piece of diplomatic history devoted essentially to the problems faced by international organizations located in France, as well as by the League of Nations and the International Labor Organization, which arose in connection with the questions raised by the Second World War in relation to France. The subject is considered only with reference to France and the study, therefore, does not fully deal with the problems concerning the difficulties of all international institutions in time of war; for example, the book omits the Permanent Court of International Justice, the Universal Postal Union and other organizations. On the other hand, it furnishes valuable information on the League of Nations and the International Labor Organization. The research is of a high scientific quality; the author has made a very thorough search of the records, has brought together the personal evidence of many witnesses, and has had access to many unpublished sources, some parts of which he has published for the first time in an annex. Beyond certain sources of information which have not yet been made public, the investigation could hardly go farther than the author has pursued it.

The historian will therefore acquire valuable information concerning the attitude of the Third Republic, the Vichy régime and of "Free France" with reference to international organizations. The lawyer will note with interest certain practices which bring into play, in a confused way, the concepts of "non-existence" and nullity (*e.g.*, p. 159) or of *de facto* recognition; but the author himself has refrained from any interpretation or critical examination of the strictly legal aspects of the facts he reports.

Finally, the specialist in international organization may well ponder the data relative to the situation of host states in case of armed conflict or of threat of armed conflict, as well as to the comparative rôle of international secretariats and of the great Powers in the fate of international organizations.

However, in spite of these many aspects, the book remains essentially that of an historian, meticulous of the minor as well as the major historical facts, of the rôle of individuals as well as of the weight of events. The preface by President René Cassin clearly shows what justification can be

drawn from this history by the French resistance for the attitude of its leaders on foreign policy.

PAUL REUTER

*Human Rights, the United States, and World Community.* By Vernon Van Dyke. New York, London, Toronto: Oxford University Press, 1970. pp. x, 292. Index.

How would the American public take to international investigation of U. S. human rights problems, such as the treatment of Black Panthers? This question, foreseen in Professor Van Dyke's book, has been made all the more urgent by a decision of the U.N. Economic and Social Council in May, 1970, after the book went to press. A resolution, adopted with strong U. S. support over strenuous Soviet opposition, has established machinery for examination of a whole range of human rights violations. The new procedures might soon be brought to bear on complaints lodged by the Black Panthers. Then the true U. S. attitude toward U.N. investigation, questioned by Van Dyke, would be put to the test.

Still abroad is the spirit of Senator Bricker, whom the author quotes as declaring: "No patriotic American will be able to support the United Nations if it continues to threaten national sovereignty by claiming jurisdiction over fundamental human rights." Bricker's successful drive to halt U. S. participation in human rights treaty-making is set forth by Van Dyke, who reaches the gloomy conclusion that, "as a matter of practical domestic politics, the United States can scarcely ratify, say, the Covenant on Civil and Political Rights." Why the problems he sees in the Covenant could not be avoided through reservations is not made clear.

Van Dyke has furnished incisive commentary on the range of rights which are the subject of present international protective efforts. Especially skillful is his analysis of the elements of self-determination. He perceives a fault in that "where colonial entities are concerned the champions of self-determination have found no acceptable stopping point: the right belongs to all, even to the smallest, the weakest, the most backward." The same champions, he observes, insist "that self-determination applies to colonies and has no further relevance once the colony becomes independent." Domestic minorities need not apply. Nor may a territory like Namibia (South West Africa) be dismembered in the name of self-determination.

Save for under-emphasis on what the United Nations calls "human rights in armed conflicts," *e.g.*, the Geneva Conventions of 1949, Van Dyke's discussion of the present substantive international law of human rights is as timely and thorough as is his survey of implementation measures and his study of enforcement by treaty. By depicting the agony of treaty ratification in the United States, he makes clear why the current evolution of human rights implementation based on existing United Nations organs is so much more promising than treaties as a path for the growth of international protection against oppression.

JOHN CAREY

*Rechtsfragen der Währungsparität. Festsetzung und Vollzug der DM-Parität im Verfassungs-, Verwaltungs-, und Völkerrecht.* By Wolfgang Hoffmann. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1969. pp. xl, 240. Index. DM. 38.

The author of this book is obviously an unusually erudite man, as evidenced by the broad coverage of the English and German literature on the subject (pp. xxi-xxxvii), by the detailed footnote citations, and by the numerous references to dominant or conflicting views in the field of constitutional law, international law, and monetary law. However, the reader who looks for precise information on, and clarification of, the three fundamental issues involved in the book: (1) relationship of international law to domestic law in the determination of parity matters, (2) the legal status of the Articles of Agreement of the International Monetary Fund (or the Fund Agreement) as internal law of the Federal Republic of Germany, and (3) the legal bases of the establishment of the initial par value and of changes of the par value of the Deutsche Mark, will presumably share the sense of disappointment that this reviewer experienced as he endeavored to pinpoint the author's position on these issues.

Although the author states that inductive analysis revealed that from a legal viewpoint parity questions do not belong exclusively to either international or to domestic law, but pertain to both fields of law simultaneously (p. 225), his views on the relationship between international and domestic law are by no means clear. He alleges that for the solution of the questions raised in his study it was not necessary to opt either for the dualistic or monistic view on the relationship between international and domestic law,<sup>1</sup> but contends, on the basis of a truly amazing admixture of the sociological and juridical approach, the following: "International law and domestic law form jointly as 'uniform social phenomenon' (*einheitliche Sozialerscheinung*) the normative bases of parity change and parity implementation." In support of this rather questionable formulation he invokes Georg Erler, *Grundprobleme des Internationalen Wirtschaftsrechts* (1956) (p. 225) and the somewhat mystical approach of Lorenz von Stein (cited on p. 226, note 6) to international administrative law as that field of law that, irrespective of the source (*ohne Rücksicht auf die Quelle*) to which it may be traced in the individual instance, affects the intercourse of nations (*Völkerverkehr*) and the totality of the life (*das Gesamtleben*) of nations. The latter approach, it should be noted, dates back to 1869!

The German Bretton Woods Agreements Law, 1952, provides in Article 5(1) that the Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development, adopted at Bretton Woods in 1944, "are published below with the force of law" (see *Bundesgesetzblatt* 1952, Part II (August 1, p. 637,<sup>2</sup> and pp. 638 to 683).

<sup>1</sup> On the view that only a monistic approach to the international law of money, that is, an approach which considers international law as an integral part of monetary law, can result in a legal theory of money which is commensurate with the legal nature of the Fund Agreement, see Hans Aufricht, "The Fund Agreement and the Legal Theory of Money," 10 *Österreichische Zeitschrift für Öffentliches Recht* 74-76 (1959).

<sup>2</sup> For the English text of the Bretton Woods Agreements Law, 1952, see Aufricht, *Central Banking Legislation*, Vol. II: Europe 296-297 (Washington, 1967).

This provision has been widely interpreted as conferring on the Fund Agreement the status of supreme law of the land which, in principle, prevails over Federal statutory law on matters governed by the Fund Agreement. However, this interpretation does not preclude a finding that individual provisions of the Fund Agreement that are not self-executing are endowed with force of law *pro foro interno* only if implemented by Federal statute or other duly authorized measures, and provided these measures are in conformity with the controlling norms of the Fund Agreement. By contrast, the author appears to be determined to lower the rank of the Fund Agreement in internal law from that of a treaty under Article 25 of the Basic Law of the Federal Republic of Germany to that of a statute; this conclusion may be inferred from the propensity of the author to follow the "implementation doctrine" in the version advocated by Gerhard Boehmer in *Der Völkerrechtliche Vertrag im deutschen Recht* (1965), which advocates the view that the domestic law level (*der innerstaatliche Rang*) of international treaty law is determined by the level of the application command (*Anwendungsbefehl*) of the enabling legislation.<sup>3</sup>

The author quotes on p. 144 the statement in the Report of the *Bundestag* Committee on Money and Credit (or the Scharnberg Report) that: "The determination of the par value (*des Wechselkurses*) is regulated by the law ratifying the Articles of Agreement of the International Monetary Fund." He criticizes this statement as superficial on the ground that the Bretton Woods Agreements Law, 1952, nowhere mentions the *Wechsel* (*Devisen*-) *kurs*. Hoffmann seems to overlook, however, that by virtue of Article 5(1) of this Law the Fund Agreement is published "with force of law." Accordingly, it stands to reason that the establishment of the initial par value of the Deutsche Mark on January 30, 1953, was governed by Article IV, Section 1(a), of the Fund Agreement in conjunction with paragraph 5 of the Fund's Membership Resolution No. 7-3 of May 28, 1952.<sup>4</sup> As far as could be ascertained, Hoffmann nowhere mentions these provisions as constituting the legal bases of the initial par value of the German Mark under IMF law and under German law, but writes in 1969: "Since at present there is a fixed parity for the German Mark, the problem of the determination of the par value becomes significant as a problem of the change of par value" (p. 227, Point 2; English translation by the reviewer).

The work evidences an extraordinary input of time and intellectual effort. Had it been subjected to rigorous scrutiny by outstanding economists and lawyers, or by experts in *Wirtschaftsrecht* thoroughly familiar with the subject matter of the book, the book might have become a major contribution to the field. As it is, the claim by the editor in the Preface that the work is a realistic (*lebensnahe*) study in depth (*tiefgründig*) is hardly warranted. However, because of its detailed documentation and its Index, it may be useful as a work of reference even to those readers who may not be in a position to accept the author's findings and conclusions at face value.

HANS AUFRICHT

<sup>3</sup> See on this point Aufricht, 61 A.J.I.L. 851 (1967).

<sup>4</sup> For the text of the resolution, see IMF, Summary Proceedings, 1952, pp. 162-165.

*The Air Net: The Case Against the World Aviation Cartel.* By K. G. J. Pillai. New York: Grossman Publishers, 1969. pp. xxii, 212. \$5.95.

The International Air Transport Association is a non-governmental organization whose more than one hundred members are airlines operating scheduled international air services. Its most important function is to determine the international rates and fares to be charged by these airlines. IATA exercises this power consistently with the network of bilateral air transport agreements that had to be patched together as a result of the failure of the 1944 Chicago Conference on International Civil Aviation to produce an acceptable multilateral system for the allocation and exchange of commercial air traffic rights. IATA rates and fares are negotiated at traffic conferences in which only the representatives of the member airlines may participate and where, because of a unanimity requirement, each airline has the power to veto rate and fare agreements that are not to its liking. The rate structure which emerges from these conferences consequently is the product of a very complex and highly sophisticated bargaining between diverse interest groups within the industry.

The book under review examines the IATA rate-making process and the forces that influence it. The author's over-all conclusion is that the IATA system "gives refuge to inefficiency"; that "it effectively serves the interests of those who wage unending battles for maintaining an untenable economic *status quo*"; and that "it institutionalizes resistance against those who earnestly try to establish low fares which are consistent with economic and efficient airline operation." (P. 177.) He assigns the primary blame for this state of affairs to the exclusion of consumer interests from the IATA bargaining process, the secrecy of its deliberations, the unanimity rule under which it operates, and the pressure of governments that see fit to subsidize inefficient national airlines.

Few will have reason to quarrel with this thesis or with the soundness of the author's view that a way must be found to give consumer interests a voice in the IATA rate-making process. The book is well written and documented. Its scholarly value is, however, substantially diminished by the fact that it is basically a consumer's brief against the IATA system. It makes no attempt to present a balanced view of the problems of the international air transport industry and lacks a thorough analysis of alternatives to the IATA system that take account of the legal, political and military realities which sustain and explain it.

THOMAS BUERGENTHAL

*The Legal Status of the Arabian Gulf States: A Study of Their Treaty Relations and Their International Problems.* By Husain M. Al-Baharna. Manchester, England: Manchester University Press, 1968; Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. xvi, 351. Index. \$7.50.

The Arabian (or Persian) Gulf states with which this book is concerned are Muscat, Kuwait, Bahrain, Qatar, and the seven shaikhdoms of the so-called Trucial Coast—Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Qaiwain, Ras al-Khaimah, and Fujairah. Formerly all of these, except Muscat (in

theory an independent state, though in close relations with Britain) were classifiable as "states under British protection." Since 1961, however, Kuwait has been fully independent; and while the special relationship of the others with Britain still continues, it is rapidly drawing to an end in its traditional form. The economic changes resulting from oil revenues, coupled with political and social changes in the Arab world, have made the old system an anachronism.

Yet these very developments make it all the more useful to have an analysis of the situation out of which the new pattern is evolving, for that situation has long been obscure and complex. What has been the juridical position of these entities under British protection? What have their agreements with Britain, dating back at least to 1820, actually provided? What has been in practice the British rôle in their internal and external affairs? To what extent are they to be regarded as states from the international standpoint? Where does international responsibility rest for occurrences within their territory, particularly in view of the extraterritorial jurisdiction long exercised therein by Britain? How is their rather anomalous position to be reconciled with the United Nations system?

The first half of this study by Dr. Al-Baharna, a Bahraini jurist, is addressed to such questions as the foregoing. After a painstaking review of the relevant documents and history (including much material not hitherto readily available to the non-specialist in Gulf affairs), he concludes that the protected states are states, but that the restrictions imposed on them by their special relationship to Britain prevent them from possessing full international personality. Nevertheless, they are not "colonial" protectorates, such as formerly existed in the hinterland of Aden, and they (or some of them) enjoy a "measure" of international personality which may be expected to increase as Britain relinquishes its traditional position.

The second part of the volume is devoted to territorial and boundary problems of the Gulf states, *e.g.*, Iran's claim to Bahrain, Iraq's claim to Kuwait, and the dispute between Saudi Arabia, Muscat, and Abu Dhabi over the Buraimi region. A final chapter deals with offshore boundaries, currently an important topic because of potential oil resources underlying the Gulf. The analysis of these issues is judicious and enlightening.

Although the account in the book ends in 1966, and subsequent developments are therefore not covered, the work remains a valuable contribution to understanding the background and history of present international problems in the region. It is all the more welcome as the first thorough study in English by an Arab scholar of questions which have heretofore been treated only in limited fashion by Western writers not always free from bias or misunderstanding.

RICHARD YOUNG

*Derecho y Practica Consulares.* 3 vols. By Jonas Guerra Araya. Santiago de Chile: 1969. Vol. I: pp. 360. Index; Vol. II: pp. 373. Index; Vol. III: pp. 371. Index.

This three-volume work on Chilean consular law and practice is a follow-up to the author's *Prontuario de Derecho Consular Chileno* (third

edition, 1959) and his *Apuntes de Derecho Consular* (1965). The author brings impressive credentials to his task of preparing the new publication. He is a lawyer, Consul General of Chile, Professor of Consular Law and Practice at the School of Political and Administrative Sciences of the University of Chile and Professor in the same subject matter at the "Andrés Bello" Academy of the Ministry of External Relations.

In the first volume, the author examines consular law under such headings as the consular institution, the legal status of consuls, consular attributions, the positive codification of consular law and consular fees. In dealing with the question of codification, the volume contains a thorough discussion of the Vienna Convention on Consular Relations (1963) together with valuable and detailed references to applicable Chilean material (pp. 189-267). The volume also contains a good description of the Chilean consular service.

The second volume is concerned with a synthesis of the evolution of the consular institution in Chile and the general prerogatives, attributions and obligations of consular officials. The many forms contained in this volume, as well as the detailed directions for carrying out a wide range of consular activities, could not help but make the life of the Chilean consular official abroad much easier and would, in many cases, obviate the need for frequent consultation with the Ministry of External Affairs in Chile.

The third volume contains discussions on visas, passports, immigration, legalization of documents, notarial acts, consular accounting and various administrative activities. The volume is completed with a useful bibliography on consular law.

It should not be thought that the three volumes under review represent a mere catalogue of what a consular official is expected to do. To be sure, the volumes give the busy consular official many guidelines. But these guidelines are accompanied by an underlay of legal doctrine which is the product of painstaking and erudite research in a wide variety of source materials. This makes the work all the more valuable for the general reader since, by viewing Chilean consular law and practice in the context of international unification in the field, the author lays the foundation for even further unification.

The Chilean consular official who has this invaluable work on his office bookshelf may consider himself a privileged man and the envy of his consular colleagues from other countries. Born of experience, written with great talent and salted with wisdom, this three-volume *magnum opus* will be paid the tribute of constant use in Chilean consular offices throughout the world. Other countries could well benefit from a similar statement of their consular law and practice.

GERALD F. FITZGERALD

*The Canadian Yearbook of International Law*, 1969. Vol. VII. Vancouver, B. C.: University of British Columbia Publications Centre, 1969. pp. x, 377. Index.

This volume of the *Canadian Yearbook* provides a rich variety of material. In the first section, on "Canadian Federalism, and the Foreign

Affairs and Treaty Power," Edward McWhinney discusses the impact of Quebec's "quiet revolution," suggesting that

at the level of constitutional law-in-action important changes and modifications are occurring in Canada which largely render out-of-date certain traditional *a priori* concepts and attitudes as to inter-governmental relations within a federal system. . . .

He submits (p. 3) that *de facto* changes throw new light on the Privy Council's work on the Canadian Constitution, and that Constitutional changes that have occurred "make good sense in pragmatic, experiential terms." He regards "expansionist, pre-emptive federal foreign affairs power" as politically unacceptable in Canada. Described as best of the three options available (p. 10) are constitutional self-restraint and moderation, with non-escalation "into a federal-provincial constitutional crisis over foreign affairs and the treaty power, before one is sure that . . . it really is 'foreign affairs' or even 'treaties' that are involved." Envisaged as possible choices are either outright separatism for Quebec or "vastly more decentralized federalism with Quebec participating equally with English-speaking provinces . . ." (p. 27).

Writing on "Direct Satellite Broadcasting: A Case Study in the Development of the Law of Space Communications," A. E. Gotlieb and C. M. Dalfen anticipate the feasibility within a decade of such broadcasting. They submit (pp. 58-59) that "with regard to the substance of the legal norms that have been emerging . . . there is a discernible pattern." They note that in the emergence of space law through the U.N. General Assembly and in the Space Treaty there was "conscious agreement to build on the international law already in force."

Dean R. St. J. Macdonald, in an article on "Economic Sanctions in the International System," regards the rôle of sanctions as having been too long obscured by unconscious references to domestic legal systems (p. 68), and cites Galtung on the point that frequent resort to economic sanctions will produce a decrease in interdependence and integration among states (p. 88). He foresees the need for fewer rather than more sanctions, for flexible measures that are positive rather than negative, and for a wider consensus on the norms of international public order (p. 91).

Writing in his personal capacity, Dr. P. Weis, Special Adviser, Office of the High Commissioner for Refugees, contributes a 54-page article on "The United Nations Declaration on Territorial Asylum." Examining the legal aspects, he observes (p. 135) that the definition of asylum by the Institute of International Law "may well be appropriate." He notes the scheme as to rendition of political offenders within the Commonwealth and the effect given thereto by legislation in four Commonwealth member states (pp. 130-131). He finds state practice to be largely in line with the United Nations Declaration on the subject (p. 148).

In an article on "Fact Finding and the World Court," W. F. Foster points out that the Court, aware of the special status of its litigants (*i.e.*, states) has refused to adopt strict technical rules of evidence. Referring to Article



50 of the Court's Statute and to Article 57(1) of its Rules of Procedure, the author reminds us that the Court has no power to subpoena and compel the attendance of witnesses or experts or to administer oaths or punish for perjury, but notes three methods by which the Court can obtain testimonial evidence (pp. 171-172). The author submits that the Court should have power to require the production of documents and to subpoena witnesses; he suggests several methods by which these powers might be conferred (pp. 190-191).

On the subject, "International Control of Narcotic Drugs and International Economic Law," J. W. Samuels notes that for more than half a century there has been international co-operation in such control. He finds it significant that "present narcotics problems are not the result of breaches of treaty obligations by governments but rather of private criminal acts which individual governments are powerless to prevent" (p. 202). Referring to Article 55 of the United Nations Charter, he notes that while the Single Convention of 1961 on the subject of Narcotic Drugs came into effect in 1964, only fifty states had at the time of his writing ratified the convention. Appended (pp. 212-223) are lists of states that are parties to the relevant conventions.

In the section of the *Yearbook* on "Chronique (Notes and Comments)" Christian Vincke considers "*Certain aspects de l'évolution récente du problème de l'immunité de juridiction des Etats*," noting in the writing of internationalists some tendency toward "demystification" of the jurisdictional immunity of foreign states. The author suggests that in Canada the evolution of law relative to immunity is not terminated (p. 241). A court, he feels, should start from the position that it has jurisdiction unless it can be otherwise shown. The effect of a statement from a foreign office is considered (as at p. 244). The problem of immunity is not, the author suggests, a "*problème résolu*."

J. S. Stanford of the Treaty and Economic Section in the Legal Division, Department of External Affairs, has contributed a comment on "Treaty Amendment: The Problem of the GATT Tariff Schedules." In this he deals with the origin of the GATT schedule problem and the steps taken by the contracting parties to resolve it and restore it to a useful schedule. There is suggestion (p. 268) that, as to the GATT Secretariat, it might have been better to have in the body of experts at least one person retained to advise on the international law aspects of increasingly important and complex activities.

Gerald F. FitzGerald, Senior Legal Officer, ICAO (writing in his personal capacity), is the author of a timely comment on "Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft." This is described (p. 271) as not "a chronicle of despair so much as an example of the air lawyers' hopeful efforts to solve a singularly baffling problem. . . ." The author observes (p. 297) that the problem of coping successfully with hijacking "is one of the most serious problems that have arisen in the history of international civil aviation."

Published under the auspices of the Canadian Branch of the International Law Association, the *Yearbook*, now in its seventh volume, continues to be deserving of a high place in the literature in this field.

ROBERT R. WILSON

## BRIEFER NOTICES

*Cases and Materials on the Regulation of International Trade and Investment.* By Carl H. Fulda and Warren F. Schwartz. (University Casebook Series. Mineola, New York: Foundation Press, 1970. pp. xlv, 796. Index.) This is the fourth casebook on "international transactions" to appear since the course entered the law school curriculum over fifteen years ago. Without attempting radically to revise and restructure the field, the authors try to enhance its unity, which has remained problematic: they collect their materials around two "essential . . . objectives of international commerce": liberalization of trade and development through direct investment. They see its central policy dimension as "the tension between the principle of the free market on the one hand and government intervention on the other." Acutely aware of conflicts of interests and lack of consensus, they rightly assert that "the absence of agreement on such matters is a far more important impediment to economic progress than any shortcomings in existing legal rules" (p. xiii).

The casebook is divided in two unequal parts: the first, largest and, in this reviewer's judgment, best, deals with international trade: it starts with two excellent chapters on antitrust (impact of U. S. law abroad, E.E.C. law, the export exception), then moves to efforts toward trade liberalization and tariff reduction (GATT and the Kennedy Round) and to various "deviations" from free trade (agriculture, national security, escape clauses, dumping, trade preferences for developing countries). The second part deals first with restrictions on direct foreign investment (including again some antitrust problems), then with devices for its encouragement, especially through protection and incentives, and regulation of some of the interests involved.

One particularly attractive feature is the extended coverage of specific cases or problems: 37 pages are devoted to the *Swiss Watchmakers* case, about 55 each to the Kennedy Round and to the oil import program. These are veritable case studies, which significantly enrich the course. The book is further enriched by well-chosen excerpts from economic and legal literature, administrative and legislative reports, and other non-judicial materials. In long detailed textual notes the authors raise questions and pose problems with great sensitivity and acuity of perception.

Two fundamental questions remain. Have the authors managed to bring unity or at least coherence to the fragmented and disparate topics and materials of the field? A reading of their selections does not give that impression, but a definite answer is possible only after using the book in the classroom, as this reviewer has not yet done. Second, how appropriate is it to study problems of developed and less developed countries together, as the authors largely do? Despite technical similarities, is not the economic and political background of Canada's and Japan's policies toward foreign investment significantly different from India's or Ghana's? Would it not be better then to discuss developing countries' problems separately and more comprehensively—to study, for instance, private foreign investment and trade preferences together with foreign aid and public financing? To these questions there are no easy answers for authors or reviewers.

A. A. FATOUROS

*Judicial Remedies in the European Communities. A Case Book.* By L. J. Brinkhorst and H. G. Schermers. (Deventer, The Netherlands: Æ. E. Kluwer; London: Stevens and Sons, Ltd.; South Hackensack, N. J.: Fred B. Rothman & Co., 1969. pp. xxii, 275. Index. \$12.00.) This casebook on the law of the European Communities is a welcome addition to the growing literature on this subject. Messrs. Brinkhorst and Schermers, both professors of law in The Netherlands (the former at the University of Groningen, the latter at the University of Amsterdam), have collaborated in producing a collection of cases which they have assembled for use in teaching the International Course on European Integration given at the *Europa Instituut* of the University of Amsterdam. Fortunately for members of the American scholarly audience of European Community Law, this course is taught in English, which accounts for the casebook's appearing in English.

The book is expressly designed for use in a course on the law of the European Communities, and as such it comprises the most complete collection of excerpts of cases in this body of law yet to appear. The format is one of excerpts of varying lengths interspersed with commentary by the authors. The format and substance of this volume serve to a very great degree to flesh out with actual cases much of the abstract and theoretical literature that has appeared on the subject. The six chapters divide the subject matter into the following headings: actions against Community organs before the Court of Justice; administrative jurisdiction; the application of Community law by national courts; division of competence between national courts and the Court of Justice; preliminary rulings; the law applied by the Court of Justice; and procedure before the Court of Justice.

The authors have combined with advantage the American casebook method with the European method of systematic exposition to produce a volume that should be invaluable to anyone wishing to teach a course in the law of the European Community or to anyone who has a basic knowledge of the mélange of private and public law that comprises European Community Law and wishes to gain a fuller understanding of that law through concrete cases.

W. ANDREW AXLINE

*Political Integration by Jurisprudence. The Work of the Court of Justice of the European Communities in European Political Integration.* By Andrew Wilson Green. (Leiden: A. W. Sijthoff, 1969. pp. xxviii, 848. Index. Bibliography. Fl. 95.) Andrew Green, an American lawyer, presently the European representative of Georgetown University's Center for Strategic Studies, has offered us a weighty tome of 850 pages, originally written as a doctoral dissertation. It examines in great detail the law of the European Community through the cases decided by the Court of Justice.

Mr. Green has attempted to assess the degree to which the jurisprudence of the Court has contributed to the political integration of Europe. He does this by establishing six elements of political integration, which provide categories into which he can place the behavior of the Court, and from which he can judge its integrative effect. He then examines in great detail the decisions of the Court of Justice to reach conclusions about their impact.

For the most part, the categories into which the cases are divided are not new, and many of the cases studied have been the subject of ample commentary (as his extensive citation of authority shows). Yet Mr. Green does succeed in providing some new and interesting insight into this body of case material, even in such cases as *Costa v. ENEL*, which has been the subject of more commentary than perhaps any other case in Community law.

One flaw in Mr. Green's treatment is that at times he allows his conservative ideology gratuitously to intrude on his well-reasoned analysis, while he berates others for similar shortcomings. Thus, the assumption of a legislative rôle by American judges has brought "disastrous consequences" to the maintenance of law and order in the United States, while Jean Pierre Colin, a scholar of Community law, is guilty of "partisan polemics and not scholarship" when he suggests that the U. S. Supreme Court "menaced the very principles of democracy" during the period of the New Deal.

Apart from this, Mr. Green has produced a very carefully and extensively researched and documented treatment of European Community case law, complete with a very useful 350-page appendix of tables and bibliographies.

W. ANDREW AXLINE

*New Frontiers in Space Law.* Edited by Edward McWhinney and Martin A. Bradley. (Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. xii, 134. \$5.50.) The present volume comprises the revised working papers of a special conference sponsored by the Institute of Air and Space Law of McGill University in October, 1968, and devoted to "After the Moon Treaty: New Frontiers in International Cooperation in Space Law." Essays contributed by Judge Manfred Lachs, Paul G. Dembling, and G. P. Zhukov were also included.

Space law is not exactly an understudied field, and most of the contributions suggest that it is difficult to say much at this stage that has not been said elsewhere. Two essays especially noteworthy, however, are by a Czechoslovak jurist, Vladimir Kopal, who thoughtfully compared the development of the Agreement on Rescue of Astronauts with prior similar instruments of maritime and air law, and by Paul G. Dembling of NASA, who surveyed some of the considerations involved in the development of a convention on liability for outer space activities. Other articles treat: Latin American (A. A. Cocca) and Soviet (G. P. Zhukov) views on space law; registration of spacecraft (I. H. Ph. Diederiks-Verschoor); the co-ordination of European organizations for space co-operation (M. M. Bourély); the rôle of the International Law Association in developing a legal régime for outer space (D. Goedhuis); the field of application of space law (J. L. Vencatassin); the lawmaking process for outer space (Manfred Lachs); and the next steps in creating a legal order for outer space (Eugène Pépin).

WILLIAM E. BUTLER

*Vietnam and China, 1938-1954.* By King C. Chen. (Princeton, N. J.: Princeton University Press, 1969. pp. xvi, 436. Index. \$12.50.) This book deals primarily with Sino-Vietnamese relations between 1938 and 1954. Chapter 1 (The Background) gives a concise description of Sino-Vietnamese relations from 300 B.C. to the 1930's (pp. 3-32); while Chapter 7 (Epilogue: Peking, Hanoi, and a New Peace for Vietnam) covers briefly Sino-Vietnamese relations from 1954 to 1968 (pp. 331-350). The methodology of the book appears to be descriptive, although there is some good analysis of several historical events.

The book raises several interesting problems involving international law. Chapter 4 discusses the Chinese Nationalist troops' retreat to Viet-Nam in 1949 (pp. 201-211). Before their entry into Viet-Nam, the Chinese Communists warned the French authorities which then controlled Viet-Nam against allowing the entry of the Nationalist forces, and threatened

that they "shall bear the responsibility for handling this matter and all its ensuing consequences" (p. 203). It appears that the Chinese Communists would exercise the right of "hot pursuit" to enter Viet-Nam in order to eliminate the Nationalist forces. Later, however, they were surprisingly quiet on the whole issue and did not intervene in the final repatriation of the Nationalist forces to Taiwan in 1953. In Chapter 6 the author deals with the Geneva settlement of 1954 and describes in detail the process leading to the conclusion of the several international agreements in the Geneva settlement (pp. 279-330).

It is regrettable that the author did not use an important Chinese Communist source—*Chung-hua jen-min kung-ho kuo tui-wai kuan-hsi wen-chien-chi* [Compilation of Documents Relating to the Foreign Relations of the People's Republic of China].<sup>1</sup> The compilation contains a number of important documents relating to Sino-Vietnamese relations. For instance, Volume 1 of the compilation contains a document issued by Chou En-lai on January 18, 1950, protesting French persecution of Chinese nationals in Viet-Nam (pp. 90-91). This document is, however, not mentioned in the book under review. Volume 2 of the compilation mentioned contains a document issued by the official New China News Agency denying the conclusion of a Soviet-Chinese-Viet-Minh agreement for sending 300,000 Chinese troops to Viet-Nam (p. 136). While the book mentions this fact, no reference is given (p. 274).

HUNGDAH CHIU  
Professor of International Law,  
National Chengchi University,  
Republic of China

*The Reluctant Door: The Right of Access to the United Nations.* By Lief Kr. Tobiassen. (Washington, D. C.: Public Affairs Press, 1969. pp. viii, 413. Index. \$8.50.) The establishment of a general international organization whose activities require extensive staff and invite transit in and out of the host state raises enormous legal and administrative problems for the organization and its host country; these problems increase in proportion to the political limitations on immigration practiced by the host country. In an extremely useful and detailed study, Professor Tobiassen traces the genesis and development of access practice in the International Organizations Immunities Act of 1945 and the United Nations Headquarters Agreement of 1947, and, within these parameters, the subsequent interactions between the Secretariat, the Department of State, Congress and foreign nationals seeking entry for United Nations purposes. The title of the study is something of a misnomer. This particular door to the United States has been quite unreluctant; it is especially surprising considering the social pathologies of McCarran-Walter, McCarthyism and the mid-fifties xenophobia, which have scarred the jambs and sill. But Professor Tobiassen does investigate minutely those prominent cases in which access or residence was restricted and conveys the complex political and legal dynamics of each case.

A study of this sort covers a wide range; selectivity is inevitable. It is, however, unfortunate that there is little comparison with the access-restriction practice of other states that are hosts to international organizations and, more important, that there is no express formulation of policy guidelines for balancing access and restriction, by reference to the inclusive and exclusive interests in different contexts.

MICHAEL REISMAN

<sup>1</sup> Published by Shih-chieh chih-shih ch'u-pan she (World Knowledge Press) in Peking.

*Space Law.* By Gyula Gál. Translated by I. Móra. (Leiden: A. W. Sijthoff; Budapest: Akadémiai Kiadó; Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. 320. Bibliography. Indices.) Dr. Gál's *Space Law* is a translation and revision of a study first completed in 1963.<sup>1</sup> While touching on the wide range of legal problems connected with space activities, Dr. Gál devotes almost a third of the treatise to the question of the legal status of outer space and of celestial bodies, a subject well covered in other literature. Relatively little attention is given to the rôle of the United Nations and other international organizations. To the Western reader, the most interesting aspect of the work is the presentation of the views of many Soviet and Eastern European legal scholars, some of whom are little known outside the Bloc. Where matters which have been issues between American and Soviet diplomats are discussed, such as the "peaceful uses" of outer space, and international arrangements for the use of satellites for communications activities, Dr. Gál generally attains a judicious and scholarly approach.

HOWARD J. TAUBENFELD

*Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten.* By Konrad Ginther. (Vienna and New York: Springer-Verlag, 1969. pp. viii, 202. Index. S. 240; DM. 38; \$9.50.) The international status of international organizations has long been debated, and the literature abounds with the different theories that have been advocated. Less commonly discussed is the question of the international responsibility of such entities, and it is to this topic that the present study is addressed. After providing a theoretical setting and an examination of the practice of sovereign states, the author sets forth the budgetary articles of certain organizations, such as the United Nations, the International Bank for Reconstruction and Development, and the European Economic Community, but finds these provisions inadequate for purposes of ascribing responsibility. Hence certain conventions and proposals on extra-hazardous activities, namely, the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the Proposed International Agreement on Liability for Damage Caused by Objects Launched into Outer Space, are presented. At the same time, Dr. Ginther describes the liability of the United Nations for damages arising out of its peacekeeping activities and analyzes certain of the appropriate regulations of UNEF, ONUC, and UNFICYP as well as the Red Cross-United Nations and Spaak-U Thant agreements, which were necessitated by the Congo operations. The conclusion is drawn that the results have differed in the two instances. With regard to peacekeeping the United Nations has automatically accepted liability without asserting a simultaneous or residual liability on the part of its Member States. In the case of potential activities on the part of international organizations in the extra-hazardous economic sphere, however, collective liability of the organizations has so far not been accepted without question, although it is noted that the evidence points in this direction. And drawing on Spencer's principle of integration which Max Huber long ago introduced into the international legal system, Dr. Ginther suggests that, with the exception of the United Nations, the test of an organization's own liability be based on whether it is an *Integrationssubjekt* or a *Haftungsssubjekt*.

GUENTER WEISSBERG

<sup>1</sup> See review of the original Hungarian edition in 60 A.J.I.L. 882 (1966).

*Tranzyt przez porty morskie w świetle Prawa Międzynarodowego* [*Transit through Maritime Ports in the Light of International Law*]. By Janusz Gilas. (Gdańsk: Wydawnictwo Morskie, 1969. Biblioteka "Techniki i Gospodarki Morskiej," Vol 15. pp. 184. Zł. 25.) This slender but compactly written and tightly reasoned volume by a young Polish expert on international economic law seems to have a dual objective, one theoretical and the other politico-economic. The former attempts to ascertain the legal "essence" of international transit in general and of transit through seaports in particular. One by one the various legal theories advanced by international jurists are discussed and rejected. Transit does not represent a basic right of states nor is it a fundamental right of persons. The theory construing freedom of transit as a kind of an international servitude is subjected to detailed criticism by the author. The judgments of the World Court in the *S.S. Wimbledon* and the *Portugal vs. India* cases are analyzed, as well as the analogy with the civil law institution of statutory claim of the owner of a parcel to access and to a right of way across plots adjacent to a public highway. The theory of international servitudes is finally rejected by the author in favor of the concept of international privileges. Transit rights are based on privileges granted by the transit state to other countries in multilateral, regional or bilateral agreements. By clear implication the transit state is free to grant or to refuse transit and to impose regulations according to its own political and economic interests.

The author seems to have somewhat overshot his aim. He admits that the 1964 New York Convention on Transit Trade of Land-Locked States created binding transit standards (p. 133). The convention seems to imply at least an obligation to negotiate transit agreements in good faith and restricts the right of control and regulation.

The last chapter deals with processes of integration in the European Economic Community and in the COMECON. The author stresses the prerequisite of political homogeneity of countries concerned and of the identity of their political and economic objectives. They make it possible to treat transit as a right and not a privilege. Thus he sees clearly the direction of modern developments. It should preclude his search for legal "essences" relevant only in a static world.

The theoretical approach serves a distinct politico-economic purpose. Poland, now a coastal and seafaring nation, seems eager to safeguard her legal bargaining position not only in relation to capitalist countries but also to her landlocked neighbors (Czechoslovakia and Hungary). Such a political motivation (to be found even in works considered as classic) does not detract from the scholarly value of this well-written book.

ALEKSANDER WITOLD RUDZINSKI

*Conflit Idéologique et Ordre Public Mondial*. By Edward McWhinney. (Paris: Éditions A. Pedone, 1970. pp. 157.) This is a series of lectures delivered in 1968 at the *Institut des Hautes Etudes Internationales* of the University of Paris which provided the author an opportunity to reformulate and restate his views on what constitutes that order which accommodates conflicting claims of the members of the international community.

The author tells us that the present international community differs from the past in that it is a world ideologically divided. Ideologies, though divisive, do not disrupt the system. Claims are formulated with reference to the rules and principles of international law. At times, however, and here the Cuban crisis is a case in point, claims are formulated with reference to other criteria: power, vital interests, etc.

Mutual accommodation, not always friendly, but always involving a series of compromises and concessions and the use of various techniques,

produces world public order. The final outcome is peaceful co-existence (a changing concept, as Professor McWhinney demonstrates). Both world public order and peaceful co-existence are not principles of international law—which is one of the important elements in both.

A good deal of attention in Professor McWhinney's collection of essays is devoted to the changing rôle of United Nations bodies and to the techniques of negotiations between the great Powers, which frequently provide the real framework for the solution of vital problems in the work for the preservation of peace. An important part of the book deals with the scientific methods used to devise international legislation to operate in the ideologically divided world.

The book ends with a suggestion that, while East-West ideological division is still the chief element influencing the realities of world public order, there are other lines of division coming to the surface. It is likely that the East-West division will be replaced by the confrontation separating the industrial from the underdeveloped nations. It may affect the tenor of the rules of international law and direct its main purpose toward the realization of concrete social and economic goals.

This is an unusual book, and deserves a place in any library.

KAZIMIERZ GRZYBOWSKI

*An International Peace Court: Design for a Move from State Crime toward World Law.* By Thomas Holton. Introduction by George W. Keeton. (The Hague: Martinus Nijhoff, 1970. pp. xv, 109.) Professor Holton has written an idealistic and independent book which reiterates the need for structural change in the world arena, quite cogently questions many of the premises of current transnational politics and develops a detailed alternative. Holton argues for some organized authoritative process to deal effectively with major as well as minor international conflicts. He believes that a court of some sort is the optimum process because of its idiosyncratic characteristics and the global political context. The premise that only military, economic and diplomatic factors are effective bases of world political power is closely questioned. Authority, particularly when it is made specific by some legitimate organ, can be an equally decisive influence on political leaders. Professor Holton presses his analysis to the phase of implementation, detailing a Model Statute for an International Peace Court and projecting and evaluating a number of the direct and ancillary consequences it may precipitate. This is a provocative little book; although the reader may himself entertain reservations about some of Professor Holton's premises, he will have gained insights by studying it.

MICHAEL REISMAN

*Fundheft für Öffentliches Recht.* Vol. XX, Part I. Edited by Otto Strössenreuther and J. M. Mössner. (Munich: C. H. Beck'sche Verlag, 1970. pp. 48.) There still is no wholly satisfactory bibliographical service for international lawyers. A revised format for the Beck *Fundheft* lists books and major articles dealing with international law and European Community law broken down by subject. The major strength of this listing is its inclusion of both major articles and books (unlike the concentration on articles alone in the *Index to Foreign Legal Periodicals*). References to book reviews of some of the listed works indicate where the book was reviewed and by whom. The major weaknesses are a numerically limited coverage resulting in some strange inclusions and exclusions, the absence of an alphabetical author list to supplement the subject index, and some understandable over-representation of German-language works. Like the



other indexes currently available, shorter works are just ignored. As a welcome innovation, the mention of book reviews is not arbitrarily limited to book reviews of at least two and a half pages as in the *Index to Foreign Legal Periodicals*. Where the *Index* seems to consider book reviews as important because the reviewer has written at length, the *Fundheft* mentions reviews where they would be useful to the researcher seeking bibliographical help, and recognizes that a short review will in many cases be more useful than a long one.

ALFRED P. RUBIN

### BOOKS RECEIVED \*

- Aguayo, Leopoldo González. *La Nacionalización de Bienes Extranjeros en América Latina*. Vols. I and II. Vol. I: pp. vi, 412; Vol. II: pp. 297. Mexico: Ciudad Universita, 1969.
- Akehurst, Michael. *A Modern Introduction to International Law*. London: George Allen and Unwin Ltd., 1970. pp. 367.
- Amerasinghe, C. F. *Studies in International Law*. Colombo: Lake House Investments Ltd., 1969. pp. xii, 321. Index. 57 s., cloth; 44 s., paper.
- Andrassy, Juraj. *International Law and the Resources of the Sea*. New York and London: Columbia University Press, 1970. pp. xviii, 191. Index. \$7.50.
- Association Bulgare de Droit International. *La République Populaire de Bulgarie et les Droits de l'Homme. Recueil d'Études et de Documents*. Sofia: Presse, 1970. pp. 233.
- Barros, James. *The League of Nations and the Great Powers. The Greek-Bulgarian Incident, 1925*. Oxford: Clarendon Press, 1970. pp. xiv, 143. Index. \$6.50.
- Behrman, Jack N. *National Interests and the Multinational Enterprise. Tensions among the North Atlantic Countries*. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1970. pp. xi, 194. \$8.50, cloth; \$4.95, paper.
- Birnbaum, Karl E. *Frieden in Europa Voraussetzungen Chancen Versuche*. Opladen: Leske Verlag, 1970. pp. 146.
- Blix, Hans. *Sovereignty, Aggression and Neutrality*. (Three Lectures.) Stockholm: Almqvist & Wiksell, 1970, for the Dag Hammarskjöld Foundation in Uppsala, Sweden. pp. 63. Sw.Cr. 12; \$2.50.
- Bohme, Eckhart. *Tankerunfälle auf dem Hohen Meer. Die Zulässigkeit Staatlicher Massnahmen zur Gefahrenabwehr*. Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1970. pp. 92. DM. 9.
- Boskey, Bennett, and Mason Willrich (eds.). *Nuclear Proliferation: Prospects for Control*. New York: The Dunellen Co., Inc., 1970. pp. 191. \$7.50.
- British Year Book of International Law, 1968-69*. Edited by Sir Humphrey Waldock and R. Y. Jennings. London, New York, and Toronto: Oxford University Press, 1970. pp. ix, 352. Index. \$17.00.
- Broderick, Albert (ed.). *The French Institutionalists, Maurice Hauriou, Georges Renard, Joseph T. Delos*. Cambridge, Mass.: Harvard University Press, 1970. pp. xxv, 370. Index. \$15.00.
- Bruxelles, Université Libre. Institut d'Études Européennes (Thèses et travaux juridiques). *L'Association à la Communauté Économique Européenne. Aspects Juridiques*. Brussels: Presses Universitaires de Bruxelles, 1970. pp. xi, 364.
- Carreau, Dominique. *Souveraineté et Coopération Monétaire Internationale*. Paris: Éditions Cujas, 1970. pp. ix, 530. Index.
- Caty, Gilbert. *Le Status Juridique des États Divisés*. Paris: Éditions A. Pedone, 1969. pp. 261.
- Collins, Edward, Jr. (ed.). *International Law in a Changing World: Cases, Documents, and Readings*. New York: Random House, 1970. pp. xvi, 493. Index. \$9.95.

\* Mention here neither assures nor precludes later review.

- Contini, Paolo. *The Somali Republic: An Experiment in Legal Integration*. London: Frank Cass and Co., Ltd., 1969. pp. viii, 92. 42 s.
- Cosgrove, Carol Ann, and Kenneth J. Twitchett (eds.). *The New International Actors: The U.N. and the E.E.C.* London: Macmillan; New York: St. Martin's Press, 1970. pp. 272. Index. \$7.50, cloth; \$2.50, paper.
- Deener, David R. (ed.) *De Lege Pactorum. Essays in honor of Robert Renbert Wilson*. Durham, N. C.: Duke University Press, 1970. pp. xiii, 274. \$13.50.
- Delcoigne, Georges, and Georges Rubinstein. *Non-Prolifération des Armes Nucléaires et Systèmes de Contrôle*. Brussels: Editions de l'Institut de Sociologie, Université Libre de Bruxelles, 1970. pp. 214.
- Díaz Cárneros, Cesar. *Derecho Internacional Público*. Vols. I and II. Vol. I: pp. ix, 743. Index; Vol. II: pp. vi, 748. Index. Buenos Aires: Tipografica Editora Argentina, 1966.
- Dickie, Robert B. *Foreign Investment: France. A Case Study*. Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. 135.
- Eisemann, Pierre Michel, Vincent Coossirat-Coustere, and Paul Hur. *Petit Manuel de la Jurisprudence de la Cour Internationale de Justice*. Paris: Éditions A. Pedone, 1970. pp. viii, 310.
- Falk, Richard A., and Cyril E. Black (eds.). *The Future of the International Legal Order*. Princeton, N. J.: Princeton University Press, 1970. pp. xi, 343. Index. \$11.00.
- Galloway, John. *The Gulf of Tonkin Resolution*. Rutherford, Madison, and Teaneck, N. J.: Fairleigh Dickinson University Press, 1970. pp. 578. Index. \$18.00.
- Gelberg, Ludwig. *Powstanie Polski Ludowej. Problemy Prawa Międzynarodowego*. Warsaw: Państwowe Wydawnictwo Naukowe, 1970. pp. 161.
- Giardina, Andrea. *Successione di Norme di Conflitto*. Milan: Giuffrè Editore, 1970. pp. x, 248. L.2600.
- Glaser, Stefan. *Droit International Pénal Conventionnel*. Brussels: Établissements Émile Bruylant, 1970. pp. 649. Index. Fr. 2200.
- Görres-Gesellschaft (eds.). *Staatslexikon. Recht—Wirtschaft—Gesellschaft. Sechste, völlig neu bearbeitete und erweiterte Auflage*. Vol. X: *Zweiter Ergänzungsband. Foerster bis Praktische Philosophie*. Freiburg: Verlag Herder, 1970. pp. 966. DM. 98, linen; DM. 108, leatherbound.
- Gotlieb, Allan (ed.). *Human Rights, Federalism, and Minorities*. Toronto: Canadian Institute of International Affairs, 1970. pp. x, 268. Index. \$6.00.
- Gould, Wesley L., and Michael Barkun. *International Law and the Social Sciences*. Princeton, N. J.: Princeton University Press, 1970. pp. xx, 338. Index. \$9.75.
- Grabitz, Eberhard. *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft*. Cologne: Europa Union Verlag GmbH, 1970. pp. 116. DM. 7.50.
- Granfeldt, Helge. *Alliances and Ententes as Political Weapons. From Bismarck's Alliance System to Present Time*. Uddevalla: Risberg & Olsson Tryckeri AB, 1970. pp. 239.
- Green, L. C. *International Law through the Cases*. Third Edition. London: Stevens & Sons, Ltd.; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xxii, 855. Index. \$14.00.
- Grzybowski, Kazimierz. *Soviet Public International Law. Doctrines and Diplomatic Practice*. Leiden: A. W. Sijthoff; Durham, N. C.: Rule of Law Press, 1970. pp. xx, 544. Index.
- Günther, Herbert. *Zur Entstehung von Völkergewohnheitsrecht*. Berlin: Duncker & Humblot, 1970. pp. 190. DM. 39.60.
- Haas, Ernst B. *Human Rights & International Action. The Case of Freedom of Association*. Stanford, California: Stanford University Press, 1970. pp. xv, 184. Index. \$6.50.
- Hague Conference on Private International Law. *Actes et Documents de la Onzième Session 7 au 26 octobre 1968*. Tome II: *Divorce*. pp. 229. Tome III: *Accidents de la Circulation Routière*. pp. 223. Tome IV: *Obtention des Preuves à l'Étranger*. pp. 219. The Hague: Imprimerie Nationale, 1970. Fl. 54; \$15.00, each.

- Harbottle, Michael. *The Impartial Soldier*. London, New York, Toronto: Oxford University Press, 1970. pp. xii, 210. Index. \$5.50.
- Hecker, Hellmuth. *Mehrseitige Völkerrechtliche Verträge zum Staatsangehörigkeitsrecht*. Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1970. pp. 111. DM. 19.40.
- Holborn, Louise W., Gwendolen M. Carter, and John W. Herz (eds.). *German Constitutional Documents since 1871. Selected Texts and Commentary*. New York, Washington, and London: Praeger Publishers, 1970. pp. viii, 243. Index of Documents. \$10.00, cloth; \$4.50, paper.
- Holleaux, Dominique. *Compétence du Juge Étranger et Reconnaissance des Jugements*. Paris: Librairie Dalloz, 1970. pp. x, 456. Index.
- Iaccarino, Ugo Maria. *Gli "Atti" delle Comunità Europee*. Naples: Casa Editrice Dott. Eugenio Jovene, 1970. pp. xxxvi, 255. Index. L. 3500.
- International Bar Association. *Twelfth Conference, Dublin, Ireland, July 11-15, 1968. Report*. The Hague: Martinus Nijhoff, 1970. pp. xli, 468. Gld. 36.
- Internationales Privatrecht. Band I. Lieferung 1. *Einleitung: Artikel 7, 8, 9 und 11 EGBGB*. Contributors: Günther Beitzke, Helmut Coing, Karl Firsching, and Friedrich Korkisch. Berlin: J. Schweitzer Verlag, 1970. pp. xii, 292. DM. 60.
- Jenisch, Uwe. *Das Recht zur Vornahme Militärischer Übungen und Versuche auf Hoher See in Friedenszeiten*. Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1970. pp. 185. DM. 29.80.
- Jose, James R. *An Inter-American Peace Force Within the Framework of the Organization of American States: Advantages, Impediments, Implications*. Metuchen, N. J.: The Scarecrow Press, 1970. pp. 324. Index. \$7.50.
- Kramish, Arnold. *Die Zukunft der Nichtatomaren. Zur Situation nach dem Kernwaffensperrvertrag*. Opladen: Leske Verlag, 1970. pp. 164.
- Kutner, Luis (ed.). *The Human Right to Individual Freedom. A Symposium on World Habeas Corpus*. Coral Gables, Florida: University of Miami Press, 1970. pp. 249. \$12.50.
- Kutner, Gerhard. *Die Organisation der Amerikanischen Staaten (OAS)*. Hamburg: Hansischer Gildenverlag, Joachim Heitmann & Co., 1970. pp. 399. Index. DM. 48.
- Lay, S. Houston, and Howard J. Taubenfeld. *The Law Relating to Activities of Man in Space*. Chicago and London: The University of Chicago Press, 1970. pp. xii, 333. Index. \$17.50.
- Litvine, Max (with the collaboration of Armand Moury). *Droit Aérien. Notions de Droit Belge et de Droit International*. Brussels: Établissements Émile Bruylant, 1970. pp. 363. Index. Fr. 900, paper; Fr. 1280, cloth.
- London Institute of World Affairs. *The Year Book of World Affairs, 1970*. London: Stevens & Sons, 1970. pp. xii, 345. Index. £14 10 s.
- Makarov, Alexander N. *Grundriss des Internationalen Privatrechts*. Frankfurt am Main: Alfred Metzner Verlag, 1970. pp. 202. Index. DM. 19.70.
- Matzner, Egon. *Trade between East and West: The Case of Austria*. Stockholm: Almqvist & Wiksell, 1970. pp. 169. Sw. Kr. 45.
- Mégret, J., J. V. Louis, D. Vignes, and M. Waelbroeck. *Le Droit de la Communauté Économique Européenne*. Vol. 1: *Préambule—Principes, Libre Circulation des Marchandises*. pp. xi, 88. Index. B. Fr. 500; Vol. 2: *Agriculture*. pp. 412. Index. B. Fr. 1100. Brussels: Presses Universitaires de Bruxelles, 1970.
- Merillat, H. C. L. *Land and the Constitution in India*. New York and London: Columbia University Press, 1970. pp. xv, 321. Index. \$10.00.
- Meyrowitz, Henri. *Le Principe de l'Égalité des Belligérants devant le Droit de la Guerre*. Paris: Éditions A. Pedone, 1970. pp. vi, 418. Index.
- Miller, John T., Jr. *Foreign Trade in Gas and Electricity in North America: A Legal and Historical Study*. New York, Washington, and London: Praeger Publishers, 1970. pp. xix, 316. \$18.50.
- Minear, Richard H. *Japanese Tradition and Western Law. Emperor, State, and Law in the Thought of Hozumi Yatsuka*. Cambridge, Mass.: Harvard University Press, 1970. pp. xi, 244. Index. \$9.00.

- Navarrete, Jaime. *El Reenvio en el Derecho Internacional Privado*. Santiago: Editorial Jurídica de Chile, 1970. pp. lxiii, 207. Index. \$6.50.
- Neeman, Yaakov. *The Tax Consequences upon Conversion of Property's Use*. Dobbs Ferry, N. Y.: Oceana Publications; Tel Aviv: Schocken Publishing House, Ltd., 1970. pp. xxviii, 241. Index. \$11.00.
- Nehrt, Lee Charles. *The Political Climate for Private Foreign Investment with Special Reference to North Africa*. New York, Washington, and London: Praeger Publishers, 1970. pp. xxix, 391. \$18.50.
- Oehler, Dietrich, and Paul-Günter Pötz (eds.). *Aktuelle Probleme des Internationalen Strafrechts. Beiträge zur Gestaltung des Internationalen und eines Supranationalen Strafrechts. Heinrich Grützner zum 65. Geburtstag*. Hamburg: R. V. Decker's Verlag, G. Schenck, 1970. pp. xii, 180. DM. 29.
- Oudendijk, J. K. *Status and Extent of Adjacent Waters. A Historical Orientation*. Leiden: A. W. Sijthoff, 1970. pp. 160. Index. Fl. 24.
- Papacostas, Alkis-Basile N. *International Organization* (in Greek). Athens: 1970. pp. 158. Index.
- Patijn, S. (ed.). *Landmarks in European Unity. A Collection of Studies Relating to European Integration. Jalons dans l'Europe Unie* (in English and French). Leiden: A. W. Sijthoff, 1970. pp. 223.
- Poulantzas, Nicholas M. *The Right of Hot Pursuit in International Law*. Leiden: A. W. Sijthoff, 1969. pp. xvi, 451. Index. Fl. 37.
- Rahl, James A. (ed.) *Common Market and American Antitrust. Overlap and Conflict*. New York, London, and Toronto: McGraw-Hill Book Co., 1970. pp. xv, 476. Index. \$32.50.
- Rubin, Neville N., and Eugene Cotran (eds.). *Readings in African Law*. 2 vols. Vol. I: pp. xxvii, 418. Index; Vol. II: pp. ix, 336. Index. New York: African Publishing Corp., 1970. \$22.50 each; \$45.00 for the two vols.
- Scherer, Josef. *Die Wirtschaftsverfassung der WEG*. Baden Baden: Nomos Verlagsgesellschaft, 1970. pp. 205. DM. 32.
- Schwartz, Mortimer D. (ed.) *Proceedings of the Twelfth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (October 5-10, 1969, Mar Del Plata, Argentina)*. South Hackensack, N. J.: Fred B. Rothman & Co., 1970. pp. iii, 336. \$17.50.
- Schwarz, Urs. *Confrontation and Intervention in the Modern World*. Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. vi, 218. Index. \$7.50.
- Slater, Jerome. *Intervention and Negotiation. The United States and the Dominican Revolution*. New York, Evanston, and London: Harper & Row, 1970. pp. xix, 254. Index. \$7.95.
- Sobarzo, Alejandro. *Régimen Jurídico del Alta Mar*. Mexico, D. F.: Editorial Porrúa, S. A., 1970. pp. xv, 323. Index.
- Szaszy, István. *Conflicts of Laws Arising from Investments in Developing Countries*. Budapest: Center for Afro-Asian Research of the Hungarian Academy of Sciences, 1970. pp. vi, 25. \$1.20.
- Tomuschat, Christian. *Die Aufwertung der Deutschen Mark. Staats- und völkerrechtliche Überlegungen zur Neufestsetzung der Währungsparität im Jahre 1969*. Cologne and Berlin: Carl Heymanns Verlag KG, 1970. pp. vii, 48.
- United States Department of State. *Foreign Relations of the United States, 1946. Vol. II: Council of Foreign Ministers*. (Dept. of State Pub. 8497.) Washington, D. C.: U. S. Govt. Printing Office, 1970. pp. xiii, 1586. Index. \$7.50.
- Valladão, Haroldo. *Direito Internacional Privado*. 2nd ed. Rio de Janeiro and São Paulo: Livraria Freitas Bastos S. A., 1970. pp. xvi, 579.
- Walter, Hannfried. *Die Europäische Menschenrechtsordnung. Individualrechte, Staatenverpflichtungen und ordre public nach der Europäischen Menschenrechtskonvention*. Cologne and Berlin: Carl Heymanns Verlag KG, 1970. pp. x, 150. DM. 26.
- Zwarensteyn, Hendrick. *Some Aspects of the Extraterritorial Reach of the American Antitrust Laws*. South Hackensack, N. J.: Fred B. Rothman & Co., 1970. pp. 174. Table of Cases. \$7.75.

## OFFICIAL DOCUMENTS

### UNITED NATIONS GENERAL ASSEMBLY

#### RESOLUTION 2625 (XXV)

##### DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

*Adopted at the 1883rd Plenary Meeting, October 24, 1970*<sup>1</sup>

*The General Assembly,*

*Recalling* its Resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among states,

*Having considered* the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>2</sup> which met in Geneva from 31 March 1970 to 1 May 1970,

*Emphasizing* the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among states,

*Deeply convinced* that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among states, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

*Considering* the desirability of the wide dissemination of the text of the Declaration,

1. *Approves* the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

<sup>1</sup> U.N. General Assembly, 25th Sess., Doc. A/RES/2625 (XXV), U.N. Press Release GA/4355 (Dec. 17, 1970), Pt. VIII, p. 1.

<sup>2</sup> General Assembly, 25th Sess., Official Records, Supp. No. 18 (A/8018).

3. *Recommends* that all efforts be made so that the Declaration becomes generally known.

#### ANNEX

#### DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

#### PREAMBLE

*The General Assembly,*

*Reaffirming* in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

*Recalling* that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

*Bearing in mind* the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

*Bearing in mind also* the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

*Considering* that the faithful observance of the principles of international law concerning friendly relations and co-operation among states and the fulfilment in good faith of the obligations assumed by states, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

*Noting* that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of states wherever carried on,

*Recalling* the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

*Convinced* that the strict observance by states of the obligation not to intervene in the affairs of any other state is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

*Recalling* the duty of states to refrain in their international relations

from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state,

*Considering* it essential that all states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,

*Considering* it equally essential that all states shall settle their international disputes by peaceful means in accordance with the Charter,

*Reaffirming*, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if states enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

*Convinced* that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

*Convinced* that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality,

*Convinced* in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter,

*Considering* the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

*Considering* that the progressive development and codification of the following principles:

- (a) The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,
- (b) The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,
- (c) The duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter,
- (d) The duty of states to co-operate with one another in accordance with the Charter,
- (e) The principle of equal rights and self-determination of peoples,
- (f) The principle of sovereign equality of states,
- (g) The principle that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter,

so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

*Having considered* the principles of international law relating to friendly relations and co-operation among states,

1. *Solemnly proclaims* the following principles:

*The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations*

Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, states have the duty to refrain from propaganda for wars of aggression.

Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of states.

Every state likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a state shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial ac-



quisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

- (a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or
- (b) The powers of the Security Council under the Charter.

All states shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among states.

All states shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based upon the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

*The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered*

Every state shall settle its international disputes with other states by peaceful means, in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other states, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of states and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by states with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

*The principle concerning the duty not to intervene in matters  
within the domestic jurisdiction of any state, in  
accordance with the Charter*

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another state, or interfere in civil strife in another state.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

*The duty of states to co-operate with one another in  
accordance with the Charter*

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

- (a) States shall co-operate with other states in the maintenance of international peace and security;
- (b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
- (c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
- (d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

*The principle of equal rights and self-determination of peoples*

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among states; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.

*The principle of sovereign equality of states*

All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) Each state enjoys the rights inherent in full sovereignty;
- (c) Each state has the duty to respect the personality of other states;
- (d) The territorial integrity and political independence of the state are inviolable;
- (e) Each state has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.

*The principle that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter*

Every state has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every state has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every state has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

*General Part*

*2. Declares that:*

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles,

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member

States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration,

3. *Declares further* that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all states to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

## INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume 9, No. 6 (November), 1970, of *International Legal Materials: Current Documents*:<sup>1</sup>

### VOLUME IX, NUMBER 6 (November, 1970)

	PAGE
JUDICIAL AND SIMILAR PROCEEDINGS	
European Communities: Court of Justice Decision in ACF Chemiefarma N.V. v. Commission of the European Communities ( <i>Restrictive Business Practices</i> ) .....	1097
Iran: Court of First Instance Decision in Sapphire International Petroleum Ltd. v. the National Iranian Oil Company ( <i>Arbitration Proceedings; National Jurisdiction</i> ) .....	1118
United States: Court of Appeals Decision in Banco Nacional de Cuba v. First National City Bank of New York ( <i>Cuban Nationalizations; Act of State Doctrine; Sovereign Immunity</i> ) .....	1125
United States Agency for International Development-Valentine Petroleum & Chemical Corporation: Concurring Opinion in Arbitration of <i>Dispute Involving the U.S. Guaranty Program</i> .....	1144
TREATIES AND AGREEMENTS	
El Salvador-Honduras: Agreement on <i>Security Zone</i> .....	1148
France-Union of Soviet Socialist Republics: Protocol and Declaration on <i>Political Cooperation</i> .....	1165
Indonesia-Malaysia: Agreement on <i>Continental Shelf Boundaries</i> ..	1173
Inter-American Juridical Committee: Draft Convention on <i>Terrorism and Kidnapping</i> .....	1177
International Civil Aviation Organization: Proposals Concerning <i>Unlawful Interference Against International Civil Aviation</i> .....	1183
United Nations Council for Namibia: Agreements with African Countries for <i>Issuing Travel and Identity Documents to Namibians</i> .....	1218

<sup>1</sup> The annual subscription for six numbers of *International Legal Materials* is \$35.00; there is a concessionary rate of \$15.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

	PAGE
LEGISLATION AND REGULATIONS	
Peru: Decree-Law 18350 on the <i>Law of Industries</i> .....	1225
OTHER DOCUMENTS	
Canada-People's Republic of China: Joint Communiqué on the <i>Establishment of Diplomatic Relations</i> .....	1244
Council of Europe: Resolution and Recommendation on <i>Unlawful Seizure of Aircraft</i> .....	1246
Inter-American Juridical Committee: Statement of Reasons for the Draft Convention on <i>Terrorism and Kidnapping</i> .....	1250
International Civil Aviation Organization: <i>Measures to Combat Hijacking</i>	
Assembly Resolutions .....	1274
Council Resolutions Setting Forth Guidelines for ICAO Legal Committee .....	1286
United Nations:	
Resolutions on <i>Hijacking</i>	
General Assembly Resolution .....	1288
Security Council Resolution .....	1291
Declaration on <i>Principles of International Law Concerning Friendly Relations and Cooperation Among States</i> .....	1292

# *American Journal of International Law*



*April 1971*  
*Vol. 65 No. 2*



*Published by The*  
*American Society of International Law*

## PATRONS OF THE SOCIETY

HONORABLE ARTHUR H. DEAN  
HONORABLE HERMAN PHLEGER  
MRS. BENJAMIN J. TILLAR (deceased)  
MR. W. ROBERT MORGAN

### *In Memoriam*

DR. JAMES BROWN SCOTT  
MR. HENRY C. MORRIS  
MR. ARTHUR K. KUHN  
MR. ALEXANDER FREEMAN

## PATRONAGE, GIFTS AND BEQUESTS

Upon donation to the Society of \$5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$5,000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

## MANLEY O. HUDSON MEDAL

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visser (1966), and Paul Guggenheim (1970).



# AMERICAN JOURNAL OF INTERNATIONAL LAW



VOL. 65

April, 1971

NO. 2

## CONTENTS

	PAGE
The International Court of Justice: Consideration of Requirements for Enhancing its Rôle in the International Legal Order <i>Leo Gross</i>	253
Barcelona Traction: The <i>Jus Standi</i> of Belgium <i>Herbert W. Briggs</i>	327
The Rann of Kutch Arbitration <i>J. Gillis Wetter</i>	346
<i>Vae Victis</i> or Woe to the Negotiators! <i>Judge Sir Gerald Fitzmaurice</i>	358
Editorial Comment:	
The Connally Reservation Revisited and, Hopefully, Contained <i>Louis Henkin</i>	374
Notes and Comments:	
A Cause of the Present Crisis of International Law <i>Miodrag Sukijasović</i>	378
Sixty-Fifth Annual Meeting of the Society, April 29–May 1, 1971	381
Annual Meeting of the Philippine Society of International Law <i>E.H.F.</i>	387
U. S. Contemporary Practice Relating to International Law <i>Steven C. Nelson</i>	388
Judicial Decisions Involving Questions of International Law <i>Edited by Alona E. Evans</i>	398
Book Reviews and Notes. <i>Edited by Leo Gross:</i>	
Jenks, C. Wilfred, <i>Social Justice in the Law of Nations</i>	411
De Visscher, Charles, <i>Problèmes de Confins en Droit International Public</i>	412
Alder, Claudius, <i>Koordination und Integration als Rechtsprinzipien</i>	413
Tunkin, G. I., <i>Teoriia Mezhdunarodnogo Prava</i>	416
Skubiszewski, Krzysztof, <i>Zachodnia Granica Polski</i>	418
Lador-Lederer, J. J., <i>International Group Protection</i>	420
Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht, <i>Judicial Protection against the Executive</i>	421
Rüter-Ehlermann, Adelheid L., and C. F. Rüter, <i>Justiz und NS-Verbrechen. Sammlung Deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945–1966</i>	423
Bailey, Sydney D., <i>Voting in the Security Council</i>	425

## CONTENTS (*cont'd.*)

	PAGE
Zacher, Mark W., <i>Dag Hammarskjöld's United Nations</i>	426
Etzioni, Minerva. <i>The Majority of One: Towards a Theory of Regional Compatibility</i>	427
<i>British Year Book of International Law, 1967</i>	429
<b>Briefer Notices:</b> <i>Drei sowjetische Beiträge zur Völkerrechtslehre</i> , 430; Pelzer, 431; Schreiber, 432; Vanossi, 433; Van Panhuys <i>et al.</i> , 433; Gutteridge, 434; Goodrich, Hambro and Simons, 434; Dölle and Zweigert, 435; Rubinstein, 435; Randelzhofer, 436; Graduate Institute of International Studies, 436	
<b>Books Received</b>	437
<b>Official Documents</b>	
<b>Convention for the Suppression of Unlawful Seizure of Aircraft. <i>The Hague, December 16, 1970</i></b>	440
<b>United Nations:</b>	
Security Council Resolution 286 (1970). <i>September 9, 1970</i>	445
General Assembly Resolution 2645 (XXV). <i>November 25, 1970</i>	445
Secretary General. <i>Statement of September 14, 1970</i>	447
<b>International Civil Aviation Organization:</b>	
Assembly Declaration. <i>June 30, 1970</i>	452
Council Resolution. <i>October 1, 1970</i>	453
<b>International Legal Materials. Contents, Vol. X, Nos. 1 (<i>January</i>) and 2 (<i>March</i>), 1971</b>	454

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

---

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$30.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$6.00 a copy; other available back numbers at \$7.50 a copy.

Manuscripts may be sent to either the Editor-in-Chief of the JOURNAL, Harvard Law School, Cambridge, Mass. 02138 (Tel. 617-495-3132), or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$30 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$35 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$25 for residents of the United States, \$10 for non-residents; professional, \$40; intermediate, \$15; student, \$7.50. Application for membership may be made on the form printed at the back of this issue of the JOURNAL.

### OFFICERS OF THE SOCIETY, 1970-1971

<i>Honorary President</i> .....	PHILIP C. JESSUP
<i>President</i> .....	HAROLD D. LASSWELL
<i>Executive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>Vice Presidents</i> .....	RICHARD A. FALK, COVEY T. OLIVER, WILLIAM D. ROGERS
<i>Honorary Vice Presidents:</i>	DEAN G. ACHESON, WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, GREEN H. HACKWORTH, JAMES N. HYDE, HANS Kelsen, CHARLES E. MARTIN, BRUNSON MACCHESNEY, MYRES S. McDOUGAL, OSCAR SCHACHTER, JOHN R. STEVENSON, ROBERT R. WILSON.
<i>Secretary</i> .....	EDWARD DUMBAULD
<i>Treasurer</i> .....	FRANZ M. OPPENHEIMER
<i>Assistant Treasurer</i> .....	JAMES C. CONNER

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER  
Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. LILLICH  
University of Virginia Law School

OLIVER J. LISSITZYN  
Columbia University

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. MCDUGAL  
Yale Law School

STANLEY D. METZGER  
Georgetown University Law Center

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS KELSEN  
University of California

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY

# THE INTERNATIONAL COURT OF JUSTICE: CONSIDERATION OF REQUIREMENTS FOR ENHANCING ITS RÔLE IN THE INTERNATIONAL LEGAL ORDER

*By Leo Gross \**

## I

### ARBITRATION AND ADJUDICATION AS A SUBSTITUTE FOR WAR

It is commonplace to say that the Court has not lived up to the expectations expressed at its creation, although it could also be said that the governments in and out of the United Nations have not lived up to those expectations. In presenting the Statute of the Court to the Fourth Commission at the United Nations Conference on International Organization, the Rapporteur of its First Committee said that the Committee "ventures to foresee a significant role for the new Court in the international relations of the future." He went on to say: "The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means."<sup>1</sup>

This prediction has not become true: "Since the Second World War, remarkable advances have been made in virtually every sector of international organization except the judicial sector."<sup>2</sup> This lack of progress is commonly ascribed to a lack of confidence in the Court, its composition, and the law which it applies. The problem of compulsory jurisdiction "is political and psychological," and

The essence of the question is confidence; confidence in the stability and adequacy of the law, and confidence in the integrity and predictability of the courts and tribunals administering the law.<sup>3</sup>

\* Of the Board of Editors.

I wish to thank the American Society of International Law for inviting me to undertake, in my capacity as rapporteur of the Society's Panel on the Future of the International Court of Justice, a study on the Court from the point of view of requirements for enhancing its rôle in the international legal order. Also, my thanks to Dietrich E. Franke (LL.M. Harvard '70), Richard E. Bissell (B.A. Stanford '68, M.A. Fletcher '69) and Michael Doyle (B.A. Harvard '70) for their research assistance.

I wish to thank Professor Norman J. Padelford of M.I.T. for permission to use his tables on the composition of the Court and the qualifications of the judges. The tables were brought up to date by Harold Paysen, III (B.A. Harvard '61, M.A. Fletcher '68, M.A.L.D. Fletcher '69).

I am particularly indebted to Judge Philip C. Jessup, who was good enough to read the entire manuscript. His numerous comments were most helpful in revising the manuscript.

<sup>1</sup> Doc. 913, 13 U.N.C.I.O. Docs. 381, at 393.

<sup>2</sup> C. Wilfred Jenks, *The Prospects of International Adjudication* 1 (1964).

<sup>3</sup> *Ibid.* at 101.

The question is:

How can we contribute to creating in a world of cataclysmic change and acute mutual distrust, the wider and fuller confidence necessary to the further progress of international adjudication? Only by so doing can we enable international adjudication to play a more effective part in promoting and securing the rule of law.<sup>4</sup>

On the level of predictability we face, we are told, a dilemma, which is as old as adjudication but which has assumed baffling proportions in the present international order, that includes so many new states which share a certain distrust of customary international law. A tribunal which boldly strikes out in new directions will be accused of lack of predictability, but a tribunal which applies the law as it finds it, and fosters "stability of law and predictability of outcome" of international litigation may "fall soon into disuse and sterility."<sup>5</sup>

Lack of confidence is not merely a matter of scholarly appreciation and analysis. On the level of practical statesmanship the discussion relating to the Court in the Special Committee on Friendly Relations is revealing. The main arguments explaining the reluctance of states to accept compulsory jurisdiction were the following: (a) recent international practice did not justify attempts to extend the compulsory jurisdiction of the Court; (b) the need to take into account the freedom of the parties to settle each specific dispute by the means which they considered most appropriate; (c) the need for more equitable representation in the membership of the Court; (d) the still vague and fragmentary state of international law.<sup>6</sup>

The Special Committee pointed out with respect to (a) that compulsory jurisdiction was rejected at the San Francisco Conference and by the 1958, 1961 and 1963 Conferences on the Law of the Sea, on Diplomatic Relations and on Consular Relations, respectively; that the compulsory jurisdiction of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 depended on the consent of all the parties to the disputes; that most states adopted a negative attitude towards the Draft Articles on Arbitral Procedure; and, finally, that many states attached reservations to their acceptances of compulsory jurisdiction which deprived them "of any real value."<sup>7</sup>

A "more equitable representation" was understood to mean "a more equitable representation of the main forms of civilization and of the principal legal and social systems of the present-day world."<sup>8</sup> The question of the composition of the Court will be discussed later, but it may be useful to state that Article 9 of the Court's Statute does not refer to representation of "social" systems.

With respect to point (d), several views were expressed: the need for accelerating the progressive development of international law and its codification; the fear of states "that they would be subject to customary international law which they did not recognize and which they had played

<sup>4</sup> *Ibid.* at 3.

<sup>5</sup> *Ibid.* at 107.

<sup>6</sup> Report of the 1966 Special Committee . . . Doc. A/6230, p. 102, par. 217.

<sup>7</sup> *Ibid.* 103, par. 218.

<sup>8</sup> *Ibid.*, par. 219.

no part in forming"; and the expectation "that codification and progressive development of international law would facilitate the elimination of outdated and unjust treaties by which the colonial Powers were guaranteed advantageous positions and economic, political and military privileges and would thus strengthen the confidence of the new States in international law and in the legal settlement of disputes."<sup>9</sup>

There is no elaboration of point (b) in the Report, but freedom of choice is the idea which permeates the consensus text which was adopted by the Committee<sup>10</sup> and which will be referred to later.

The views expressed in the Special Committee are presented here not because they are necessarily right but because it is important to consider views which are believed to be right by a substantial number of Members of the United Nations. They address themselves to the question of confidence in the Court, its composition and the law which it applies.

There is, finally, another way of looking at the problem which has been commonplace for a long time, and that is that the Court has a rôle to play in the preservation of peace. This thought was expressed at the San Francisco Conference by the Rapporteur of the First Committee of Commission IV as follows:

In establishing the International Court of Justice, the United Nations hold before the war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.<sup>11</sup>

The notion that arbitration or adjudication is or may be a substitute for war as dispute-settling procedure was developed by the 19th-century peace movement. It received a sort of official *imprimatur* in the 1899 Hague Convention for the Pacific Settlement of Disputes,<sup>12</sup> in the Covenant of the League of Nations,<sup>13</sup> and in the Geneva Protocol for the Pacific Settlement of International Disputes of 1924.<sup>14</sup> Much of the League efforts to con-

<sup>9</sup> *Ibid.*, par. 219.

<sup>10</sup> *Ibid.* 113, par. 248. The text adopted in 1966 was incorporated into the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" and adopted by the General Assembly on Oct. 24, 1970. Doc. A/Res/2625 (XXV); reprinted in 65 A.J.I.L. 243 (1971).

<sup>11</sup> See note 1 above.

<sup>12</sup> Art. 1: "With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences." And Article 27, par. 1: "The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them." Scott, *The Hague Conventions and Declarations of 1899 and 1907*, at 42 and 61 (1915).

<sup>13</sup> Art. 12, par. 1: "The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."

<sup>14</sup> Art. 2: "The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out. . . ."

solidate peace was summed up in the formula: arbitration, security and disarmament. Outside the League the Kellogg-Briand Pact of 1928 expressed the same idea when it condemned "recourse to war for the solution of international controversies" and posited the principle that the solution of such controversies "shall never be sought except by pacific means."

Writing on the contribution of the League Court, the Permanent Court of International Justice, Judge Hudson, while recognizing that it was conceived "as a great bulwark of peace, and popular support was enlisted for it on that basis," concluded with the understatement that "On the record of its eighteen years of useful service, however, some doubt may be entertained with reference to the Court's fulfillment of such a rôle."<sup>15</sup> It is interesting to note that so shrewd a student of international affairs as William E. Rappard could write on the eve of World War II of the same Court that its "constitution and actual working . . . are a very significant triumph of super-nationalism over nationalism."<sup>16</sup>

The essence of the provisions of the Kellogg-Briand Pact reappears in paragraphs 3 and 4 of Article 2 of the U.N. Charter. The Court was presented at the San Francisco Conference as a substitute "for the vicissitudes of war and the reign of brutal force," and it was predicted that "the judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means."<sup>17</sup> The experience of the past 25 years is otherwise. The Court did not become a substitute for the reign of brutal force, although the Court was enabled to adjudicate some tension-laden disputes, and it has not occupied a "central" place in the procedures for the settlement of disputes. To be sure, the Security Council is to take into consideration, when making recommendations with respect to high-tension disputes,<sup>18</sup> "that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." This clause calls for comment: First, the Security Council has used this authority only in one case, which is a far cry from the "central" place the Court was to occupy; secondly, in that case, the *Corfu Channel* case, the Court based its jurisdiction first on the *forum prorogatum* doctrine and then on the special agreement between the United Kingdom and Albania, and not on the Security Council resolution,<sup>19</sup> and, thirdly, Article 36 (2) of the Statute of the Court was amended in San Francisco to read "in all legal disputes" in lieu of "in all or any of the classes of legal disputes," which may restrict the range of disputes in which the Court could exercise compulsory jurisdic-

<sup>15</sup> International Tribunals at 238 (1944).

<sup>16</sup> "What is the League of Nations," in: *The World Crisis* at 44 (1938).

<sup>17</sup> See note 1 above.

<sup>18</sup> This follows from the reference to Art. 33 in Art. 36 (1) which deals with "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security. . . ." The disputes thus covered are essentially identical with those described in Art. 12 of the Covenant as "likely to lead to a rupture."

<sup>19</sup> Leo Gross, "The International Court of Justice and the United Nations," 121 *Hague Academy, Recueil des Cours* 351-355 (II, 1967).



tion: high-tension disputes, some assert, are not legal but political disputes, even though they relate to questions of international law.<sup>20</sup>

The relation between paragraphs 3 (settlement of disputes) and 4 (non-recourse to force or threat of force) of Article 2 of the Charter has been interpreted in two ways: On the one hand, it has been argued that the principle in paragraph 4 "has had an adverse effect on the willingness of States to submit to adjudication or arbitration" in the sense that "In many cases the alternative is no longer arbitration on the one hand or war or other forcible measures of redress on the other, but adjudication or arbitration on the one hand or stalemate on the other."<sup>21</sup> The other interpretation was adopted by the Institute of International Law on September 11, 1959, at its Neuchâtel session. According to this, the renunciation of the use of force or threat of force should have as its corollary recourse to arbitration or to adjudication by the Court.<sup>22</sup>

It is not surprising that there is no contradiction between these two interpretations: the former describes the practical effect of paragraph 4 on paragraph 3, whereas the latter describes the ideal effect which paragraph 4 should have on paragraph 3. Both views reflect the traditional link between arbitration and adjudication on the one hand and recourse to force or threat on the other. There is a suggestion here, to go no higher than that, that states should either agree to have recourse to arbitration or adjudication or else face coercion as a means of obtaining a settlement of the dispute.<sup>23</sup>

The prevailing trend in international lawmaking is, however, in the opposite direction. Three illustrations may be given. First, there is Article 52 of the 1969 Vienna Convention on the Law of Treaties which declares:

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.<sup>24</sup>

Secondly, there is the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the United Nations Conference on the Law of Treaties, which

Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another

<sup>20</sup> Leo Gross, "Some Observations on the International Court of Justice," 56 A.J.I.L. 33-62 at 39 (1962).

<sup>21</sup> Jenks, *op. cit.* at 104.

<sup>22</sup> The relevant paragraph reads as follows: "In an international community the members of which have renounced recourse to force and undertaken by the Charter of the United Nations to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, recourse to the International Court of Justice or another international court or arbitral tribunal constitutes a normal method of settlement of legal disputes as defined in Article 36, paragraph 2, of the Statute of the International Court of Justice." 48 Institute of International Law, *Annuaire* at 381 (II, 1959).

<sup>23</sup> That was in fact the essence of the 1907 Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. See Scott, note 12 above, at 89.

<sup>24</sup> Doc. A/CONF. 39/27 (May 23, 1969), at 25; 63 A.J.I.L. 891 (1969).

State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.<sup>25</sup>

And, thirdly, there is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States which, with reference to paragraph 4 of Article 2 of the Charter, declares:

Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.<sup>26</sup>

Considering that the term "treaty" as used in the Vienna Convention embraces every kind of written international agreement between states, including exchanges of notes, and considering the specific clause relating to the settlement of disputes, the conclusion seems inescapable that the prevailing trend is to eliminate coercive methods as an acceptable alternative to peaceful methods for the settlement of international disputes. The wisdom of this and its practicability in the contemporary international system may be open to doubt. The viability of such an approach may be questioned in view of its total one-sidedness, leaving wide open the alternative, peaceful method of settlement.

To be sure there have been many resorts to force since 1945. The reasons vary from simple to complex, but one may wonder in which cases resort to force was an alternative to settlement by arbitration or adjudication. Put in another way, in how many of them did there exist a dispute taken in its simplest meaning as a conflict between states as to their respective rights? No doubt, in many cases issues of this nature were involved, but they were not the issues which provoked or led to the use of force. It seems no longer even to be relevant whether the use of force was legal under international law. For in declaring that "States have a duty to refrain from acts of reprisal involving the use of force," the 1970 Declaration proscribes the use of force as a reaction against a prior illegal use of force or some other violation of international law.<sup>27</sup> This goes very far indeed in view of the absence of a working system for peaceful settlement of such violations of international law, but one is forced to concede that the Declaration expressed what is a widely shared attitude in the United Nations.

This being so, it would seem unprofitable to relate the need for or desirability of a greater and regular use of arbitration or adjudication to the renunciation of force or threats of force as was done by the Institute of International Law. Though framed in the most innocuous terms, such a link must be seen as unacceptable to a large number of states, old and new, and harks back to the policies of colonialism and imperialism. If states are to be induced to make a greater use of the Court, other ways and means must be sought. In any event it would seem that the commonplace assumption of arbitration and adjudication as a substitute for war

<sup>25</sup> Doc. A./CONF. 39/26 (May 23, 1969), at 7.

<sup>26</sup> *Loc. cit.* note 10 above.

<sup>27</sup> *Ibid.*

or other methods of coercion should be abandoned. The proper rôle for the Court lies in promoting unification in the interpretation and application of international law, both customary and conventional, and contributing thereby to the rule of law and greater integration of the international society.

If the Court will contribute to the achievement of these objectives it will make a contribution to peace; it will not be, except perhaps in rare cases, a direct contribution to peacemaking but an indirect one by strengthening the underpinnings of law on which a secure peace can eventually be based.

## II

### PROGRESS OR RETROGRESSION

It may be useful to clear away another misconception. As indicated earlier, it is believed that there have been "remarkable advances . . . in virtually every sector of international organization except the judicial sector."<sup>28</sup>

As the general field of international organization is outside the scope of this paper, it is only necessary to see to what extent the proposition is correct with respect to the judicial sector. It will be argued that, following a period of progress in the development of peaceful methods for the settlement of disputes, a retrogressive trend has set in, and that the retrogression concerns not merely the judicial sector but is discernible in the whole area of peacemaking. As the Legal Counsel of the United Nations pointed out:

. . . As regards the pacific settlement of disputes, it must be said that experience over the past 25 years has been generally very discouraging. This is not for want of machinery within the Charter itself. Besides the Security Council and the General Assembly, which offer a forum for political settlement, the International Court of Justice, established as one of the principal organs of the United Nations, provides a means of judicial settlement. States have not, however, shown in the great majority of cases the will to avail themselves of these means for a genuine resolution of their international disputes. . . . At the present the International Court of Justice does not have a single case before it, although this is not, as we all know, for lack of disputes. Nor can it be said that this reluctance has been accompanied by a compensating growth in recourse to the alternative means of settlement listed in Article 33 of the Charter, ranging from negotiation and arbitration to resort to regional agencies or peaceful means of the parties' own choosing. In this sphere, if no other, the past 25 years have witnessed a disappointing lack of progress and it is difficult to envisage any sudden change in the preference of States for keeping a dispute alive, rather than entrusting it to some form of third party settlement which might not come out wholly in their favour.<sup>29</sup>

<sup>28</sup> See Jenks, note 2 above.

<sup>29</sup> Constantin A. Stavropoulos, "The United Nations and the Development of International Law 1945-1970," in 7 U.N. Monthly Chronicle 78-84 (June, 1970) at 80-81. On July 29, 1970, the Security Council for the first time requested of the Court an advisory opinion on a question relating to Namibia. Res. 284 (1970), 1969-1970 I. C. J. Yearbook at 112.

The standstill amounting to retrogression covers the whole range of procedures for the settlement of disputes and goes back to the founding of the United Nations. Some aspects of this situation will be indicated briefly after a sketch of the era of progress.

The century opened hopefully with the 1899 Hague Convention for the Pacific Settlement of International Disputes setting forth procedures for good offices, mediation, and commissions of inquiry, and establishing the Permanent Court of Arbitration. The Second Hague Peace Conference adopted the Draft Convention relative to the Creation of a Judicial Arbitration Court and the Convention relative to the Creation of an International Prize Court neither of which materialized.<sup>30</sup> In spite of its obvious shortcomings, 17 disputes were brought before tribunals of the Permanent Court between 1902 and 1914. Sixteen states were involved in voluntary arbitrations before panels composed of jurists of recognized competence: Renault (France) was involved in seven cases, de Savonnin Lohman (The Netherlands), Hammarskjöld (Sweden), and Fusinato (Italy) in five cases each, Lammasch (Austria), Kriege (Germany), and Taube (Russia) in four cases each.<sup>31</sup>

The Central American Court was established in 1907 and functioned until 1917, and many bilateral treaties of arbitration were concluded during the same period. Following World War I there was a great activity in the area of dispute settlement: thousands of cases were adjudicated by Mixed Arbitral Tribunals set up in connection with the Peace Treaties of 1919, by the Tribunal in Upper Silesia and by numerous claims commissions. The League of Nations Covenant provided a measure of compulsory settlement of disputes by arbitration, adjudication or inquiry by the Council, and established the Permanent Court of International Justice as a separate institution. The Optional Clause providing for the compulsory jurisdiction was a breakthrough in the development of international adjudication and as of December 31, 1938, out of 54 Members of the League, 38 were bound by the Optional Clause. In Judge Hudson's opinion "the willingness of so many States to confer compulsory jurisdiction on the Court . . . marks a substantial advance in the history of the law of pacific settlement of disputes."<sup>32</sup> The Court was fairly active: it received 27 requests for advisory opinions, it was seized in 65 contentious cases, it gave 20 judgments on merits, 2 judgments interpreting an earlier judgment, and 9 on preliminary objections, including one declaring the application inadmissible. The League handled over 40 political questions involving conflicts or complaints with varying degrees of success.

The League tried to improve procedures for the peaceful settlement of

<sup>30</sup> Scott, note 12 above, at 31, 41 and 188.

<sup>31</sup> W. J. M. van Eysinga, "Évolution Rétrograde," *Varia juris gentium, Liber Amicorum J. P. A. François*, 6 *Netherlands International Law Review* (Special Issue) 100-102 at 100-101 (1959). Five additional disputes were settled between 1920 and 1932. A. M. Stuyt, *Survey of International Arbitrations, 1794-1938*, at 325, 330, 388, 415, 418 (1939). One dispute was settled in 1956, XII *Reports of International Arbitral Awards* 155 (U.N. Pub. Sales No. 63. V. 3).

<sup>32</sup> The Permanent Court of International Justice 1920-1942, at 482.

disputes, and its greatest achievement in this field was the General Act for the Pacific Settlement of International Disputes adopted by the Assembly on September 26, 1928. The Act entered into force on August 16, 1929, and was accepted by 23 states, including France, the United Kingdom and Italy. Of these, 21 states acceded to the Act as a whole; The Netherlands and Sweden acceded to parts of the Act. The Act provides in Chapter I a procedure of conciliation for all disputes; in Chapter II, a procedure of judicial settlement or arbitration for legal disputes; and in Chapter III, a procedure of arbitration for other disputes. The League manifested great respect for legal issues involved in disputes of a mixed, political-legal character. One indication of this concern is the fact that all but five, it would seem, of the requests for advisory opinions related to disputes pending before the Council.

The Kellogg-Briand Pact of 1928 was hailed as a milestone in the progress of peace. A great number of treaties—about 300—providing for the peaceful settlement of disputes were concluded during the period of the League.<sup>33</sup>

The common feature of the endeavors of the League and of states during the inter-war period was the introduction of an element of compulsion in the processes for dispute settlement, and it is this that distinguishes them from the voluntarism which was characteristic of the Hague system. The substitution of firm commitments for agreements to agree, and the reliance on arbitration and adjudication as against the diplomatic procedures of negotiations, good offices and mediation, were the elements of progress. The substitution clearly involved a willingness to depoliticize the conflicts between states, adjudication by the Court being regarded as the highest possible and desirable degree of depoliticization.

A reversal of both these tendencies, amounting to retrogression, marks the current period of the United Nations. This became evident as early as the Dumbarton Oaks Proposals. With reference to settlement of disputes, "[t]he Security Council should be empowered, at any stage of a dispute of the nature referred to in paragraph 3 above [disputes the continuance of which is likely to endanger the maintenance of international peace and security], to recommend appropriate procedures or methods of adjustment."<sup>34</sup> The degree of retrogression can be measured by comparison with the Covenant of the League. Unlike the Council of the League, the Security Council was not empowered to recommend terms of settlement. The omission was made good to some extent at the San Francisco Conference, and the Charter provides in Article 37 that, if the parties fail to settle the dispute voluntarily or by arbitration or judicial means, "they" shall refer it to the Council, which may then decide whether to recommend procedures or "to recommend such terms of settlement as it may consider appropriate." Here again there is a degree of retrogression: The Covenant

<sup>33</sup> Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes*, at xix (1931); *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1929-1948*, at 1180 (U.N. Pub. Sales No. 1949. V. 3).

<sup>34</sup> Chap. VIII, Sec. A, par. 5. Department of State Pub. 2257, Conf. Ser. 60, at 12; 39 A.J.I.L. Supp. 51 (1945).

made it clear that "any party to the dispute" is authorized to submit the dispute to the Council. The Charter is ambiguous and unnecessarily so. Strictly speaking "they" means all the parties to the dispute. Article 35(1) provides that "Any Member of the United Nations may bring any dispute, or situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly"; but it is doubtful whether the Council, in such a case, can do more than apply Article 36 and "recommend appropriate procedures or methods of adjustment" only or whether it may recommend terms of settlement as well.<sup>85</sup>

The Court was made one of the principal organs of the United Nations and its "principal judicial organ," and all Members of the United Nations are "*ipso facto* parties to the Statute" of the Court. The organic link between the Court and the United Nations and the enlargement of the judicial community appear progressive steps but only on the surface. It has yet to be demonstrated that the Court benefited from this link and from the wider judicial community.<sup>86</sup> The jurisdiction of the Court remained optional. Out of the 130 parties to the Statute—Liechtenstein, San Marino and Switzerland in addition to 127 Members of the United Nations—not more than 46 have accepted the jurisdiction of the Court as compulsory. This compares very unfavorably with the 1938 ratio of 54 to 38 in the League. Moreover, 25 other states which were bound by the jurisdiction of the present Court or of its predecessor "have withdrawn their acceptance or have not renewed it."<sup>87</sup> The Court has delivered 13 advisory opinions and one request is pending.<sup>88</sup> The Court, during the period 1946–1970, was seized in 39 contentious cases and gave 31 judgments,<sup>89</sup> of which 14 were on merits, two were judgments designated "Second Phase" (*Nottebohm* and *South West Africa*), and one was an interpretative judgment. The others were concerned with preliminary objections, of which 6 were upheld.

The declarations by which states accepted the jurisdiction of the Court as compulsory are studded with reservations, the most damaging of which is probably still the so-called self-judging and automatic Connally Amendment to the United States Declaration of 1946. The extent of harm done

<sup>85</sup> Hans Kelsen, *The Law of the United Nations* at 415–416 (1950).

<sup>86</sup> See Gross, note 19 above, at 323–336.

<sup>87</sup> Report of the I.C.J., Aug. 1, 1968–July 31, 1969. GAOR, 24th Sess., Supp. No. 5 (A/7605), at 1.

<sup>88</sup> See note 29 above. The total number of requests was in fact only 12 but in the *Peace Treaties* case the Court gave 2 opinions.

<sup>89</sup> The judgments in the *Continental Shelf* cases and *South West Africa* (Second Phase) cases are each counted as one. Eight cases were simply removed because there was no acceptance of the jurisdiction on the part of the impleaded states. By the Court's own count, the number of cases "with which the Court has had to deal can really be reckoned as 24; since in eight of the cases shown on its list the applicant State itself recognized in its Application that the other side had not recognized the Court's jurisdiction, and the cases which have a common origin but which have separate entries on the list can be counted as a single case." Report of the International Court of Justice, August 1, 1969–July 31, 1970. GAOR, 25th Sess., Supp. No. 5 (A/8005), at 2. The number of states involved was 33. *Ibid.*

to the legal framework constituted by such reservation will be appreciated if it is borne in mind that most reservations are available on the basis of reciprocity to states which have not made them. Thus the United States reservation can be invoked, and has been invoked in one case,<sup>40</sup> by any other state against which the United States has instituted or will in the future start proceedings before the Court. While there were reservations to the instruments relating to the Optional Clause, those included in the post-1945 era are particularly rampant and retrogressive, for they constitute so many attempts to re-introduce voluntarism through the back door of reservations to the declarations, which, it was hoped, would establish firm commitments.

The application of the Charter procedures for peaceful settlement has been generally disappointing. It would be an exaggeration, perhaps, to say that the United Nations has failed to settle any disputes by its political organs.<sup>41</sup> A recent study examined 55 "disputes" referred to the United Nations during the 20-year period and concluded that 18 were settled by the United Nations or with its assistance.<sup>42</sup> How one evaluates success or failure in settling a dispute or adjusting a situation is to a large extent a matter of judgment. In what sense could the United Nations be credited with the settlement or aid to settlement of such matters as Korea, Suez or the India-Pakistan war which are listed in that study in the "success" column? In my view the performance of the United Nations in dispute settlement as distinguished from stopping hostilities is very unsatisfactory. It would require a very detailed study and agreement on relevant criteria in order to determine whether there has been progress or retrogression compared with the League.<sup>43</sup>

The late Secretary General of the United Nations, Dag Hammarskjöld, in several of his *Annual Reports on the Work of the Organization*, called attention to the unsatisfactory state of affairs relating to the Court, and the paucity of declarations accepting its jurisdiction and the far-reaching reservations attached to some of them. He regretted in particular the reluctance of states to separate the legal from the political aspects of a dispute and to submit the former to the Court. In 1957 he wrote: "Even in the present state of international society there are many disputes which would be closer to settlement if the legal issues involved had been the subject of judicial settlement."<sup>44</sup> In 1959 he was even more explicit. Referring to his concern about the Court, he observed that "the development and acceptance of international law impartially administered by judicial

<sup>40</sup> See Leo Gross, "Bulgaria Invokes the Connally Amendment," 56 A.J.I.L. 357-382 (1962).

<sup>41</sup> Synopses of United Nations Cases in the Field of Peace and Security 1946-1967, compiled by C. G. Teng, published by the Carnegie Endowment for International Peace (rev. ed., 1969) lists 71 cases, some of which may be disputes and others situations.

<sup>42</sup> E. B. Haas, *Collective Security and the Future International System*. University of Denver: The Social Science Foundation and Graduate School of International Studies, Monograph Series in World Affairs, Vol. 5, No. 1 (1967-1968), at 46.

<sup>43</sup> Cf. note 29 above, for the view of the U.N. Legal Counsel.

<sup>44</sup> GAOR, 12th Sess., Supp. No. 1A (A/3594) Add. 1, at 4-5.

tribunals is essential to progress towards a more just and peaceful international order," and he stressed the possible separability of legal and political aspects of disputes as follows:

It should also be recognized that there are many international disputes which involve legal questions along with the political elements and that submission of such questions to the Court for judicial determination would clear the ground for processes of peaceful negotiations in the political organs of the United Nations. Neglect of the legal elements in international conflicts, and of the means by which they may be clarified, thus stands in the way of progress in the political field and, in the long run, may tend to weaken the weight of law in international affairs.<sup>45</sup>

A reversal of progressive tendencies can also be seen in other aspects of dispute settlement. The General Act of 1928, the high-water mark of League efforts in this field, was restored with some amendments to adapt it to the United Nations organs by Resolution 268 A (III) of April 28, 1949, and remained virtually a dead letter. The Scelle Draft on Arbitral Procedure of 1953 was totally emasculated and every element of compulsion was expurgated from it. The negative attitude of Member Governments and their preference for liberty of action was expressed by Professor Scelle as follows:

... as the number of States Members of the United Nations increases, so the majority hostile to the Commission's draft seems bound to increase, for the more recently the new Members required [*sic*] their sovereignty the greater will be their desire to maintain it whole and entire.<sup>46</sup>

The accuracy of this appraisal could be questioned only on the ground that the attitude of new states is shared in large measure by old states.

The Optional Protocols to the Geneva and Vienna Conventions have been ratified by a small number of states. This lack of enthusiasm, shared by the United States, is all the more significant as the obligation to adjudicate is limited to the disputes relating to the interpretation or application of conventions in the drafting of which the new states participated on a footing of equality with the old states.<sup>47</sup>

Most illuminating of the retreat from the adjudicative process altogether is the 1970 Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States with respect to the settlement of disputes. It reads as follows:

1. Every State shall settle its international disputes with other States by peaceful means, in such a manner that international peace and security and justice are not endangered.

<sup>45</sup> *Ibid.*, 14th Sess., Supp. No. 1A (A/4132) Add. 1, at 3-4. See also the Annual Reports of 1953 and 1955, *ibid.*, 8th Sess., Supp. No. 1 (A/2404) at xi-xii, and *ibid.*, 10th Sess. Supp. No. 1 (A/2911) at xiii.

<sup>46</sup> [1958] I.L.C. Yearbook (II) at 2; see also pp. 3, 80, and G.A. Res. 1262 (XIII), Nov. 14, 1958.

<sup>47</sup> For an illuminating discussion of the arguments for and against the Optional Protocols and disputes clauses, see H. W. Briggs, "Reflections on the Codification of International Law by the International Law Commission and by Other Agencies," 126 *Hague Academy, Recueil des Cours* 244-256, 267-283 (I, 1969).



2. States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

3. The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

4. States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

5. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

6. Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.<sup>48</sup>

Attempts to include a reference to the Court or the desirability of including jurisdictional clauses in treaties were rebuffed and dropped for the sake of reaching a consensus. The result is a paean to the liberty of states in which Vattel would have rejoiced.

A total emasculation of jurisdictional clauses may be seen in Article 8 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, which provides that any dispute relating to its interpretation or application, shall, "at the request of *all* the parties to the dispute," be referred to the Court.<sup>49</sup> The model for this clause was obviously Article 1 (1) of the convention, which provides that "no marriage shall be legally entered into without the full and free consent of *both* parties . . .," and not the model clause for conferring compulsory jurisdiction upon the Court for inclusion in conventions, adopted by the Institute of International Law in 1956 and reaffirmed in 1959.<sup>50</sup> The essence of such jurisdictional clauses is that disputes can be submitted to the Court by unilateral application.

In this context it may be noted that the dispute clause in the recent Convention on the Law of Treaties relating to the application or interpretation of the *jus cogens* (Articles 53 and 63) is not free from ambiguity. Article 66 provides for two procedures: in paragraph (a) for arbitration or adjudication, and in paragraph (b) for conciliation. It is not clear which procedure has priority over the other and which procedure shall be applied

<sup>48</sup> *Loc. cit.* note 10 above, at 5-6; 65 A.J.I.L. 247 (1971). For comment, see Briggs, note 47 above, at 284-301.

<sup>49</sup> Annex to General Assembly Res. 1763 (XVII) of Nov. 7, 1962. GAOR, 17th Sess., Supp. No. 17 (A/5217) at 29. Italics supplied.

<sup>50</sup> 48 Annuaire, note 22 above, at 382.

in case one party follows paragraph (a) and the other, paragraph (b). Furthermore, paragraph (a) merely provides that any one of the parties to a dispute may "by a written application submit it to the International Court of Justice for a decision."<sup>51</sup> This is a far cry from conferring upon the Court compulsory jurisdiction.<sup>52</sup> For obviously any party is free to submit a dispute to the Court by a written application, and the Court will remove it if the other party fails to consent to jurisdiction. This has happened in eight unrelated cases.

Outside the United Nations, the trend seems to be also in favor of the liberty of states. The Charter of the Organization of African Unity fails to provide for judicial settlement of disputes. The Charter of the Organization of American States (O.A.S.) was recently revised and the discussions relating to dispute-settlement indicated a marked tendency toward voluntarism and against obligation. Articles 23-26 and Articles 84-90 on peaceful settlement of disputes are very general in character and do not seem to go beyond fact-finding and good offices. The application of the latter depends normally upon acceptance by both parties to the dispute.<sup>53</sup> The failure to achieve anything of significance evoked this eloquent comment from the United States Delegation:

While the United States would have preferred that the amendments had given broader powers to the pertinent O.A.S. organs with respect to the peaceful settlement of disputes . . . it recognized that these points were too controversial for incorporation into a treaty which all of the Member States would be expected to ratify.<sup>54</sup>

The lowest common denominator was very low indeed.

The fact has often been commented upon that the most remarkable retrogression, compared with the Permanent Court, has been in the advisory jurisdiction of the present Court. The Permanent Court received 27 requests between 1922 and 1942, or between 1922 and 1935, the last year in which a request was made. Only two organs of the League were empowered to make requests, the Assembly and the Council. In fact, all requests were made by the Council, five of them on behalf of the International Labor Organization. In the United Nations, on the other hand, four principal organs, two subsidiary organs of the General Assembly, 12 specialized agencies, and the International Atomic Energy Agency—altogether 19 organs—are authorized to request advisory opinions. So far the General Assembly has requested 11 advisory opinions, the Security Coun-

<sup>51</sup> Doc. A/CONF. 39/27 (May 23, 1969), at 33.

<sup>52</sup> But see Briggs, note 47 above, at 308, who concludes that Art. 66(a) "provides for the compulsory adjudication of *ius cogens* issues." In view of its history (*ibid.* at 302-309), it may be doubtful whether it is indeed so or whether Art. 66(a) is merely a face-saving formula.

<sup>53</sup> Protocol of Amendment to the Charter of the O.A.S. Pan American Union, Treaty Series, No. 1-B, OAS Official Records, OEA/Ser. A/2, Add. 2, 1967; 64 A.J.I.L. 996 (1970).

<sup>54</sup> Report of the U. S. Delegation to the Third Special Inter-American Conference, Feb. 15-27, 1967. Dept. of State ARA/IPA, at 38.

cil one, and of the 12 specialized agencies only two (UNESCO and IMCO) have requested opinions.

This remarkable reluctance of specialized agencies was a topic of discussion at an informal conference of legal advisers sponsored by the American Society of International Law. It was pointed out that

one reason for reluctance to use them [the advisory opinion procedures] has been a concern that the Court, being outside the mainstream of the organization's activity, might come to decisions not fully sensitive to the internal requirements for effective operation. In other words, the detached objective legal view may not contribute to the actual effectiveness of the organization. Added to this is the reluctance of all parties, even those in a minority position, to force an "authoritative," definite, and presumably enduring interpretation when compromise and flexibility may be more useful. ("It does not help that the application of a legal rule is legally impeccable if it is politically impossible.") This is reflected in the practice of adopting informal legal decisions in those organizations that have a power of "authoritative" interpretation.<sup>55</sup>

In view of this somewhat parochial attitude of legal advisers, it would be unrealistic to expect that specialized agencies will make a better use of the Court's advisory function in the foreseeable future. It may be noted that the International Bank for Reconstruction and Development has recently (1965) established an "International Centre for Settlement of Investment Disputes," but no requests for settling any dispute have been submitted so far.<sup>56</sup> The possibility cannot be excluded that some cases which otherwise might have found their way to the Court will go to the Center.

Finally, the effect of the Court's judgment in the *South West Africa* cases (Second Phase) on the Members of the United Nations should be mentioned. The dissatisfaction was profound and widespread. It was expressed in criticism of the composition of the Court and its insensitivity to anti-colonial and anti-apartheid sentiments as formulated in resolutions and declarations of the General Assembly.<sup>57</sup> As was to be expected, this criticism is also reflected in learned articles. Thus in one of them it was said, with respect to the hopeful view that "in five or six years' time, it will be realized that this (judgment) was a great turning point because (the Court) did not give way to political pressure," that:

If this Judgment proves to be a "turning point," this will be, it is submitted, because the Judges now being elected, and likely to be in the future, come from a generation of legal scholars which recognizes the significance of functional and sociological approaches, and as such are determined to bring the Court and the law they are called upon to apply up-to-date and suitable for the mid-century world. If they do

<sup>55</sup> H. C. L. Merillat (ed.), *Legal Advisers and International Organizations* at 10 (1966). The words between parentheses are attributed by the editor to Edvard Hambro, *ibid.* at 8.

<sup>56</sup> ICSID Press Release, Sept. 29, 1969. The Convention for the creation of the Center has been ratified by 52 states.

<sup>57</sup> For a sample of the views of Members, see Cross, note 19 above, at 346-349.

not, then there is the danger that the Court and the world will split into two different schools of international law to the disadvantage of both and the further collapse of the rule of law.<sup>58</sup>

It is too early to say what the reaction will be to the Court's most recent judgment in the case of the *Barcelona Traction Company*.<sup>59</sup> The judgment in the *North Sea Continental Shelf* case<sup>60</sup> has not provoked violent criticism on one side or excessive praise on the other. In any event, it has helped the parties to come to an amicable resolution of their respective claims. On the Danish side it was said that

In the present Judgment, the Court has proved extremely restrictive in its attitude towards the progressive development of international law. Viewed abstractly as a theoretical proposition, the restrictive concept of international law appears highly justified. It is not to be expected that States will esteem a court which by its judgments imposes obligations which the States have not expressly or tacitly accepted as legally binding.<sup>61</sup>

On the German side it was emphasized that the Court has avoided rigidity and tried to find a just and equitable solution. "In this sense," it is said, "the judgment represents one of the highest achievements of international jurisprudence and will significantly enhance confidence in the potential of international dispute settlement."<sup>62</sup>

It may be fitting to close the presentation of regressive tendencies in international peacemaking on this optimistic note. It may be noted in passing that the Court has achieved its best results when it applied the law and did not engage in judicial lawmaking in a pronounced manner.<sup>63</sup> While the judicial function made no spectacular advance in the last 25 years and the optimistic forecasts of the great rôle it was to play in maintaining peace were not fulfilled, it held its ground and fared better than the political procedures of the United Nations for the settlement of disputes. The question is whether the absence of contentious cases on its docket is the sign that the stagnation and regressive trend have now extended to the Court or whether it is merely a fortuitous lull without portents for its future.

It may be noted in this context that, whereas the number of arbitral decisions since 1945 was not spectacular, it was not insignificant, although it is probably true that, as the Secretary General of the United Nations pointed out, "most of them concerned minor questions, many of them of

<sup>58</sup> L. C. Green, "The United Nations, South West Africa and the World Court," 7 *Indian J. of Int. Law* 491-525 at 522 (1967). The words in the text to which Prof. Green addressed himself are Sir F. Vallat's.

<sup>59</sup> [1970] *I.C.J. Rep.* 3; 64 *A.J.I.L.* 653 (1970).

<sup>60</sup> [1969] *I.C.J. Rep.* 3; 63 *A.J.I.L.* 591 (1969).

<sup>61</sup> Isi Foighel, "The North Sea Continental Shelf Case," 39 *Nordisk Tidsskrift for International Ret* 109-127 at 125 (1969). For an analysis of the contribution of this judgment to the theory of sources of international law, see Krystyna Marek, "Le Problème des Sources du Droit International dans l'Arrêt sur le Plateau Continental de la Mer du Nord," 6 *Revue Belge du Droit International* 44-78 (1970).

<sup>62</sup> E. Menzel, "Der Festlandsockel der Bundesrepublik Deutschland und das Urteil des Internationalen Gerichtshofs vom 20. Februar 1969," 14 *Jahrbuch für Internationales Recht* 13-121 at 96 (1969).

<sup>63</sup> Gross, note 19 above, at 370 ff.

a commercial nature, which were not in the least likely to disturb peace and security.”<sup>64</sup> The total figure is 22, including the *Gut Dam* claim, which was before a United States-Canada Claims Tribunal but was settled by negotiations.<sup>65</sup> In addition, there were three Postal Arbitrations, and many cases were settled by various Conciliation Commissions or Property Commissions established pursuant to peace treaties terminating the second World War.<sup>66</sup>

### III

#### THE COURT AT A CROSSROADS

The choice is thus presented: Should one opt for remedial action in improving procedures and opening new ways of access to the Court or should one opt for what may appear to be structural changes? In substance, one has to make up one's mind whether the Court can make a greater contribution to the clarification, and thereby to the development of international law, by relying on states as its clientèle in contentious cases, and international organizations in advisory proceedings, or whether a new and additional function should be conferred upon the Court. Those who argue in favor of the first alternative remain in the tradition of the Hague system. Those who prefer the latter would appear as advocating a progressive step, the first since 1899, if one leaves out of account the permanency of the Court along with optional, compulsory and advisory jurisdiction introduced by the League about 50 years ago. Important as these innovations were and continue to be, they were in line with the thinking of 1899 that arbitration and adjudication were civilized substitutes for war for the solution of conflicts between states. More imaginative innovations may be needed to take into account the unprecedented interdependence of states in their international relations, due above all to the phenomenal growth of transnational activities of individuals and corporations. Here is a resource of the first magnitude which has never been tapped for international judicial business. In order to tap this natural resource, it seems necessary to establish a link between the traditional forum of litigation, national tribunals, and the international forum, the World Court, in cases of international law, conventional and customary. Such a link has been established in the European Communities between the Court of Justice and the domestic tribunals of the six member states. Reviewing that Court and the Court of Human Rights, Jenks suggested that “the jurisdiction and procedures of the Euro-

<sup>64</sup> Introduction to the Annual Report of the Secretary General on the Work of the Organization, June 16, 1969–June 15, 1970 (A/8001/Add. 1), at 38.

<sup>65</sup> U.N. Reports of International Arbitral Awards, Vols. 12–16. The figure of 22 includes the Ottoman case which was settled in 1956 by a tribunal of the Permanent Court of Arbitration. The figure given by the Secretary General is 14. *Ibid.*

<sup>66</sup> The Commissions and number of cases decided are as follows: France–Italy: 284; Italy–U.S.A.: 235; Italy–Netherlands: 1; United Kingdom–Italy: 190; U.S.A.–Japan: 8; Netherlands–Japan: 2; United Kingdom–Japan: 7; Arbitral Commission on Property, Rights, and Interests in Germany: 52; Arbitral Tribunal for the Agreement on German External Debts, Italy–Switzerland: 1. This material is as of 1962 and culled from the source cited in note 65 above.

pean tribunals and those of the International Court represent different epochs in the development of international adjudication."<sup>67</sup>

This is indeed so, inasmuch as the International Court is the outgrowth of the Hague system and its concern is with inter-state relations governed by law. The concern of the new European Court, however, is not limited to inter-state relations and inter-state conflicts, but extends to interpersonal (natural and juristic) relations and relations between individuals, the states and international organizations governed by law. The function of the European Court is to ensure that the law be applied uniformly throughout the European Community. The new function for the World Court, it is suggested, should be that of an authoritative interpreter of that part of international law, largely conventional, which governs business transactions and the relations between individuals, both natural and corporate, *inter se*, and between them on the one hand and states on the other. Relations between individuals who are international civil servants and international organizations are already to some extent within the purview of the Court, but there is room for improvement even here.

It is not suggested that, as one epoch succeeds another, the traditional function of the Court should be replaced by the new function. What is suggested is that, first of all, the idea should be explored whether, to what extent, and in what ways the new function could be grafted on the old one. There is no reason to assume, in the present submission, that the two functions are incompatible. The International Court, subject to a slight amendment in its Statute, could discharge both functions and thus establish a central position in the vastly expanded and still expanding area of transnational activities. There is no need for a multiplicity of tribunals whose jurisprudence, far from bringing uniformity and predictability in the interpretation of the law, might merely contribute to its fragmentation.

An extension of the Court's jurisdiction along the lines tentatively indicated above should be considered on its merits in spite of the retrogressive tendencies in the General Assembly of the United Nations manifested in connection with the supervision of the application of the International Covenant on Civil and Political Rights. As adopted this Covenant gives states parties the option under Article 41 to allow the Human Rights Committee to receive claims of one state party against another state party that the latter is not fulfilling its obligations under the Covenant, provided both parties have accepted the Committee's competence to consider such claims. The Committee may offer its good offices to the parties, make a report, or, under Article 42, refer the claim with the consent of both parties to a Conciliation Commission. The Commission may in turn try to bring about an "amicable solution" and, failing this, submit a report embodying its views on the possibilities of an amicable solution.<sup>68</sup> An Optional Protocol opens the possibility for individual claims against a state party which

<sup>67</sup> Jenks, note 2 above, at 148. See p. 308 below.

<sup>68</sup> General Assembly Res. 2200 (XXI) of Dec. 16, 1966. GAOR, 21st Sess., Supp. No. 16 (A/6316), at 57; 61 A.J.I.L. at 882 (1967).

is also a party to the Protocol.<sup>69</sup> More far-reaching proposals to provide for a reference of legal questions raised in claims by states against states, or individuals against states, to the Court by means of a request for an advisory opinion were rejected.<sup>70</sup> This is a far cry from the optional provisions which make possible recourse to the European Court of Human Rights in order to obtain a judgment and not merely an advisory opinion.<sup>71</sup> However, failure in one area does not necessarily preclude success in another. Progress does not thrive on defeatism.

In accordance with these considerations it is proposed to explore some of the ways and means for enhancing the Court's traditional, Hague system, function<sup>72</sup> and of grafting a new function on the old one.<sup>73</sup>

#### IV

##### BUILDING CONFIDENCE IN THE COURT

Leadership is required for any improvement in the existing situation. It may be possible to make some headway by means of a General Assembly resolution, or, what will be more difficult, by means of an amendment to the Statute of the Court, or by filling the present vacuum by submitting some contentious cases to the Court. In any event, no progress is likely to materialize unless one of the leading Powers or a group of Powers takes the necessary initiative. In view of its adamant stand vis-à-vis the Court and the judicial function in general, the Soviet Union and its bloc must be ruled out, although its acquiescence in some changes of the Statute may become necessary. This leaves the United States and the group of liberal, democratic nations with a tradition of arbitration and adjudication, as well as those new nations which through their acceptance of the compulsory jurisdiction have manifested their sense of appreciation of the judicial function.

The United States, however, has precluded itself from playing an active rôle in the promotion of judicial settlement through the Court. The United States Declaration of August 14, 1946, struck a most damaging blow at the Court. It expresses a virtually total lack of confidence in the Court. To be sure, other states hedged with reservations their acceptances of the Court's compulsory jurisdiction, but they had enough confidence in the objectivity and impartiality of the Court to let it decide whether these reservations were applicable in a given case. The United States expressed its total lack of confidence in the Court by claiming for itself the right to determine whether its reservations applied in a given case. The United States may or may not have foreseen—as one of its imitators, France, has certainly not—that what it claimed for itself it was bound to concede to its

<sup>69</sup> GAOR, 21st Sess., Supp. No. 16 (A/6316), at 59; 61 A.J.I.L. 887 (1967).

<sup>70</sup> Gross, note 19 above, at 424.

<sup>71</sup> The text of the relevant provisions is reproduced in Brownlie, *Basic Documents in International Law* at 194-219. The American Convention on Human Rights, "Pact of San José, Costa Rica" signed Nov. 22, 1969, follows the European model. O.A.S. Official Records, OEA/SER. A/16, Articles 33-73.

<sup>72</sup> See below, p. 302 ff.

<sup>73</sup> See below, p. 308 ff.

adversary. This is not relevant here. Nor is it relevant whether, as Judge Lauterpacht argued in the *Interhandel* case,<sup>74</sup> the whole Declaration was invalid because it was incompatible with the principle of customary international law, of which Article 36(6) of the Statute is the expression, namely, that in case of a challenge to its jurisdiction, "the matter shall be settled by the decision of the Court"; or whether, as I have argued, only the self-judging clause in the Declaration is invalid.<sup>75</sup> What does matter is that any United States representative who raised the issue of the present stalemate in the contentious jurisdiction of the Court would decidedly lack credibility in the General Assembly or in any other forum. A state which would encourage other states to show confidence in the Court must itself show confidence. And this no United States representative can do as long as the present reservations stand.<sup>76</sup> Therefore, if there is any validity in the considerations set out above, these reservations must be removed. They are unnecessary; they offer no protection to the United States; and they show lack of confidence in the Court. Moreover, the self-judging reservation is violative of a cardinal principle of the international judicial process, so essential and so widely accepted that it could rank as a peremptory norm of international law, and the reservation on multilateral treaties shows merely lack of knowledge of the Statute of the Court and particularly of its Article 63.

It has been said that, as the reservations originated in the Senate of the United States, the initiative for their repeal must come from the same body. It is not necessary to express an opinion on the merits of this argument: It may be valid as far as it goes or it may be merely a pretext for tolerating an unworthy situation, or it may have elements of both. However, it is certainly within the authority of the Executive Branch of the Government to give notice to terminate the Declaration of August 14, 1946, and to submit a new Declaration to the Senate for its advice and consent. First steps must come first, and surely the claim of the United States to be the champion of the free world and a staunch advocate of the rule of law in international relations will have a hollow ring unless and until the United States removes those crippling reservations. Other governments have done so, but what other governments have done is no substitute for the initiative which the United States should take for its own sake and in order to break the present deadlock.<sup>77</sup>

<sup>74</sup> [1959] I.C.J. Rep. 6 at 101.

<sup>75</sup> Gross, note 40 above, at 375 ff.

<sup>76</sup> The Declaration provides:

"... that this declaration shall not apply to

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." 1969-1970 I.C.J. Yearbook at 80.

<sup>77</sup> It may be recalled that in 1959 the Institute of International Law called for the withdrawal of self-judging reservations and called attention to the judgments given



Before closing this section it is important to note some encouraging indications of renewed interest in the Court. The Secretary of State of the United States, Mr. William Rogers, has called for greater use of the Court's advisory and contentious jurisdiction and has made some constructive proposals, most of which will be found elsewhere in this essay.<sup>78</sup> The Secretary General of the United Nations, U Thant, regretting the infrequent use of the Court, appealed "to the Members to give serious consideration to the advantages of a final settlement by an impartial tribunal on the basis of the law binding on both sides" and encouraged Members to accept the compulsory jurisdiction of the Court "with as few reservations and limitations as possible."<sup>79</sup> Finally, mention should be made of the initiative of several delegations to the 25th Anniversary Session of the General Assembly proposing the establishment of an *Ad Hoc* Committee to undertake "an appropriate study with a view to enhancing the effectiveness of the Court" which would complement the study of the Rules of Court on which the Court has been engaged for several years.<sup>80</sup> The Assembly decided by a resolution adopted unanimously on December 15, 1970, to defer the proposal until the next session; but it authorized the Secretary General to request the Members to submit their views and suggestions concerning the rôle of the Court; it invited the Court, should it so desire, to state its views; and it requested a comprehensive review by the Secretary General.<sup>81</sup>

## V

### DEPOLITICIZING THE RECOURSE TO THE COURT

It is generally agreed that adjudication by the Court ensures the greatest degree of objective and impartial consideration of an international dispute on the basis of the law.<sup>82</sup> Political factors are involved, however, in the election of judges, possibly in the framing of a *compromis*, but above all in the decision whether or not to choose the judicial method or another method which may be available. It has been said that one of the factors which impedes recourse to the Court, particularly by unilateral application in reliance upon compulsory jurisdiction, is the consideration that such

---

and the opinions expressed in the Norwegian Loans and Interhandel cases. 48 Institute of International Law, *Annuaire* 381 (1959, II); reproduced in 54 A.J.I.L. 136 (1960).

<sup>78</sup> In particular he proposed consideration to giving additional intergovernmental and particularly regional organizations as well as states access to the advisory jurisdiction. He also suggested greater use of chambers and summary proceedings. In his view chambers could meet outside The Hague and chambers could be established for handling disputes arising within the Latin American, Asian and African regions. "The Rule of Law and the Settlement of International Disputes," 62 Dept. of State Bulletin 623 f. (1970); printed in 64 A.J.I.L. 285 f. (September, 1970).

<sup>79</sup> Introduction to Annual Report of the Secretary General on the Work of the Organization, June 16, 1969-June 15, 1970, GAOR, 25th Sess., Supp. No. 1 (A/8001/Add. 1), at 38.

<sup>80</sup> See Doc. A/8042 of Aug. 14, 1970, and the same, Add. 1 and 2.

<sup>81</sup> Res. 2723 (XXV), U.N. Press Release GA/4355 (Dec. 17, 1970), Pt. VIII, p. 32.

<sup>82</sup> Gross, note 20 above, at 39-42.

action may be regarded as an unfriendly act by the respondent government. This is not an idle exaggeration of the sensitivity of states. At the inauguration of the Hague system it was found necessary to stipulate that the offer of good offices and mediation and the advice offered to conflicting parties "to have recourse to the Permanent Court, can only be regarded as friendly actions."<sup>83</sup>

It would be extremely difficult to provide factual proof that governments have refrained from having recourse to the Court for fear of offending the susceptibilities of their adversaries. However, the Institute of International Law, which includes members of the legal and political elite, found it desirable and perhaps even necessary to declare in 1959 that recourse to the Court constitutes "a normal method of settlement of legal disputes" as a consequence of paragraphs 3 and 4 of Article 2 of the Charter, and that

Consequently, recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act towards the respondent State.<sup>84</sup>

Inasmuch as the Court is a descendant of the Hague system, it makes sense to go back to it in order to advance beyond it. An appeal along the lines of the Institute's resolution may therefore be the logical first step in order to get the Court off dead center.<sup>85</sup> The appeal should come from the General Assembly and be addressed to all states. It should contain two simple propositions: first, that the Court is open to all states members of the international judicial community, and, second, that recourse to the Court shall never be regarded as an unfriendly act when other procedures for resolving legal disputes have failed.

There are two additional reasons for a resolution of this kind. First, the General Assembly has not expressed itself on the Court since its Resolution 171(II) of November 14, 1947, which called upon the Members and organs of the United Nations and specialized agencies to make greater use of the Court's contentious and advisory jurisdictions. This resolution had no apparent impact upon the Members and organs. The proposed resolution, like that of 1947, would state a general principle. The second reason is that the Declaration on Friendly Relations is silent on the Court, although it is eloquent on the liberty and sovereignty of states. It might be well to remind the members of the international legal community that resort to the Court, whether by means of a special agreement or a unilateral application, is not a surrender but an exercise of sovereignty. The proposed resolution would remind the members that judicial settlement is one of the options and that use of this option can never be regarded as an unfriendly act. This is implicit in Article 33, which is restated in the Declaration on Friendly Relations. The time has come to make it explicit. It is also implicit in Article 92(1) whereby the Court is instituted as "the

<sup>83</sup> Arts. 3 and 27 of the Convention for the Pacific Settlement of International Disputes, Scott, note 12 above, at 43, 61. See also Philip C. Jessup, "International Litigation as a Friendly Act," 60 *Columbia Law Rev.* 24-34 (1960).

<sup>84</sup> 48 *Institute of International Law, Annuaire* 381 (1959, II). Reproduced in 54 *A.J.I.L.* 136 (1960).

<sup>85</sup> Jenks, note 2 above, at 108.

principal judicial organ of the United Nations," that is, of the Members of the United Nations.

Finally, it may be worth while to ponder the question whether the proposed resolution or another resolution should remind the Security Council of Article 36(3). The fact that this clause was used only once (*Corfu Channel* case) in nearly twenty-five years is eloquent testimony to the high degree of the politicization of the handling of international disputes by the United Nations. More frequent use of this option available to the Security Council would be an essential first step in its depoliticization.

The appeal outlined above may appear as weak compared with "an appeal for general ratification of the Optional Clause, with no conditions except reciprocity and the exclusion of disputes arising out of the past and belonging thereto."<sup>86</sup> However, in this writer's view such an appeal would be premature and likely to fall on deaf ears, as did the 1947 resolution of the General Assembly. Such an appeal might well be considered at a later stage, when the present situation is unfrozen and some momentum gained in recourse to the Court.

## VI

### POSSIBLE APPROACHES AND SOME PROPOSALS

Proposals for facilitating and encouraging recourse to the Court in contentious and advisory proceedings fall into two categories: those which involve a change in the Statute and those which do not. Changes in the Statute are equivalent to amendments of the Charter (Article 69 of the Statute) and require "a vote of two thirds of the members of the General Assembly" and ratification by two thirds of the Members, including all the permanent members of the Security Council (Article 108 of the Charter). The initiative may come from Members or from the Court (Article 70 of the Statute). The Court has already taken such an initiative for amending Articles 22(1), 23(2) and 28 of its Statute, which provide that the seat of the Court shall be at The Hague.<sup>87</sup>

It may be possible to devise some changes with respect to access to the Court or procedural matters which do not necessarily involve formal amendments. There is some flexibility in this matter under Article 36(1) of the Court's Statute:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

It has been pointed out that the Permanent Court for fourteen years, from 1922 to 1936, delivered advisory opinions at the request of the Council of the League, in spite of the fact that the Statute which was in force during the period was silent on the subject of advisory proceedings.<sup>88</sup> The

<sup>86</sup> Jenks, note 2 above, at 109 and 124-125.

<sup>87</sup> Report of the International Court of Justice, August 1, 1968-July 31, 1969, GAOR, 24th Sess., Supp. No. 5 (A/7605) at 3, 5.

<sup>88</sup> Hudson, note 32 above, at 210-213; Jenks, note 2 above, at 127.

1922 Rules of the Court contained provisions for advisory proceedings and these were included in the Revised Statute of 1936.<sup>89</sup> The Statute of the Permanent Court did not include in its Article 36 a specific reference to the Covenant; the Covenant, being Part I of the Treaty of Versailles, was covered by the words "treaties and conventions in force," and Article 14 of the Covenant dealt with advisory opinions. Relying on this precedent and on the broad scope of Article 36, paragraph 1, it has been asked whether some innovations in procedure and remedies might be brought about "by means of an instrument or instruments supplementary to the Statute giving jurisdiction in respect of matters provided for in treaties and conventions in force within the meaning of Article 36."<sup>90</sup>

A simple and well-known example is the provision in some agreements between states, such as the General Convention on the Privileges and Immunities of the United Nations, and in agreements between states and international organizations, such as the Headquarters Agreement between the United States and the United Nations, which attach binding force to the advisory opinions of the Court. In the *UNESCO* case the Court stated that "the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with."<sup>91</sup> This case is also authority for the proposition that the requested opinion may in fact relate to a dispute between individuals and international organizations.<sup>92</sup>

The Committee on Applications for Review of Administrative Tribunal Judgments, established by General Assembly Resolution 957(X) of November 8, 1955, which was authorized to request advisory opinions in certain defined circumstances and with defined consequences, is a useful precedent. It has been suggested that, drawing upon this, the General Assembly might "create an organ of the United Nations specially for the purpose of requesting advisory opinions in defined circumstances, instruct such an organ to request an opinion whenever satisfied that certain conditions exist, and make such an opinion binding on the parties substantively interested in the matter."<sup>93</sup> Such a method of "outflanking" Article 34 of the Statute of the Court, which provides that "only States may be parties in cases before the Court," could be used in disputes between individuals and organizations, and between states and organizations or individuals.<sup>94</sup>

Such an organ might also be used in order to obtain, on the basis of an appropriate instrument, an interpretation of the instrument in a case arising before a domestic tribunal of a party. It could be provided in the instrument that the advisory opinion would have the effect of a declaratory judgment<sup>95</sup> or simply that it would be binding upon the domestic court.

It has been suggested that international organizations other than specialized agencies might be authorized to request advisory opinions of the

<sup>89</sup> Hudson, note 32 above, at 680-681, 730-732.

<sup>90</sup> Jenks, note 2 above, at 124.

<sup>91</sup> [1956] I.C.J. Rep. 77 at 84.

<sup>92</sup> Leo Gross, "Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties," 52 A.J.I.L. 16-40 (1958).

<sup>93</sup> Jenks, note 2 above, at 160-161.

<sup>94</sup> *Ibid.* at 161.

<sup>95</sup> *Ibid.*

Court. It may be noted that Article 96(2) of the Charter provides that organs of the United Nations other than the General Assembly or the Security Council and organs of specialized agencies may be authorized to request advisory opinions. In fact the International Atomic Energy Agency, which is not a specialized agency of the United Nations, has received this authorization. This may not appear to be strictly in accordance with Article 96(2). However, Article 65(1) of the Statute is broader than Article 96(2) of the Charter and it could be argued that the Court would be guided by its Statute rather than by the Charter. Article 65(1) provides that:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

It all depends on how strictly the Court would construe the words "in accordance with the Charter." This is obviously a doubtful point. However, since the General Assembly saw fit to authorize IAEA to request advisory opinions, there is no reason why the Assembly could not, if requested, authorize regional or functional organizations to request advisory opinions of the Court upon any legal question.<sup>96</sup>

Finally the suggestion has been made that the Court could handle requests for advisory opinions before chambers, already constituted or to be constituted *ad hoc* (Article 26(2) of the Statute), or by summary procedure (Article 29 of the Statute).<sup>97</sup> Usually the Court has been able to render an opinion within a year of the request, and it may not be easy to accelerate the advisory proceedings very much. Furthermore, some stretching may be required to apply the procedure before chambers or the summary procedure to advisory proceedings. However, the Court would seem to have ample authority under Article 68 of the Statute to apply provisions governing contentious cases in its advisory function.

In this connection attention may be drawn to a provision in the Statute which has never been used in contentious cases but which may assume importance in connection with a wider use of the advisory function by regional organizations and specialized agencies. Article 30(2) of the Statute reads: "The Rules of the Court may provide for assessors to sit with the Court or with any chambers, without the right to vote." According to Article 7(1) of the Rules of the Court,

The Court may, either upon its own initiative or upon the request of a party made not later than the end of the written proceedings, decide, for the purpose of a particular case, to appoint assessors to sit with it but without the power to vote.

The remaining paragraphs of Article 7 deal with the selection and appointment of assessors by secret ballot. The same procedure applies to the appointment and selection of assessors by chambers. According to Article 8 of the Rules the assessors shall make a declaration which is substantially

<sup>96</sup> Jenks, note 2 above, at 160; and Rogers, note 78 above.

<sup>97</sup> *Ibid.*

identical with that required of members of the Court by Article 20 of the Statute and Article 5 of the Rules. It is well to recall that the Court has also the power to carry out an inquiry or call for an expert opinion (Article 51 of the Statute and Articles 54 and 57 of the Rules). Unlike such experts, the assessor may participate in the private deliberations of the Court and in this fashion, presumably, in the drafting of the judgment.

The legal advisers of specialized agencies have appeared reluctant to use the advisory function of the Court on the ground that the Court, "being outside the mainstream of the organization's activity, might come to decisions not fully sensitive to the internal requirements for effective operation."<sup>98</sup> This is certainly a legitimate concern. It is believed that the use of assessors and possibly also of experts should go a long way toward providing the Court or one of its chambers with the sort of expertise which would enable the Court to appreciate the particular sensitivities of any functional agency. In truth, there may be some advantage in seeking the legal opinion of a relatively detached but knowledgeable tribunal. In any event the point here is that, pursuant to Article 68 of the Statute and the corresponding Article 82 of the Rules, the Court would seem to have authority to use assessors and experts in advisory proceedings.<sup>99</sup>

There are also possibilities for developing recourse to the contentious jurisdiction of the Court which do not require explicit changes of the Statute. One improvement is seen in accelerating the process of litigation. The Court is sensitive to the issue.<sup>100</sup> *Barcelona Traction* is the landmark case and provoked some comment from the Court in its judgment.<sup>101</sup> Such inordinate delays which increase the cost of litigation are due to the parties in the first place, but there may be opportunities for the Court in co-operation with the parties to expedite the written and often repetitious oral phase of the proceedings. The Statute provides that "the hearings shall be under the control of the President" (Article 45), but it is well known that this control has been nominal in most cases.

Article 29 requires the Court to set up chambers for summary procedure. It has been proposed that summary proceedings could be held before the full Court at the request of the parties or if provided for in instruments.<sup>102</sup> This is neither specially provided for nor excluded by the Statute. However, Article 82(2) of the Rules provides that "If the Court is of the opinion that a request for an advisory opinion necessitates an early answer, it shall take the necessary steps to accelerate the procedure." What is possible for advisory proceedings without a special clause in the Statute should be possible in contentious cases with the consent *ad hoc* of the parties or in the applicable jurisdictional clause. The Court has resources, hitherto largely untapped, for speedier conduct of its business in Article 49 of the Statute:

<sup>98</sup> Merillat, note 55 above, at 10-11.

<sup>99</sup> On the status of international organizations in relation to the Court see Jenks, note 2 above, at 185-208.

<sup>100</sup> Leo Gross, "The Time Element in the Contentious Proceedings in the International Court of Justice," 63 A.J.I.L. 74-86 (1969).

<sup>101</sup> [1970] I.C.J. Rep. 3 at 6. See also Separate Opinions of Judges Fitzmaurice, at 113, and Jessup, at 221.

<sup>102</sup> Jenks, note 2 above, at 132.

"The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." In using the possibilities opened up by this clause the Court would be in a position to develop contacts with the parties which might expedite the proceedings without depriving them of their "day in court," as it were.

Other proposals on access to the Court would take the "adversary" out of contentious proceedings. A jurisdictional clause could be inserted in a treaty providing that proceedings instituted thereunder by one party would be regarded "as proceedings instituted jointly for the determination of a question rather than as proceedings instituted by an applicant against a respondent." The question could be defined, if necessary, "under the control of the Court by an officer acting on its behalf."<sup>103</sup> This approach is hardly distinguishable from proceedings instituted pursuant to a special agreement. In such proceedings there are no adversaries in the sense of applicant and respondent, and the procedure has the added advantage that the agreement defines the question on which the Court is requested to rule and, conceivably, the law to be applied.<sup>104</sup> Usually the subject matter of a special agreement is a concrete dispute, in the sense of a difference between the parties as to their respective rights. However, there is no reason why the special agreement should not invite the Court to define the legal principles on the basis of which the parties shall seek a settlement rather than provide the solution itself.

An example of this sort of approach is the recent *North Sea Continental Shelf* case. This case came before the Court by means of Special Agreements concluded on February 2, 1967, between Denmark and the Federal Republic of Germany and between the Federal Republic and The Netherlands. Differences having arisen between the parties concerning the delimitation of their shares in the continental shelf in the North Sea, the parties requested the Court "to decide the following question: What principles and rules of international law are applicable to the determination as between the Parties of the area of the continental shelf in the North Sea which appertains to each of them. . . ."

In the Special Agreements the parties also agreed that they "shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice."<sup>105</sup> The Court was not asked to resolve the dispute—that is, it was not asked to delineate the boundaries, this task being reserved to the parties. The Court in its judgment of February 20, 1969, laid down applicable principles and rules of international law and also "the factors to be taken into account in the course of negotiations."<sup>106</sup> The dispute was

<sup>103</sup> Jenks, note 2 above, at 155. The model for this is the Master of the Supreme Court of England and the *juge d'instruction* in France.

<sup>104</sup> The parties could certainly agree that the Court apply provisions of a treaty even though the treaty has not been ratified by them or, if ratified, has not yet entered into force. This would seem compatible with the language of Art. 38, par. 1 a, of the Court's Statute.

<sup>105</sup> [1969] I.C.J. Rep. 3, at 6.

<sup>106</sup> *Ibid.* at 53; reprinted in 63 A.J.I.L. 591 (1969).

eventually settled by negotiations between the parties. The method adopted by the parties in this case is a useful precedent for the future.

Another procedure would also require the prior consent of the states to an instrument providing "for the citation of nominal respondents." Thus an agreement might authorize any party to bring before the Court questions relating to the interpretation or application of the agreement, naming "automatically . . . as respondent all the other parties to the instrument." The respondents having thus been named, all or some could appear before the Court; and if none appeared, judgment would be given by default.<sup>107</sup>

A similar approach (advance consent in a treaty) could be used for obtaining judgments relating to the interpretation of constituent instruments of international organizations, through *ex parte* proceedings. This method avoids naming any other party to the treaty as respondent, but in accordance with Article 34(3) of the Statute the organization concerned would be notified, and in virtue of Article 63 of the Statute, any interested state could apply to the Court for permission to intervene.<sup>108</sup> The interests of the organization and of states concerned could be fully safeguarded in this manner.

The feature common to these proposals is that they depend upon consent. In that respect they are analogous to proceedings based upon special agreements, in which there are no adversaries in the sense of proceedings instituted by unilateral application. But they depend upon prior consent, given in advance of a dispute or question, as do proceedings instituted by unilateral application. They require, in short, a jurisdictional clause of a special kind, the distinctive virtue of which is that they permit institution of contentious proceedings by unilateral application not directed against any particular state. Through this device it is hoped to overcome the hesitation of a state to call another state before the Court and thus appear as committing an unfriendly act toward it. Such procedures may well be criteria of a mature system of law, even though they start from the premise of the immaturity of the states or, at the lowest, of their extreme sensitivity.

In the same manner, that is, through a separate instrument or clauses in conventions, states could agree to accept as binding provisional measures indicated by the Court pursuant to Article 41(1) of the Statute.<sup>109</sup> It will be recalled that in the *Anglo-Iranian Company* case the question of the legal effect of such measures was controversial, and the matter has not yet been clarified. Short of amending the Statute, states would generally in a treaty, or perhaps even in special agreements, agree to accept provisional measures as binding. In view of the frequently protracted nature of litigation, an agreement of that sort would make sense and might encourage states to have recourse to the Court, knowing that their interests would be protected pending the final disposition of the case.

It remains to note that most of these proposals were discussed by an informal study group on the International Court of Justice. The group was unable to consider all of them in detail but there was support particu-

<sup>107</sup> Jerks, note 2 above, at 157 f.

<sup>108</sup> *Ibid.* at 156-157.

<sup>109</sup> *Ibid.* at 157-158.



larly for an extension and wider use of advisory proceedings. The study group was convinced, as was the Institute of International Law, that one way of promoting progress was through the dissemination of a "wider and more thorough knowledge of the working and decisions of the International Court of Justice and other international courts and tribunals" and that public and private national and international bodies can play an important rôle in this task.<sup>110</sup>

## VII

### COMPOSITION OF THE COURT

Confidence in the Court, its impartiality and objectivity has been widely identified as a crucial factor in the rôle which it might play in the changing pattern of international relations. In this context the composition of the Court is of central significance. The principles and procedures governing the composition of the Court are contained in Chapter I (Articles 2-33) of the Statute. There has been on the whole satisfaction with the composition of the Court through the application of these principles and procedures, but there has also been consideration of proposals designed to ensure the independence of the Court from political and other influences.<sup>111</sup> Some of the desired objectives might be attained by means of General Assembly resolutions, which Members would be free to accept as binding and act accordingly. Others might require an amendment of the Statute. Judge Huber suggested that the former method would be acceptable in matters which by the Statute are left to the discretion of the Members, such as the functioning of the national groups for the nomination of candidates for the Court. Some of the more significant considerations will be discussed below.

#### 1. *Qualification of Judges*

(Articles 2 and 9 of the Statute)

The basic principle is in Article 2, which states the personal and professional requirements: high moral character, eligibility to highest judicial office, recognized competence in international law.<sup>112</sup> Such persons should be elected "regardless of their nationality." Article 9, however, reminds the electors that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." In a perfect world such a combination of factors would present no insuperable problem. In the actual world of the United Nations nationality has always been a factor—nationals of the Four Big Powers were always elected—a fact which provoked no criticism, as nationality seemed to go hand in hand with the other requirements. However, generally speaking, the feeling arose that the "forms and systems" requirement

<sup>110</sup> 48 *Annuaire* at 380-386 (1959).

<sup>111</sup> M. Huber, 45 *Institute of International Law*, Session of Aix-en-Provence, *Annuaire* at 407 (I, 1954).

<sup>112</sup> For qualifications of judges see Table in Annex 2, p. 325.

seemed of greater concern to the electors than the personal and professional requirements. In the climate of the United Nations all requirements tended to be submerged in the considerations which generally govern elections, namely, the preference for representation of voting blocs, regional and/or social, economic and political "affinity" groups. As the balloting is secret, it would be impossible for an outsider to test the validity of this feeling. However, an outspoken demand exists for a more equitable representation in the Court of various political and social systems,<sup>113</sup> which are not mentioned anywhere in the Statute.

Indeed from Table 1 a shift in the geographical origins or affiliations of judges can be detected.<sup>114</sup> The most striking expression of this can be seen in the election of one judge from Africa in each of the last three triennial elections. By comparison there are two judges from Latin America and two from Western Europe (apart from judges from the United Kingdom, the U.S.A. and France). No judge from a non-Member State has ever been elected, although candidates of outstanding ability and competence have been nominated.

The Secretary General of the United Nations, U Thant, stated that the present composition of the Court satisfies not merely the requirements of representation of the main forms of civilization and the principal legal systems, "but, even from the geographic standpoint, it may be noted that the composition of the Court is *exactly* the same as that agreed on in 1963 for the Security Council. Since the composition of the Council is generally considered balanced, there appears little justification for objecting to that of the Court."<sup>115</sup>

The question, then, has arisen whether somehow the political climate pervading the United Nations can be eliminated and the pre-eminence of the "character" and "competence" requirement can be established over the "forms and systems" requirement. With this end in view the Institute of International Law made two suggestions, one relating to the election process itself and the other concerning the relation between Articles 2 and 9. After rejecting radical proposals (such as that Article 9 be altogether eliminated or at least that the words "principal legal systems," which had come to be regarded as a synonym for geographical areas, be deleted) the Institute adopted in 1954 the following resolution:

Without prejudice to the need for maintaining a certain geographical representation within the International Court of Justice, as provided for in Article 9 of the Statute, judges of the Court should be elected primarily on the basis of their personal qualifications in accordance with Article 2.

<sup>113</sup> Report of the Special Committee on Principles . . . (A/6230), June 27, 1966, at 103, par. 219. See note 6 above.

<sup>114</sup> See Table, Annex 1, p. 324.

<sup>115</sup> Introduction to the Annual Report, note 79 above, at 38, par. 147. Italics supplied. The Secretary General presumably referred to General Assembly Resolution 1991 A (XVIII) of Dec. 17, 1963, pursuant to which the ten non-permanent members shall be elected according to the following geographical pattern: (a) five from African and Asian states, (b) one from Eastern European states, (c) two from Latin American states, and (d) two from Western European and other states. GAOR, 18th Sess., Supp. No. 15 (A/5515) at 21-22.

In the event of the Statute being revised, a clarification covering this point could usefully be added to Article 9.<sup>116</sup>

The sense of this resolution might well be expressed, short of a formal amendment, in a resolution of the General Assembly. It is open to question, however, whether deeply ingrained habits could be changed by a resolution, if it were to be adopted (which is doubtful), or even by an amendment of Article 9. As Judge Spiropoulos observed, it would be "chimerical to believe that one could eliminate the political combinations in connection with the election of judges by a simple revision of the text of Articles 2 and 9, for the Assembly and the Council are political bodies in which political considerations prevail."<sup>117</sup>

Other proposals tending to influence the election of judges in accordance with the "character and competence" criteria will be discussed in their context. However, one proposal may be mentioned here. In the wide-ranging discussion of the Principles of Friendly Relations in the Sixth Committee of the General Assembly, the representative of Japan, Mr. Hattori, outlined several steps that would strengthen the rule of law and the rôle of the Court. He covered some well-known ground but also included the following: "to examine the possibility of making acceptance of the Court's compulsory jurisdiction a factor in deciding its composition, albeit with the utmost care to avoid any damage to its prestige."<sup>118</sup>

This stipulation could, if found acceptable, be included in a revised Article 9 or in a General Assembly resolution. This would add another factor to the "character and competence" and "forms and systems" factors. It would not be wholly without precedent. Article 23 (1) of the Charter lays down the factors to be taken into account in the election of non-permanent members of the Security Council: "in the first instance . . . the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution." Both factors were relevant in the formative stage of the United Nations; then the second seemed to take precedence over the first, and currently the elections are governed by the resolution of the General Assembly of 1963 allocating places among geographic regions. Still, within geographic areas, political, social and economic affinities seem to play an important rôle.

It may well be that the consideration advanced by Japan would, like other criteria, come to be dominated by the factor of affinity, whether it were incorporated in a revised Article 9 or in a resolution of the General Assembly. Its merit would be to remind the electors of the distinction between the nominal international judicial community and the effective one, the latter being comprised of those states which have manifested a

<sup>116</sup> 45 *Annuaire* at 296, and at 412, 414, 509, 523, 542 (II, 1954); 49 *A.J.I.L.* 14 (1955).

<sup>117</sup> J. Spiropoulos, "Les Résolutions de l'Institut de Droit International sur les Amendements à Apporter au Statut de la Cour International de Justice," in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der Internationalen Organisation*, Festschrift für Hans Wehberg 374-384, at 376 (1956).

<sup>118</sup> GAOR, 18th Sess., Sixth Committee, 821st Meeting, Nov. 27, 1963, at 226.

disposition to settle their disputes by adjudication by accepting the compulsory jurisdiction of the Court.

It is impossible to determine objectively whether the electors have had the compulsory-jurisdiction factor in mind when casting their secret ballot. It can be objectively determined whether the elected members of the Court are nationals of states which have or have not accepted the compulsory jurisdiction of the Court. In the triennial election the ratio of states that had accepted its compulsory jurisdiction to those that had not was 4:1 (Senegal) in 1963, 3:2 (Lebanon, Poland) in 1966; and 2:3 (Dahomey, U.S.S.R., Spain) in 1969. By going back to 1946 one might be able to determine whether the last 3 triennial elections indicate a trend.

Article 7 of the Statute directs the Secretary General to prepare a list in alphabetical order of all persons nominated in accordance with Article 5. It also states that, with the exception of Article 12 (2), "these shall be the only persons eligible." However, while this is so, it does not follow that all of them are equally eligible. It might be worth considering the desirability of requesting the Secretary General, through a resolution of the General Assembly, to prepare a second list for the guidance of the electors which would separate the persons nominated from countries which have accepted the compulsory jurisdiction from those which have not. Article 98 of the Charter would be ample authority for such a resolution. There is, after all, a difference between the 46 countries which accept the judicial process and those which do not. The former have a greater stake in the composition of the Court than the latter. The non-election of a candidate from China indicates that permanent members of the Security Council have no vested right in being "represented" on the Court. The veto-free vote in the Security Council is further evidence that it was not the intention of the founding fathers of the United Nations to provide for such "representation."

What impact a Court constituted along the lines indicated above would have on the advisory function is problematical. It could hardly lead to a less frequent recourse to it than during the last 10 years or so. It might have an encouraging effect on some of the specialized agencies. Conceivably, it might spur some states to accept the compulsory jurisdiction of the Court. To be sure, the possibility cannot be excluded that some of these acceptances may be accompanied by reservations of a far-reaching character. However, as noted in a different context, there may still remain a residuum of usable compulsory jurisdiction.<sup>119</sup>

## 2. *Number of Members of the Court* (Article 3 of the Statute)

The Statute provides that the Court shall consist of 15 members. The Permanent Court consisted of the same number of judges. Since 1945, when the present Statute was drafted, the number of Members of the United Nations has risen from 51 to 127. The question then is whether the

<sup>119</sup> See p. 314 below.

increase in the nominal membership of the international judicial community, which stands at 130, should be reflected in an increase in the number of members of the Court. The question was discussed in the Institute of International Law in 1954 and the informal study group on the Court in 1963. The result was a resolution which reads:

It is desirable to avoid an increase of the number of judges, which would be calculated to make the deliberations of the International Court of Justice more difficult.

Should new circumstances make some increase necessary, the number of judges should not exceed eighteen.<sup>120</sup>

As to the method for achieving this increase, there were two views in the Institute. According to one, the increase should be accomplished through a revision of the Statute fixing the number at 18; and according to the other, supported by Judge Huber, the Statute should be amended by a change in Article 3, declaring that the Assembly and Council may, in agreement, raise the number to 18. The former view prevailed. It is obvious that a larger number than 15 might threaten the cohesion and efficiency of the Court.<sup>121</sup> This danger could be mitigated. One proposal was to split the Court into two "chambers" of nine judges each.<sup>122</sup> Obviously the term "chambers" is not used in the sense of Article 26 of the Statute. Rather it is used in the sense of sections, and the Statute makes no provision for them. Article 25 says that "the full Court shall sit except when it is expressly provided otherwise in the present Statute." If the Court were to be split into sections, a revision of this clause would be necessary.

A more practical proposal would rely on keeping the operational membership at no more than 15 judges by use of Article 23 (2) which states: "Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court. . . ." <sup>123</sup> This seems certainly feasible as long as "the number of judges available to constitute the Court is not . . . reduced below eleven" (Article 25 (2)), and a quorum of nine judges is assured (Article 25 (3)). Another method is indicated in Article 25 (2), namely, that "the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting," provided that the number of available judges is not thereby reduced below eleven.

It is clear, then, that an enlargement of the membership of the Court need not necessarily produce an unwieldy tribunal. However, there is still a possibility that the cohesion and efficiency of the Court might suffer. The manipulation of leaves of absence and dispensations from sitting might result in a tribunal the composition of which might be quite unpredictable. As will be argued below, the introduction of triennial elections has already

<sup>120</sup> 45 *Annuaire* at 297 (1954); 49 *A.J.I.L.* 14 (1955).

<sup>121</sup> See 45 *Annuaire* at 504, 525, 532 and 529, for the views respectively of Castberg, Kaackenbeeck, Lauterpacht and Olivan. See also Spiropoulos, note 117 above, at 377.

<sup>122</sup> E. Hambro, "Should the Membership of the International Court of Justice be Enlarged?" in *Festgabe für A. N. Makarov*, 19 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 141-152 at 149 (1958).

<sup>123</sup> Hambro, *loc. cit.* at 148.

introduced a degree of uncertainty and unpredictability. This would be increased by leaves and dispensations from sitting. States would like to have their disputes settled by the same Court. As litigation becomes protracted by reason of preliminary objections and delays in the written stage of the proceedings, the likelihood decreases of having the same judges at the start and at the finish.

The need for continuity is recognized in Article 13 (3), dealing with triennial elections: "The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun." This clause has not prevented a different bench from indicating provisional measures and hearing objections to jurisdiction, or from ruling on preliminary objections and rendering judgments on merits.<sup>124</sup> It would seem that the term "case" does not mean the whole litigation but certainly includes hearings in a case and the rendering of the judgment. Since the composition of the bench is without doubt one of the factors taken into account by the party or parties instituting proceedings, the various schemes propounded for mitigating the adverse effects of an enlarged Court might fall short of their objective; they might even become counter-productive.

An enlargement of the Court was primarily considered as a response to demands of the new states for "more equitable representation." In the last three triennial elections for the first time—if one does not consider India and Pakistan as "new" states—three judges from Africa, and one each from the Philippines and Lebanon were elected. To be sure, this has been possible at the expense of Western European and other states. Surely the three elections gave "equitable representation" to new states. They now have one-third of the seats on the bench. The situation raises the question whether other areas and systems of law and politically related groups of states can be said to have "equitable representation" on the Court. One test for determining the effect of the change in the composition of the Court will be whether contentious cases are submitted to the Court from the ranks of the new states as well as from the traditional clients of the Court in the West. If there are no cases from new states, then the lack of "equitable representation" was not the cause for their reticence, although it may have become a cause for the reticence of the West. If that turns out to be the case, then an enlargement of the Court's membership may have to be carried out in order to restore a more "equitable representation" to the traditional clients of the Court.

### 3. *Nomination of Candidates* (Articles 4, 5 and 6 of the Statute)

The process of nominating qualified persons for election to the Court was not changed when the Statute was drafted in 1945. An alternative

<sup>124</sup> For examples, see 1 Rosenne, *The Law and Practice of the International Court* 199-200 (1965). To the examples there listed should be added the Barcelona Traction Company and the South West Africa cases, where judgments on preliminary objections were rendered in 1963 and 1962 and final pronouncements in 1970 and 1966, respectively.

method was proposed, namely, nomination directly by governments; but the preference was for the old method of indirect nomination, and the question was decided accordingly at the San Francisco Conference.<sup>125</sup> It was felt that the old method had worked well. Whether the same method has worked well in the United Nations seems less clear. Everything in the United Nations tends to be politicized in the sense that everything, including elections to the Court, becomes stakes in the never-ending process of bargaining for whatever is on the market. The process of nomination, it is felt, has also been infected, and the national groups and their equivalents (Article 4(2)) are not as autonomous in their selections as they were reputed to have been in the League of Nations period. It may not be much of an exaggeration to suggest that the difference between the direct and indirect nominations is the difference between direct and indirect political influences. It seems more important to governments that the Court should reflect accurately the strength of the several "affinity" groups in the United Nations than that it should be an effective organ of the United Nations.

In the Institute of International Law several ideas to improve the nomination process were discussed. Little support was given to La Pradelle's proposal that the Court itself should draw up a list of candidates.<sup>126</sup> Gidel's proposal that Article 5 be revised to provide that members of the national groups and their equivalents shall be considered *ipso facto* as eligible<sup>127</sup> did not fare better. Lauterpacht suggested that the national groups should be encouraged to set up a committee of five persons to assist them in making the nominations. The Committee should include two judges, one practicing lawyer and two teachers of international law. Such a committee "would offer some guarantees of independence and expert knowledge."<sup>128</sup> This proposal was not adopted. Obviously it has some merit. Under Article 6, the national groups have leeway to establish such committees. They could be encouraged to do so by means of a resolution of the General Assembly. They could also be encouraged to publish the consultations undertaken pursuant to Article 6 and the responses they received, without necessarily mentioning names.<sup>129</sup>

None of these proposals was accepted by the Institute. It has been claimed that only those nominees are likely to be elected who are supported by their governments. "Moreover the collaboration between the national groups of the Permanent Court of Arbitration and the governments is extremely close, and as a consequence the decision concerning persons to be nominated cannot be insulated from political influences."<sup>130</sup> Still, an appeal

<sup>125</sup> N. J. Padelford, "The Composition of the International Court of Justice: Background and Practice," in K. W. Deutsch and S. Hoffmann, *The Relevance of International Law* 219-250, at 224-227 (1968).

<sup>126</sup> 45 *Annuaire* 407-554 at 419 (II, 1954).

<sup>127</sup> *Ibid.* at 450-451. See also 44 *Annuaire* at 64 (II, 1952).

<sup>128</sup> 45 *Annuaire* at 476 (II, 1954).

<sup>129</sup> In this context cf. R. R. Baxter, "The Procedures Employed in Connection with the United States Nominations for the International Court in 1960," 55 *A.J.I.L.* 445-446 (1961). This is the only such account of which the writer is aware.

<sup>130</sup> Spiropoulos, note 117, above, at 378.

to the national groups to discharge their task independently and responsibly might serve a useful purpose.

One more point may be made in connection with the nominating process. The Statute sets an upper limit on the number of persons to be nominated in each of the two categories—no more than two co-nationals and no more than four altogether (Article 5(2)). Some national groups nominate only one co-national which lends some credence to the suspicion that political influence is at work. It would decidedly be an improvement if the national groups would regularly nominate two of their co-nationals.<sup>181</sup> This would give the electors a better choice. A resolution of the General Assembly might well make an appeal along these lines to the national groups, and the Secretary General of the United Nations could be instructed to remind the national groups of such a resolution when inviting them, pursuant to Article 5(1) of the Statute, to make the nominations. The national groups and their equivalents could also be reminded that in fulfilling this task they are acting as international organs and not as organs of the state which appointed them. In free and democratic societies such an appeal should not fall on deaf ears.

The Secretary General, under Article 7, is to "prepare a list in alphabetical order of all the persons thus nominated." It has already been suggested that he could be instructed by the Assembly to prepare another list which would indicate which persons are nationals of countries which have accepted the compulsory jurisdiction of the Court. The Secretary General could also be instructed to include in the list short biographies of the nominated persons. Lauterpacht contended that the greatest flaw in the present procedure is that the elections are "not preceded by any organized collective examination of the merits of the individual candidates" nor "by any fully responsible and orderly attempt to balance the claims of representation as conceived under Article 9 and the personal requirements as laid down in Article 2." He suggested that a "preparatory and explanatory body" be established to carry out the scrutiny and report to the General Assembly and Security Council. The report would not be binding. The committee could be composed of eleven members—three members each from the Assembly and the Council, three members of the Court, the Secretary General of the United Nations, and one international lawyer of acknowledged authority who could be nominated by the Bureau of the Institute of International Law.<sup>182</sup>

No doubt such procedure would provide some guidance for the electors in choosing the judges from the raw list prepared by the Secretary General. From the purely constitutional point of view, it seems unobjectionable.<sup>183</sup> A committee could be set up by the General Assembly or by the

<sup>181</sup> This was proposed by the Institute of International Law in 1952, 44 *Annuaire* at 64 (II, 1952), but not adopted at its 1954 session.

<sup>182</sup> 45 *Annuaire* at 481 (II, 1954). Fitzmaurice supported this proposal. *Ibid.* at 511.

<sup>183</sup> In this context it may be recalled that Art. 6 of the I.L.C. Statute provides: "The Secretary General shall as soon as possible communicate to the Governments of States Members the names submitted, as well as any statements of qualifications of candi-



Assembly upon a recommendation of the Security Council. The question is whether it is feasible from the political point of view. What Lauterpacht and others were concerned about is to take politics and politicking out of the election process. Other proposals yet to be discussed all tend in the same direction. Some may deny that there has been politicking; others may admit it and argue that it is inevitable. A tribunal which satisfies the political instincts and reflects the political deals of the members, but is not the kind of court to which they would entrust the settlement of their disputes, is obviously of no use to anybody. Political affinity groups may score victories, but they may turn out to be Pyrrhic victories. The crisis of confidence in the Court may indeed be the result of the extent to which the process of politicizing the elections has gone. The electors know it and they have no confidence in what they have created.

#### 4. *The Timing of Elections* (Article 8 of the Statute)

Article 8 merely provides that the Assembly and the Council "shall proceed independently of one another to elect the members of the Court." Proposals to let the Assembly alone elect the judges were considered at various times but found no acceptance.<sup>184</sup> Article 8 is silent on the question of timing. The practice has been to include elections of judges on the agenda of the regular sessions of the Assembly along with the election of the members of a miscellaneous array of other organs. It is in this practice that political bargaining on the composition of the Court had its origin. Election of a candidate to the Court is traded off for support of another candidate to another body. And the Court became just one more body. To counter this practice, proposals have been made to separate the election of members of the Court from other elections. Elections to the Court should be held within eight days of the opening of the Assembly session.<sup>185</sup> With the same objective in mind the Institute at its Siena Session in 1952 adopted a resolution stating that

... in order to comply with the letter and spirit of Article 2 and 8 of the Statute, the following administrative measures should be taken at once:

1. By reason of its non-political character, the election of the Members of the Court, being concerned with persons, not with States, should be kept altogether apart from the elections relating to other organs of the United Nations, and should take place at the nearest possible date to the opening of the Session of the Assembly and immediately after the closure of the general opening debate.

2. In order to ensure independence for the voting in the two organs which have to carry out the elections of the judges simultaneously, steps should be taken to prevent any communications passing between

---

dates that may have been submitted by the nominating Governments." *The Work of the I.L.C.* (U.N. Pub. 67.V.40), at 56.

<sup>184</sup> 45 *Annuaire* at 420, 544 (II, 1954). Rolin, Kaeckenbeeck and Olivan supported the proposal.

<sup>185</sup> See Judge Guerrero's proposal, *ibid.* at 544.

them, save only the official announcements made by each body to the other, of the results of their respective electoral meetings.<sup>138</sup>

It should be noted that this proposal was made in 1952, when the membership of the United Nations stood at sixty. It proceeds from the assumption that the elections are "concerned with persons, not with States." If that had been correct in 1952, there would have been no need for the resolution. Currently it is probably closer to the true situation to say that the elections are concerned with states and with political affinity groups rather than with persons. The groups bargain about which will get what, and it is not an exaggeration to say that the effective nominations are made by the groups. The notion of the Institute that there should be no communication between the two electoral organs loses much of its meaning in view of the current practice. It simply does not make much sense to say that the 127 Members of the United Nations and the three non-Members, on the one side, and the fifteen members of the Council will be guided by an "invisible hand." Some preparation and consultation are inevitable and unavoidable, particularly as long as the present bicameral system of elections is maintained. Lauterpacht's suggestion, discussed in the preceding section, assumed correctly that some screening and guidance are necessary. If this is not done by an independent body with the best interest of the Court in mind, it will be and has been done instead on the basis of the perceived best interests of the affinity groups.

The suggestion to separate the judicial from other elections by scheduling them early in the session may have been useful in 1952 when the bargaining process for elective posts was less intense. Currently it would make no difference when the elections for the Court are held because the bargaining process has become a year-round business. Also the general debate has expanded and covers four to six weeks, during which lobbying between and within groups takes place.

However, it would at least be an acknowledgment of the special position of the Court as the principal judicial organ, not of the United Nations alone but indeed of the world, if the election of its members were held at a special session of the Assembly and the Council. The members of the Court should ideally be elected at a meeting of the international judicial community and without the Security Council. Assuming that a unicameral system of elections is not practical at this juncture, the least that could be done is to convene the parties to the Statute every three years for the purpose of electing members of the Court and of dealing with other matters relating to the Court, such as possible revisions of the Statute or the consideration of resolutions relating to the Court. This could certainly be done without any revision of Article 8. Preferably the Assembly and the Council would agree by resolutions to hold special sessions in the spring of the year in which triennial elections are to be held. If that were too expensive or inconvenient, the special session could be held a week before the opening of the regular session of the Assembly. This is suggested without any fond expectation that the electors would then be guided solely by the spirit of

<sup>138</sup> 44 *Annuaire* at 474 (II, 1952); 47 *A.J.I.L.* 463 (1953).

Articles 2 and 8. But at least they would be reminded of their solemn obligation as members of the international judicial community to elect a bench which would command the confidence of the international community and to which, as a consequence, they would be willing to submit their disputes.

##### 5. *Voting in Elections of Members of the Court* (Articles 10 to 12 of the Statute)

The rules laid down in these articles, although of some complexity, do not eliminate all difficulties. In triennial elections, when five judges are to be elected, it is possible for more than five persons to receive the requisite majorities—an absolute majority of votes—in both the Assembly and the Security Council. The case of the election of Judge Ammoun is well known.<sup>137</sup> The Statute provides in Article 10(2) that a vote in the Security Council “shall be taken without any distinction between permanent and non-permanent members of the Security Council.” The Statute provides for the eventuality that one or more seats remain to be filled after a third meeting (Article 12), but does not deal with the situations which have actually arisen.

The Institute of International Law considered a proposal to abolish Articles 11 and 12 in favor of co-optation of the judges by the Court itself from among those candidates who received a certain minimum of votes.<sup>138</sup> It proposed in 1954 the following rule:

When several seats are to be filled, successive votes for each seat seem more likely to prevent unexpected results. This method is not incompatible with the present Statute.<sup>139</sup>

The second sentence is correct, although clearly Article 10 and following are so drafted as to convey the impression that several candidates are voted upon simultaneously. This has been the understanding which has prevailed in the practice of both the League and the United Nations. However, a different interpretation is not excluded. In supporting the election of “one man at a time” Judge Huber recalled the example of the Swiss Federal Council, which for a hundred years has been elected in this manner.<sup>140</sup> If this method took more time, the results of the elections would be “more mature and more just.”<sup>141</sup> In this as in all its other proposals the Institute was guided by the concern of reducing the political element in the elections. Doubt was expressed whether the new scheme would indeed be successful in this regard.<sup>142</sup> On the other hand, Professor Rudzinski, who has the advantage of an insider’s experience, suggested that:

<sup>137</sup> W. N. Hogan, “The Ammoun Case and the Election of Judges to the International Court of Justice,” 59 A.J.I.L. 908-912 (1965).

<sup>138</sup> 45 *Annuaire* at 422 (II, 1954). Rolin suggested two fifths of the vote. *Ibid.* at 544.

<sup>139</sup> *Ibid.* at 297.

<sup>141</sup> *Ibid.* at 422.

<sup>140</sup> 45 *Annuaire* at 421-422 (II, 1954).

<sup>142</sup> Spiropoulos, note 117 above, at 379.

... A sequence of five separate one-man elections instead of one five-man election would strain substantially the trust needed for election deals. . . . Anyhow, splitting of multiple ballots may be the least objectionable basic remedy and is worth considering.<sup>143</sup>

Inasmuch as no formal revision of the Statute is involved but only a change in the practice, a change for the better might be accomplished through appropriate amendments in the Rules of Procedure of the Assembly and the insertion of an appropriate rule in the Provisional Rules of Procedure of the Council. Rule 40 of the latter simply refers to the Statute, and Rule 152 of the former blatantly underscores the defects of the present system by stipulating that any meeting of the Assembly "shall continue until as many candidates as are required for all the seats to be filled have obtained *in one or more ballots* an absolute majority of votes."<sup>144</sup> At the very least the "one man at a time" scheme would do away with this objectionable feature, and it may well tend to reduce the politicking of the various affinity groups.

#### 6. *Term of Office*

(Articles 13 and 15 of the Statute)

The present Statute provides for a term of nine years, one third of the judges to be elected every three years after an initial transitional period, which has expired. The nine-year term is the same as that of the judges of the Permanent Court. The triennial election is an innovation designed to secure continuity. The Statute has been criticized on both counts. The triennial elections introduced an element of uncertainty in the composition of the Court which is apt to discourage states from submitting cases to the Court. A further adverse effect of this innovation has been that preliminary objections may be decided upon by one bench and the merits by another.<sup>145</sup> Forty-seven judges have served on the Court between 1946 and 1970, including judges elected to fill unexpired terms caused by death. During the roughly comparable period of 1922-1942, thirty-two judges served on the Permanent Court. There has been a significantly larger turnover on the bench of the Court than on that of its predecessor. Since triennial elections multiply the opportunities for political bargains, they are also objectionable on that score.

Various proposals were canvassed by the Institute of International Law, which in 1954 adopted the following resolution:

With a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for fifteen years and should not be re-eligible. In this event, an age-limit should be laid down; it might be fixed at seventy-five years.

<sup>143</sup> A. W. Rudzinski, "Election Procedure in the United Nations," 53 A.J.I.L. 81-111 at 84 (1959).

<sup>144</sup> Doc. A/520/Rev. 4. Italics supplied. Rule 152 defeats the purpose and *raison d'être* of Art. 12 of the Statute and its constitutionality is, therefore, open to question.

<sup>145</sup> See above, at p. 286.

Provisions should also be made whereby, contrary to the present text of the Statute, new members of the Court would be elected for terms of fifteen years, subject to the age-limit, irrespective of the terms for which their predecessors held office.

It is not intended to suggest that these new provisions should apply to judges now in office, except in cases of re-election for a new term of office.<sup>146</sup>

The first and obvious consequence implied in this text is the elimination of Article 15 of the Statute, according to which a replacement for a member whose term of office has not expired "shall hold office for the remainder of his predecessor's term." This particular provision has been criticized on the ground "that the relatively short term of office inevitably offered to members elected to fill occasional vacancies may deter qualified persons from agreeing to be candidates."<sup>147</sup> This is certainly a consideration. However, whether qualified persons have indeed been deterred would require an analysis of the facts, all of which may not be in the public domain. The suggested remedy, namely, that members elected at occasional elections should serve a full term of nine years,<sup>148</sup> is not feasible as long as the system of triennial elections remains in force.

It is not clear from the Institute's resolution whether it implies the abolition of the present system of triennial elections or whether it presupposes a return—perhaps after a transitional period—to the old system of electing all 15 members every fifteen years. In any event, the application of the age limit would require occasional elections to replace retiring members either for the balance of their unexpired term or for a full term of fifteen years.

As to the proposal to extend the term of judges to 15 years, abolish re-election and fix an age limit, it was inspired, as were all the proposals of the Institute, by the desire to reduce the political hazards of frequent elections and to ensure the independence of the judges. The first question which comes to mind, is, of course, whether the present system of a nine-year term, re-eligibility and no age limit has, in fact, affected the independence of the judges. Absent any reliable data, any attempt to give an answer would be highly speculative and conceivably harmful to the prestige of the Court. One must confine himself to the general proposition that judges elected for life, as are for instance, the members of the Supreme Court of the United States and of high magistratures in other countries, are generally regarded as more independent than judges for whom considerations of re-election might be a factor.

The Institute may also have been impressed with the thought that the proposed reform could conveniently lead to a system of individual elections.<sup>149</sup> Obviously, such a system would tend to reduce the influence of the manipulations of affinity groups and perhaps focus on the qualifications of the single member to be elected. The reform proposed by the Institute might lead to greater stability in the composition of the Court, and this

<sup>146</sup> 45 *Annuaire* at 297 (II, 1954); 49 *A.J.I.L.* 14 (1955).

<sup>147</sup> I *Rosenne*, *The Law and Practice of the International Court* at 191 (1965).

<sup>148</sup> *Ibid.*

<sup>149</sup> 45 *Annuaire* at 424 (II, 1954).

in turn might promote a greater understanding and spirit of co-operation among the Members. The jurisprudence of the Court might, as a consequence, become more predictable, a factor which, as has already been pointed out, is ever present in the calculations of governments whether to submit a dispute to the Court.<sup>150</sup> For all these reasons the general idea of the proposed reform, if not its exact formulation, deserves close scrutiny. There is no point, obviously, for governments to go on electing a Court to which they are not prepared to submit their disputes.

*7. Incompatibility of Functions and Disqualification of Members*  
(Articles 16, 17, and 24 of the Statute)

The provisions contained in these three articles appear to have worked well in practice. Those in Article 16 regarding incompatibility of current activities or previous functions are self-evident, although there may be room for some doubt whether they have been applied by the Court with precision. In the opinion of Rosenne, Article 17 "may also require a judge to divest himself of financial and other material holdings which could lead to a conflict of interests."<sup>151</sup> In view of the significance which this matter assumed in the United States recently, there may be some advantage in stating explicitly a principle which can be read into Article 17 only with some difficulty.

The operation of Article 24 and Article 17 (2) "is an internal matter for the Court."<sup>152</sup> On the whole, they have worked smoothly. However, in view of the controversy surrounding the stepping down of Judge Sir Zafrulla Khan in the Second Phase of the *South West Africa* cases, it may be useful to take a fresh look at the subject. In that case, it is widely assumed, his absence proved fatal to the applicant governments.

As it is, it may be argued, Article 24 (2) places a very great burden on the President of the Court in providing that: "If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly." It is only in case of disagreement between the President and the member that, according to paragraph 3 of Article 24, "the matter shall be settled by the decision of the Court." The procedure envisaged in paragraph 2 is surely more delicate, but that of paragraph 3 is more judicious. One may wonder whether it would not be preferable to sacrifice the delicacy and thus relieve the President of what must be an unwelcome burden and to provide simply that in such matters the Court shall have the power of decision. This could be accomplished by dropping paragraph 2 and by a slight re-wording of paragraph 3. As there is no particular reason why the President alone should have the right to raise the matter, it could also be provided that any member of the Court could initiate the appropriate proceedings.

<sup>150</sup> Rosenne, note 147 above, at 189 and 199, note 2.

<sup>151</sup> See note 147 above, at 196 and *ibid.*, note 2.

<sup>152</sup> Rosenne, *ibid.*

The Court appointed on May 10, 1967, a committee of three members to study the question of functions which are incompatible with the office of a judge and the "circumstances in which a Member of the Court should refrain from participating in a case." The three members (Sir Gerald Fitzmaurice, M. Gros and Mr. Ammoun) submitted a report, which was adopted on July 3, 1968. "The recommendations approved by the Court relate to the following matters: other forms of peaceful settlement of disputes; scientific activities; public function and occupation of a professional nature; private activities."<sup>153</sup>

It is merely a speculation to suggest that this re-examination of the practice of the Court was brought about in part by the incident which arose in connection with the *South West Africa* cases (Second Phase). Since details of the report are not available, it is impossible to say whether the new rules are designed to prevent future such incidents.

### 8. *Judges ad hoc* (Article 31 of the Statute)

The institution of judges *ad hoc* in contentious cases and in advisory proceedings under Articles 68 of the Statute and 83 of the Rules of Court has been a matter of controversy between those who would suppress it for the sake of enhancing the impartiality of the Court<sup>154</sup> and those who, for a variety of reasons, would maintain it.<sup>155</sup> There are also those who, occupying a middle ground, assert that the abolition of judges *ad hoc* should be combined with the exclusion of "national" judges from the bench, that is, judges who are nationals of one or both parties before the Court.<sup>156</sup> In this view, the essential objective is equality between the parties; this can be achieved either by adding to the bench a judge *ad hoc* or by excluding the "national" judge. The right of a party to appoint a judge *ad hoc* has also been urged on the ground that it gives practical expression to the maxim *audiatur et altera pars*. This, it has been claimed, has become a general principle of law within the meaning of Article 38, paragraph 1(c) of the Statute, and necessarily entails "the right of a party to be represented in the composition of the Court."<sup>157</sup> On the other hand, the Indian judge *ad hoc* in the *Right of Passage* case expressed himself against this institution.<sup>158</sup>

<sup>153</sup> Report of the I.C.J., Aug. 1, 1967–July 31, 1968, GAOR, 23rd Sess., Supp. No. 17 (A/7217), at 4, and 1967–1968 I.C.J. Yearbook at 91.

<sup>154</sup> For a recent view see F. L. Griebes, *Supranationalism and International Adjudication* at 180 (1969).

<sup>155</sup> See Rosenne, note 147 above, at 202–205.

<sup>156</sup> Erik Castrén, "Revision de la Charte des Nations Unies," 7 *Revue Hellénique de Droit International* 20–34 at 32 (1954).

<sup>157</sup> V. S. Mani, "Audi Alteram Partem: Journey of a Principle from the Realms of Private Procedural Law to the Realms of International Procedural Law," 9 *Indian Journal of International Law* 381–412 at 400 (1967).

<sup>158</sup> M. A. C. Chagla, "Rule of Law and the International Court of Justice," 1960 *Proceedings, Am. Soc. Int. Law* 237–242 at 242 (1960): "I think the system of *ad hoc* judges is bad."

The Institute of International Law discussed the matter at its sessions in 1952 and 1954. Judge Huber regarded the system of *ad hoc* judges as being "undoubtedly . . . contrary to the conception of a magistrature" and as reflecting the notion of arbitration.<sup>159</sup> Those who seemed resigned to the system, like Castberg, stressed the obvious politico-psychological reasons,<sup>160</sup> or emphasized, like De La Pradelle, that its retention would facilitate recourse to the Court.<sup>161</sup> On the opposing side, Lauterpacht argued that:

there can be no question, within the Court, of any representation of particular interests. The judges present only the impersonal interest of justice. This means that the question of the nationality of the judges adjudicating any given case must be ignored.<sup>162</sup>

Fitzmaurice attacked the system on similar grounds, arguing in particular two points: First, those who advocate its retention on the ground that it increases confidence in the Court argue from an impermissible premise that judges, particularly *ad hoc* judges, will necessarily espouse the view of their government. Secondly, once a case is terminated, a judge *ad hoc* may feel himself free of every obligation of confidence and may reveal to his government what had been said in the deliberations of the Court. This could have harmful consequences for the independence of judges, particularly if such revelations occurred shortly before elections to the Court.<sup>163</sup>

The upshot of this review of the reasons for and against the system of *ad hoc* judges was that the Institute confined itself to methods designed to ensure a better selection of such judges. A proposal made in 1952 to allow the Court itself, by analogy to Article 12(3) of the Statute, to select the judge *ad hoc* from the national groups which make the nominations<sup>164</sup> was not adopted. Instead, the following resolution was adopted in 1954:

If the system of *ad hoc* judges cannot be abandoned, it is as a minimum highly desirable that the appointment of such judges should be subject to guarantees as nearly as possible equivalent to those gov-

<sup>159</sup> 45 *Annuaire* at 428 f. (I, 1954). This was the view of the Committee of Jurists which drafted the P.C.I.J. Statute. The following passage in Hudson, note 32 above, at 354-355, traces the origin of the institution of judges *ad hoc* to the Hague Peace Conference of 1907, where "the well-known rule that 'no one can be judge in his own suit' has been advanced as a reason for excluding all participation by national judges. This view was strongly urged at the Hague Peace Conference of 1907, but it was not adopted in The Hague *projet* of 1907. It was included, however, in Article 27 of the draft proposed by the Five-Power Conference which met at The Hague in February 1920. The 1920 Committee of Jurists put its decision to permit participation by judges of the nationality of the parties on the ground that this would protect the character of the Court as a World Court, and would avoid 'ruffling national susceptibilities'; it then proceeded to defend the admission of judges *ad hoc* on the ground that this was necessary to 're-establish equality.' The Committee emphasized that 'States attach much importance to having one of their subjects on the bench when they appear at the Court of Justice,' though it admitted the result to be that the Court envisaged 'more nearly resembles a court of arbitration than a national court of justice.'"

<sup>160</sup> 45 *Annuaire* at 506 (I, 1954).

<sup>161</sup> *Ibid.* at 528.

<sup>163</sup> *Ibid.* at 444 f.

<sup>162</sup> *Ibid.* at 528.

<sup>164</sup> 44 *Annuaire* at 65 (II, 1952).



erning the election of titular judges. The appointment of such judges might, for instance, be entrusted to the national group of the Permanent Court of Arbitration of the State concerned, or to the national group appointed by the Government in pursuance of Article 4, paragraph 2, of the Statute.<sup>165</sup>

This proposal found some favor,<sup>166</sup> but doubt was expressed whether it would have any effect in terms of the independence of the judges *ad hoc*.<sup>167</sup>

The fact of the matter is that in every case where the majority of the Court gave a favorable judgment for the appointing state, the judge *ad hoc* concurred, and he dissented in nearly every case where the judgment went against it. Such voting alignments, even if the *ad hoc* judge is the only dissenting judge, as was the case in the recent *Barcelona Traction* judgment, do not necessarily reflect on the independence of the judge concerned. Even the majority of 14 in that case could be wrong, and, despite concurrence in the result, there was wide disparity in the actual reasoning of the various judges. In the matter of advisory proceedings, there is no experience to be drawn upon so far as the present Court is concerned.<sup>168</sup> This is not surprising, since the Court so thoroughly devalued the rôle and effect of advisory opinions in the *Peace Treaties* case. Since advisory opinions are strictly advisory, are given to the requesting body and not to the states at variance, and represent the participation of the Court (itself an "organ" of the United Nations) in the activities of the organization, there is no need for states to appoint judges *ad hoc*.<sup>169</sup>

It has often been observed that where two parties appoint judges *ad hoc*, their votes cancel each other out.<sup>170</sup> In litigation where only one party appoints a judge *ad hoc*, the other party having a national as a titular judge, his vote could make a difference in marginal cases, but there have been no such cases.

The most constructive view on the rôle of judges *ad hoc* has been expressed in two forms. According to one, such judges, while not representing their own countries, "fulfill a useful function in supplying local knowledge and a national point of view."<sup>171</sup> The other sees the task of an *ad hoc* judge not so much in his influence upon the judgment as upon its formulation. It rests with such judges "to represent their countries' in-

<sup>165</sup> 45 *ibid.* at 298 (II, 1954).

<sup>166</sup> H. J. Schlochauer, "Bemerkungen zur Revision der Charter of the United Nations," 19 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (Festgabe für A. N. Makarov) 416-448 at 446 (1958).

<sup>167</sup> Spiropoulos, note 117 above, at 383.

<sup>168</sup> In the Jurisdiction of Danzig Courts, both *ad hoc* judges appointed by Poland and Danzig joined in the unanimous opinion of the Court. Hudson, note 32 above, at 356.

<sup>169</sup> Gross, note 19 above, at 339. The appointment of judges *ad hoc* in advisory proceedings is based on a combination of Art. 83 of the Rules of the Court and Art. 68 of the Statute. By an order of Jan. 29, 1971, the Court, by 10 votes to 5 (Fitzmaurice, Gros, Petrán, Onyeama, Dillard), rejected the application of South Africa for leave to choose a judge *ad hoc* to sit in the proceedings concerning the pending request for an Advisory Opinion in the matter of Namibia (South West Africa). [1971] I.C.J. Rep. 12.

<sup>170</sup> Rosenne, note 147 above, at 203.

<sup>171</sup> Informal Inter-Allied Committee, Report, par. 39; 39 A.J.I.L. Supp 1 at 11 (1945); quoted in Rosenne, cited above, at 203.

terests in the whole process through which the decision is produced and the reasons formulated. If the role of the judges *ad hoc* could be more accurately designated as that of assessors, the grant to them of the status of judge (with the right to vote) represents a concession to diplomatic susceptibilities."<sup>172</sup>

It is recognized on all sides that diplomatic susceptibilities and politico-psychological considerations are involved, and if one takes them seriously, then the system of judges *ad hoc* should be left alone. To the purist it will remain objectionable as a survival of the basic idea of arbitration in the system of international adjudication. It is open to question, however, whether the rest of the argument is still convincing in view of the fact that the practice in the matter of appointing and selecting judges *ad hoc* seems to have undergone a change, a change which might be interpreted as indicating that the states themselves did not or do not attach the significance attributed to the system. In the first place, in three cases no *ad hoc* judges were appointed: *Nottebohm* (Preliminary Objections), *Frontier Land*, and *Temple of Preah Vihear*. In at least the latter two cases there would have been room for "local knowledge and a national point of view." In the second place, in six cases the judges *ad hoc* were not of the nationality of the appointing party, namely: *Corfu Channel*, *Nottebohm* (Merits), *Aerial Incident*, *King of Spain*, *South West Africa*, and *Barcelona Traction*. In these cases the judges *ad hoc* neither supplied "local knowledge and a national point of view" nor represented their "countries' interests" in the process of decision-making. To be sure, in some of these cases the judge *ad hoc* belonged to the affinity group of the appointing state: a Czech judge in the *Corfu* and *Aerial Incident* cases was appointed by Albania and Bulgaria respectively; a Swiss was appointed by Liechtenstein; and first a Pakistani and then a Nigerian were chosen by Ethiopia and Liberia. It would be more difficult to explain on affinity grounds the selection of an Italian by Honduras, a Colombian by Nicaragua (*King of Spain*), or of a Uruguayan by Spain (*Barcelona Traction*).

At best, one can see the judge *ad hoc* acting, as suggested by Rosenne, as a sort of an assessor. In that case there would seem to be no reason why he could not be chosen by the Court. Provision for assessors is made in Article 30(2) of the Statute, although, according to it, they have no right to vote. If diplomatic susceptibilities are involved, assessors chosen by the Court to function as judges *ad hoc* could be given the right to vote. It would be even simpler to propose that judges *ad hoc* be selected by the Court from members of the national nominating group or from persons nominated but not elected, or from a slate of two or three persons submitted by the government concerned. A proposal to abolish the system altogether might be inopportune at a time when the fortunes of the Court are at a low ebb. So too would be the proposal to abolish the system and, at the same time, to drop the "national" judge from the bench. To be sure, if the number of judges were raised to 18, then the argument against such reform—namely, that dropping the "national" judge might

<sup>172</sup> *Ibid.* at 204.

make it difficult for the Court to have a quorum—would lose much of its force. But the reform would be a radical one and inopportune at this time.

Perhaps the system of judges *ad hoc* is dying a quiet death anyhow. And if states continue to select qualified persons who are not their nationals as judges *ad hoc* then the main argument against the system, that in some fashion such judges represent “their” governments on the Court, would lose much of its persuasiveness. This would be so even if, as might well be the case, the government has beforehand ascertained the views of the prospective judge *ad hoc*. For all one knows, the national, titular judge of the other party may also entertain a friendly disposition towards his country’s case. For these reasons it would be appropriate to note the changes which have already taken place in the form of non-appointment of judges *ad hoc* and the appointment of non-nationals and to encourage states to continue this enlightened practice. A resolution by the General Assembly is suggested as the appropriate method.

### VIII

#### THE SEAT OF THE COURT (Article 22 of the Statute)

In 1969 the Court took the initiative under Article 70 of its Statute to propose an amendment to Article 22 which designates The Hague as the seat of the Court. The Court proposed adding to Article 22, paragraph 1, the words “or at such other place as shall at any time be approved by the General Assembly on the recommendation of the Court,” and making consequential changes in Articles 23(2) and 28. Article 22 was originally framed by the Committee of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920. It undoubtedly reflects the spirit of the Hague system of 1899 and 1907.

The Court in an explanatory memorandum gave several reasons for its proposal. First, it considered the provision discriminatory inasmuch as “no other principal organ of the United Nations and none of the specialized agencies has its seat specifically designated in its constitutional instrument.”<sup>173</sup> Secondly, “the special qualities attached to The Hague in 1922 are less distinctive now, and the importance of other places as legal centres has been enhanced”; and thirdly, “it is an uncontroverted fact that the Peace Palace, while a noble national monument with an historic past, is totally unsuited to the needs of the International Court of Justice.”<sup>174</sup>

<sup>173</sup> Report of the I.C.J. August 1, 1968–July 31, 1969, GAOR, 24th Sess., Supp. No. 5 (A/7605), at 3 and 5. Following the letter from the Minister of Foreign Affairs of The Netherlands of Sept. 15, 1969, the Court accepted the correction that by their constituent instruments of 1952 and 1947, respectively, the Universal Postal Union has its seat fixed at Berne and the International Telecommunications Union at Geneva. The Minister also pointed out that the headquarters of the International Bank for Reconstruction and Development and the International Monetary Fund are to have their seat in the country maintaining the largest financial contribution. GAOR, 24th Sess., Agenda item 93, pp. 3 and 4.

<sup>174</sup> Report, *ibid.*, at 5.

The Court did not advert to the delicate question of precedence at ceremonial receptions to which the Court and the diplomatic corps are invited.<sup>175</sup>

There are two aspects to the problem: one, of symbolic significance, is the removal of a provision which the Court considers "invidious," and the other, of practical significance, is to move the Court to another "legal center." With respect to the latter, the Court made it clear that it "is not now recommending that its seat should be established elsewhere than at The Hague," but the Court clearly had this possibility in mind when it said that it should be made possible for the Court "to be established at whatever place, in the course of the years, it may be considered that it could function most harmoniously and effectively."<sup>176</sup> Thus it seems that the symbolic aspect merges with the practical. For obviously, if the Court cannot "function most harmoniously and effectively" at The Hague, it should be moved to the place where it can.

On the other hand, the Netherlands Government has made proposals since 1966 for a new building for the Court. If it were possible to negotiate an agreement with The Netherlands for the erection of a new building at or near The Hague and if the question of precedence could be solved in favor of the Court, there would be no objection to a revision of Article 22(1) of the Statute. Otherwise the clause should be revised, even if there is objection in some quarters. The Court is entitled to a location where it can "function most harmoniously and effectively."

The second sentence in Article 22(1) of the Statute provides that the establishment of the Court at The Hague "shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable." Article 28 contains an analogous provision regarding chambers. The Court did undertake an inspection *in loco* in the *Meuse* case and refused an invitation from South Africa to visit South West Africa, but neither it nor any of its chambers has sat elsewhere than at The Hague. On this matter the Court expressed the view that

the Court would naturally exercise this option for a particular case when considerations of the convenience of the Parties and of the effective administration of its judicial functions made such a departure from its headquarters desirable.<sup>177</sup>

It would seem that in no case have the parties taken the initiative to propose that the Court sit elsewhere and the Court has seen no advantage, such as hearing of witnesses, for a more effective administration of justice in sitting outside The Hague. What remains then is the "demonstration effect" of the Court sitting in different localities to publicize, as it were, its existence and availability. For this reason, indeed, it has been thought that the Court should seize a suitable occasion and show itself to different segments of the world. Whether the Court could afford to do it within its stringent budget is a different matter. Conceivably the country which

<sup>175</sup> See Leo Gross, "The Time Element in the Contentious Proceedings in the International Court of Justice," 63 A.J.I.L. 74-85 at 84 (1969).

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

invited the Court would be prepared to share in the expenses. Were the Court to function temporarily in New York City or Geneva, it could use the facilities of the United Nations. There is a precedent for cost-sharing in connection with diplomatic conferences convened outside the American or European headquarters of the United Nations.

## IX

### INTERNAL JUDICIAL PRACTICE OF THE COURT (Article 30 of the Statute)

The Court has applied since 1946 the amended resolution of 1936 of its predecessor concerning the internal judicial practice of the Court. The resolution is drawn up pursuant to Article 30(1) of the Statute and "it is intended for the use of the Court alone and is concerned with the method by which the Court proceeds in each case to hold its deliberations in private and to prepare its decision."<sup>178</sup> The Court initiated in 1964 a review of the 1936 resolution and on July 5, 1968, approved the text of a new resolution which "is designed to render its deliberations more efficient and more rapid."<sup>179</sup>

The length of the proceedings has been a matter of concern to the Court, governments, and the profession.<sup>180</sup> Some of the delays are substantially due to the parties. The Court is responsible for the time it takes for its private deliberations and the drafting of the judgment. No doubt the work of the Court has been complicated by the large number and remarkable length of separate and dissenting opinions.

The Court closed the oral hearings in the *South West Africa* cases (Second Phase) on November 29, 1965, and delivered judgment on July 18, 1966, some six months and a half later. The Court moved more promptly in the *North Sea Continental Shelf* cases, in which hearings were closed on November 11, 1968, and judgment was delivered on February 20, 1969, some three months later. In the *Barcelona Traction* case (Second Phase), hearings were terminated on July 22, 1969, and the judgment delivered on February 5, 1970, about six months later. In this case the Court had no other demands upon its time. The amount of papers submitted to the Court is extremely large, perhaps excessive. In *Barcelona Traction*, the written documents ran to 18-19,000 pages; about 4,000 pages of "new" documents were introduced by the two parties during the oral proceedings.<sup>181</sup> Such mountains of written material and lack of law clerks, research assistants, and even individual typist-secretaries make it very difficult for the Court to work more efficiently and rapidly. And that is about as far as an outsider's opinion can go. However, it may be worth while to

<sup>178</sup> Report of the I.C.J., August 1, 1967-July 31, 1968, GAOR, 23rd Sess., Supp. No. 17 (A/7217) at 4.

<sup>179</sup> *Ibid.* The text of the resolution will be found in 1967-1968 I.C.J. Yearbook at 87-91; also in 63 A.J.I.L. 407 (1969).

<sup>180</sup> Leo Gross, note 175 above. See also the observations of the Court in the *Barcelona Traction* case (Second Phase), [1970] I.C.J. Rep. 30, par. 27, Judge Jessup, p. 221 (Note), and Judge Fitzmaurice, p. 113 (Postscriptum).

<sup>181</sup> *Ibid.* 215, par. 97 of Judge Jessup's opinion.

note here that some dissatisfaction has been observable at the length and frequency of separate and dissenting opinions and at the difficulty of determining what the majority of votes was on some segments of the operative part of the judgment. These matters are governed by Articles 55, 56 and 57 of the Statute. Whether there is room, as some believe, for remedial action here is a matter of opinion.<sup>182</sup> It is also a matter of opinion whether such action, if it is deemed advisable in the interest of a sound administration of justice, can be or should be taken through revision of the Court's rules for its internal judicial practice or by formal amendment of Articles 55, 56 and 57.

## X

### ACCESS TO THE COURT—PART 1 (Article 34 of the Statute)

The most significant feature in the Statute reflecting the enduring hold of the Hague system over the minds of its draftsmen is probably to be found in paragraph 1 of Article 34: "Only States may be parties in cases before the Court." It ignores the change which has occurred with respect to the subjects of international law, notably the recognition of the United Nations and other public inter-governmental organizations and conceivably of individuals as subjects of international law. It reflects the doctrine which was dominant in the 19th century that states and states only were subjects of international law. This doctrine was vigorously attacked in the inter-war period, but the San Francisco Conference ignored both doctrine and practice in maintaining the old text of Article 34(1), although the International Labor Office in 1944 suggested that the jurisdiction of the Court be extended to disputes between two or more public international organizations.<sup>183</sup> In view of the large and growing rôle which such organizations have come to play in international relations, it is time to consider a revision of Article 34(1) and thus free the Statute from the vestiges of the Hague system.

The Institute of International Law in 1954 and the International Law Association in 1956 adopted resolutions to this effect. The Institute resolved that:

It is a matter of urgency to widen the terms of Article 34 of the Statute so as to grant access to the Court to international organizations of States of which at least a majority are Members of the United Nations or Parties to the Statute of the Court.<sup>184</sup>

The Association proposed that Article 34 of the Statute of the International Court of Justice should be amended to give the United Nations and its specialized agencies direct access to the Court in contentious cases.<sup>185</sup>

<sup>182</sup> See President Sir Percy Spender's declaration in the South West Africa cases, [1966] I.C.J. Rep. 6 at 51-57; but *cf.* Jessup, *ibid.* 323-324.

<sup>183</sup> Jenks, note 2 above, at 208 and 217-218.

<sup>184</sup> 45 *Annuaire* at 298 (II, 1954); 49 *A.J.I.L.* 15 (1955).

<sup>185</sup> *I.L.A.*, 47th Report, at viii (1956). This resolution was based on a background memorandum provided by a committee of the American Branch. *Proceedings of the American Branch of the I.L.A.*, 1955-1956, at 70-75.

The qualification in the Institute's resolution seems unnecessary, and in any event there are few international organizations the majority of whose members are not also Members of the United Nations. The Institute's resolution is ambiguous, however, in that it does not clearly refer to the contentious procedure, as the Association's does, and does not mention the United Nations. However, the reference to Article 34 would seem to be sufficient to eliminate the first ambiguity. As to the second, it stands to reason that if international organizations are to have access to the Court, the United Nations, which, as the Court said in the *Reparation* case, "is at present the supreme type of international organization,"<sup>186</sup> should be granted access along with other organizations. Jenks has proposed a simple amendment to Article 34(1) to make it read: "Only States or public international organizations may be parties in cases before the Court."<sup>187</sup>

Even this text could be still further simplified and possibly improved by omitting "only" and substituting "and" for "or" so that it would read: "States and public international organizations may be parties in cases before the Court." A text along these lines would accommodate those who wish international organizations to have access to the Court, but it would not satisfy those who advocate access to the Court to certain individuals, such as international civil servants, or those who would like to see the Court able to give authoritative interpretations of international law questions arising before domestic tribunals, by analogy to the "evocation" procedure in the European Court of Justice or the Arbitral Tribunal of Upper Silesia of 1922.<sup>188</sup> In order to provide for a progressive evolution along such contemporary lines, it would be necessary to find a more flexible formulation for Article 34, one which would make "the parties to the original proceedings eligible parties to the proceedings before the Court,"<sup>189</sup> it being understood that the original proceedings were proceedings before domestic courts. Such proceedings may involve states, individuals,<sup>190</sup> or corporations. In order to include cases brought before the Court by reference from a domestic tribunal, the text of Article 34(1) would run somewhat along these lines:

The Court shall exercise its judicial function with respect to disputes between States, between States and international organizations, and between international organizations *inter se*; the Court shall also be competent to exercise its judicial function with respect to any question of international law brought before it by means of evocation.

It may well be, however, that the evocation procedure could be better accommodated in another article of the Statute, a matter which will be discussed in the following section.<sup>191</sup>

Disputes involving international organizations could come before the Court by means of a special agreement between the organizations con-

<sup>186</sup> [1949] I.C.J. Rep. 174, at 179.

<sup>187</sup> Jenks, note 2 above, at 209.

<sup>188</sup> See Jenks, note 2 above, at 165-166. The "evocation" terminology is that of Jenks.

<sup>189</sup> *Ibid.* at 166.

<sup>190</sup> For a strong plea in favor of opening up access to the Court for individuals, see T. Franck, *The Structure of Impartiality* 220 ff. (1968).

<sup>191</sup> See below, p. 308.

cerned or between an organization and a state. There is some support for a consequential amendment in Article 36 of the Court's Statute to enable international organizations to accept the compulsory jurisdiction of the Court. Thus the International Law Association in its resolution of 1954 proposed that

Article 36 of the Statute should be amended to empower the General Assembly to establish the conditions under which the United Nations, its specialised agencies and other public international organisations might make declarations accepting the jurisdiction of the Court under paragraph 2 of that Article.<sup>192</sup>

This amendment may be further revised to say that, by analogy to Article 93(2) of the Charter and Article 35(2) of the Statute, the General Assembly shall establish the conditions upon a recommendation of the Security Council.<sup>193</sup> However, there may be doubt as to the timeliness of this proposal. It may be argued that if international organizations are to be accepted as full-fledged subjects of the law, they should have also the power to make declarations pursuant to Article 36(2). On the other hand, it may be urged that some caution is needed and that most of the objectives of the proposed reform would be achieved if the organizations had access to the Court on the basis of special agreements or of jurisdictional clauses.

One of the chief reasons for giving organizations access to the Court is to terminate the widespread practice of restricting them to access to the Court through the device of the advisory proceedings. Beginning with the Headquarters Agreement between the United States and the United Nations, a number of agreements came to "embody rather artificial arrangements for giving such proceedings the form of a request for an advisory opinion in order to overcome the difficulty that the United Nations and specialized agencies have no *locus standi in judicio* before the Court."<sup>194</sup> It is these artificialities—proceedings advisory in form but binding in substance—which are to be eliminated by amending Article 34(1), and a subversion of the Court's advisory jurisdiction terminated. Existing instruments providing for such indirect access to the Court could be revised as soon as Article 34(1) is amended. Whether further steps, as proposed by the International Law Association, are needed and desirable may be a matter for later consideration after some experience has been gained in litigations involving states and international organizations.

Another consequential amendment relates to Article 38 of the Statute. Under paragraph 1(a), the Court shall apply conventions "establishing rules expressly recognized by the contesting states." This clause could be amended to read "the contesting parties," but in the opinion of Jenks "such an amendment would not appear to be indispensable."<sup>195</sup> Clearly it is undesirable to take a dogmatic stand on the subject, and perhaps the matter would be better handled in connection with possible changes in Article

<sup>192</sup> I.L.A., note 185 above, at viii.

<sup>193</sup> Seidl-Hohenveldern, "Der Zugang Internationaler Organisationen zum Internationalen Gerichtshof," 54 Die Friedenswarte 16-28 at 26 (1957/1958).

<sup>194</sup> Jenks, note 2 above, at 212.

<sup>195</sup> *Ibid.* at 209, note 68.



38. However, the amendment would have a solid foundation in the fact that states and international organizations are parties to many international instruments and, if appropriate, such instruments should be considered by the Court. On the other hand, one can also argue that the Court could do so in any event, as the disputes likely to arise and to come before the Court would relate to the application or interpretation of specific instruments.

The study group on the International Court of Justice supported the opening of access to the Court to international organizations, but doubts arose as to how such recourse to the Court could be practically handled. Two objections or questions were raised, one relating to the type of cases which could be litigated and the other to the conduct of the litigation. As to the first, it was pointed out that the proposed amendment to Article 34 is concerned merely with removing a procedural barrier against organizations' appearing as parties in contentious proceedings before the Court. The type of cases or the specific case which would be submitted to the Court would depend upon the sort of jurisdictional clause which would be inserted in an agreement between states and international organizations or between international organizations *inter se*,<sup>196</sup> or upon the special agreement between such parties. In case of a consequential revision in Article 36 of the Statute which would make it possible for international organizations to accept the compulsory jurisdiction of the Court, the required declaration would be carefully considered by the competent bodies on which the Member States would be represented. It is most unlikely that such declarations would be made or that they would be made without compelling reasons and careful deliberation.

The second objection is equally irrelevant at this stage, which is concerned with the removal of procedural barriers. It would be for each organization to determine, in accordance with its constitutional instrument and practice, which organ would be competent to initiate litigation or represent the agency in contentious proceedings brought against it before the Court. It could be the chief executive organ of the agency alone or that organ assisted by another organ or by an *ad hoc* organ. There is probably some, but no fundamental difference in this respect between making a request for an advisory opinion and initiating contentious proceedings. The advisory procedure is an established feature of many agreements to which international organizations are parties. Under the relevant clauses only the organization can make a request for an advisory opinion. In the case of the United Nations, such a request would probably be made by the Security Council or the General Assembly. The initiation of contentious proceedings could be regulated in a similar manner. No request for an advisory opinion has ever been made under any of the instruments in force, and therefore there is no practice as to who would represent the United Nations in such advisory proceedings. Presumably it would be the chief executive, the Secretary General of the United Nations or the Director General of the specialized agency. It has been pointed out that

<sup>196</sup> Jenks, *ibid.* at 220.

"there is nothing novel in the executive head of an international organization having to act in this manner; he is in a similar position . . . when instituting or defending legal proceedings (the other party to which may be a public authority of a member) in a municipal court."<sup>197</sup> He is acting in a similar manner when settling claims against the organization arising, for instance, out of peacekeeping operations, or initiating or defending proceedings before a tribunal of arbitration or defending proceedings before the Administrative Tribunal of the United Nations or similar tribunals of other agencies. It may be readily conceded that problems will arise, but there is no reason to assume that they will be insoluble. According to Jenks:

Progress in the matter must be made empirically but can be made only when the procedural incapacity of international organizations has been eliminated. Any developments which occur must occur by a process of natural growth, but there can be no such growth while Article 34, paragraph 1 of the Statute remains unchanged.<sup>198</sup>

To revise Article 34(1) and to give to international organizations access to the contentious jurisdiction of the Court is merely to make good a long overdue omission, for as international legal persons they have a right to defend themselves in the judicial forum of the world.

## XI

### ACCESS TO THE COURT—PART 2

(Articles 34(1), 35(1 and 2) and 36(1) of the Statute)

It may be proper to raise the question whether it would be advisable in the process of revising the Statute to review the clauses which, under the heading "Competence of the Court," deal with access to the Court and its jurisdiction. Perhaps a more rational arrangement and greater clarity could be achieved. There is no room here for a detailed analysis of these several provisions,<sup>199</sup> but some tentative ideas may be offered for consideration.

Thus far, Article 34(1) has been regarded merely from the point of view of the desirability of opening access to international organizations and, possibly, individuals. But the more basic question is whether greater rationality and economy could be achieved by cutting out this remnant of the Hague system altogether. There may be a question about the remaining paragraphs 2 and 3; but if they are deemed worth preserving, even though they have never been applied,<sup>200</sup> a place for them could doubtless be found elsewhere in the Statute. Article 34(1) serves no useful purpose; the Court need not be surrounded by a fence.

The Statute, in a section entitled "Competence of the Court," should affirmatively and simply declare the extent or scope of the Court's competence *ratione personae*, *materiae*, and *temporis*.

Article 35(1) is concerned with competence *ratione personae*: "The Court shall be open to States parties to the present Statute." This is clear

<sup>197</sup> Jenks, *ibid.* at 221.

<sup>198</sup> *Ibid.*

<sup>199</sup> For this see Rosenne, note 147 above, Chaps. VIII-X.

<sup>200</sup> Rosenne, *ibid.* at 287.

enough, but it does not say which states are parties. This is stated in Article 93 of the Charter. According to paragraph 1 of that article, the parties are all Members of the United Nations; and, according to paragraph 2, states which are not Members may under certain conditions become parties. The Court is, however, also open to states which are neither Members of the United Nations nor parties to the Statute under Article 93(2) of the Charter. This is stated in Article 35(2) of the Statute. One may question the propriety of including the third paragraph of Article 35 in the Statute. It deals with "housekeeping," and its substance could more rationally be included in the conditions laid down by the Security Council pursuant to paragraph 2 of Article 35 or elsewhere in the Statute.

If the proposal is accepted to grant access to international organizations, a clause to this effect should be included in a revised Article 35, as discussed above. It may also be desirable to provide access to individuals and corporations in cases which would come before the Court by evocation or, by analogy to Article 177 of the E.E.C. Treaty, by case-stated procedure. Alternatively, a clause should be included stating that the Court is open to entities or persons other than states on conditions laid down by the General Assembly upon recommendation of the Security Council.

The competence of the Court *ratione materiae* is defined in two separate articles instead of being dealt with comprehensively in one provision. Article 36(1) provides:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The competence of the Court *ratione materiae* is also alluded to in Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply. . . ."

The conservatory or transitional provision of Article 37 is also relevant, as it explains the last words of Article 36(1), "treaties and conventions in force." Finally, one may question whether the description of disputes contained in paragraph 2 of Article 36 is only relevant in connection with compulsory jurisdiction or with competence *ratione materiae* in general. The structure and content of this article appear more concerned with the perennial problem of voluntary as against compulsory jurisdiction than with the competence of the Court *ratione materiae*. It is, of course, obvious that if such disputes as are generically listed in Article 36(2) are fit for the compulsory jurisdiction of the Court, they are also fit for its voluntary jurisdiction. It would make for a more economical and rational arrangement if the question of consent to jurisdiction were kept distinct from the matter of material jurisdiction in contentious cases. It would be sufficient to state that, as Article 38(1) says, the competence of the Court comprises disputes submitted to it by the parties or that it comprises disputes concerning any question of international law, as stated in Article 36, paragraph 2 b. The latter formula would seem preferable, as it con-

cerns itself with the subject matter and leaves the question of parties open for whatever changes are acceptable to the international community. Questions of consent could, if necessary, be treated in a separate clause.

The Statute provides no limitation of the competence of the Court *ratione temporis*. Exclusion of disputes *ratione temporis* is a frequent feature of declarations made by states pursuant to Article 36(2) of the Statute, and there is a rich jurisprudence on the subject. However, it would be unwise to introduce any rule into the Statute that would prevent the Court from adjudicating a dispute between states, which they would otherwise be willing to submit to the Court, on the ground that it arose before, or related to facts which arose prior to, some arbitrary date. As regards such disputes there is no statute of limitations. The question whether a rule should be written into the Statute limiting the discretion of states in including or excluding disputes *ratione temporis* (Article 36(3)) is a different matter altogether.<sup>201</sup>

## XII

### ACCESS TO THE COURT—PART 3 (Preliminary Decision Procedure)

The discussion of the composition of the Court was based on the assumption that, if the judges were elected in a somewhat different manner, by which high qualifications and independence were ensured, governments would feel more confidence in the Court, refer cases to it more frequently, and thus enable the Court to play a more active rôle in the development of law, in the promotion of stability, and ultimately in the maintenance of peace. It is clearly impossible to predict the outcome of reforms. But one may have some doubt whether such reforms are likely to have great impact on the attitude of states toward the Court.

Similarly, granting to international organizations access to the Court, while long overdue, may not result in a substantial increase in the flow of cases. The attitude of legal advisers, discussed earlier,<sup>202</sup> is not promising, and there is, indeed, no compelling reason why organizations with their own procedures for the settlement of disputes should address themselves to the Court.

It remains to consider a novel approach which, in a manner of speaking, would abandon the pattern of the Hague system and base itself on the pattern of the European Court of Justice.<sup>203</sup> It may be useful to recall the acute observation of Jenks, quoted earlier, that "the jurisdiction and procedures of the European tribunals and those of the International Court represent different epochs in the development of international adjudication."<sup>204</sup> It is no part of the proposal to be submitted that the epoch of the Hague system should be abandoned. Rather, the Court should be

<sup>201</sup> See below, at pp. 314 ff.

<sup>202</sup> Above, p. 267.

<sup>203</sup> Judge Jessup has drawn attention to a similar proposal advanced by Lauterpacht as early as 1929. Philip C. Jessup, "The International Judicial Process," 52 *Judicature* 140-145, at 142 (1968).

<sup>204</sup> Note 2 above, at 148.

adapted to a new age, characterized by an unparalleled increase in transnational relations and in international agreements. What is really needed is an organ which can ensure the authoritative and uniform interpretation of conventions in the domestic forum. Indeed the Court could and should play this rôle, and beyond interpreting conventions in a uniform manner, the Court could also be empowered to give authoritative interpretations on questions of customary international law involved in disputes before domestic tribunals.<sup>205</sup> It should be emphasized that these are two different steps which could be taken, the first being more modest than the second. Whether one step is taken or both, the important objective is to integrate the Court with the mainstream of judicial settlement of international legal problems.

It is perfectly in tune with the spirit of the Hague system to regard the Court as "part of the institutional structure which modern diplomacy may—indeed should—take into account as one of the means to its end. . . ." <sup>206</sup> As such, the decline in the business of the Court would indicate that modern diplomacy prefers other means of achieving its ends. It is suggested that the Court could also play a more vital rôle as part of the judicial machinery available to litigants on the more humble level of municipal tribunals. As long as diplomacy makes no greater demands upon it, there is no reason why the Court should not perform this additional rôle.

Article 177 of the Rome Treaty of March 25, 1957, establishing the European Economic Community, and Article 150 of the Treaty of the same date establishing the European Atomic Energy Community, read as follows:

The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.<sup>207</sup>

<sup>205</sup> Reference of questions of customary international law, such as issues of sovereign immunity, is suggested by Jessup, note 203 above, at 145.

<sup>206</sup> Rosenne, note 147 above, at 6. Part One of Rosenne's book is entitled "The Court as Part of the Machinery of Diplomacy."

<sup>207</sup> 298 U.N.T.S. 11, 76 (1958); *ibid.* at 167, 215. Art. 177 may well have served as a model for Art. 56 of the U. S. Draft of United Nations Convention on International Seabed Area (Aug. 3, 1970), which reads as follows: "When a case pending before a court or tribunal of one of the Contracting Parties raises a question of the interpretation of this Convention or of the validity or interpretation of measures taken by an organ of the Authority, the court or tribunal concerned may request the Tribunal to give its advice thereon." 9 Int. Legal Materials 1046, at 1062 (1970).

This novel procedure has attracted a great deal of attention among jurists in the European Community and elsewhere. It has some affinity with, or precedent in the English "procedure by case stated" and possibly in the American *certiorari* procedure. However, the distinction between these procedures is more significant than any similarity. Both the case stated and *certiorari* are concerned with moving a question of law from a lower to a higher domestic tribunal. This is not at all the case with the preliminary decision procedure. The question of interpretation is not sent by a lower court to a higher court, for the European Court of Justice is in no sense a court which, in the hierarchy of tribunals, is superior to the domestic courts of the members of the European Community. It is altogether a different court, an international court of the Community whose function it is, as stated in Article 164 of the E.E.C. Treaty and Article 136 of the Euratom Treaty, to "ensure observance of law and justice in the interpretation and application of this Treaty."<sup>208</sup> Uniformity in the interpretation of the treaty is the principal objective of the preliminary decision procedure under Article 177. The application of the treaty, as interpreted by the Court of Justice, is left to the domestic tribunals.

It is therefore extremely important to insist that building this procedure into the Statute of the Court would not in any sense make the International Court superior to the domestic tribunals of the states. It is not at all part of the preliminary decision procedure that the Court would or should become a court of appeal from judgments of domestic tribunals, a feature of the stillborn International Prize Court of 1907. What would be achieved would be the appropriate observance of law in the decision of international issues by domestic tribunals.

There is a good deal of case law on the subject.<sup>209</sup> There are unresolved controversies about the exact application of Article 177, the relevance of the theory of the "*acte claire*," the scope of inquiry into the facts of the case by the Court of Justice, and related matters. But in the cases in which it has been applied, the procedure has worked well and has contributed to the acceptance of the integrity of the Community law. The Court of Justice interprets the abstract question of law submitted to it by the domestic tribunal and the domestic tribunal applies the interpretation to the case before it.

According to Article 20 of the Protocol on the Statute of the Court of Justice of the Community:

In cases provided for under Article 177 of this Treaty, the decision of the domestic court or tribunal which suspends its proceedings and makes a reference to the Court shall be notified to the Court by the domestic court or tribunal concerned. Such decision shall then be notified by the registrar to the parties in the case, to the Member States and to the Commission, and also to the Council if the act whose validity or interpretation is in dispute originates from the Council.

<sup>208</sup> 298 U.N.T.S. 11, 73 (1958); *ibid.* at 167, 212. Art. 31 of the earlier European Coal and Steel Community Treaty provides: "The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations." 261 U.N.T.S. 140, 165 (1957).

<sup>209</sup> Eric Stein and Peter Hay, *Law and Institutions in the Atlantic Area* 180 (1967).

The parties, the Member States, the Commission and, where appropriate, the Council are entitled to submit to the Court, within a period of two months after the latter notification, memoranda or written comments.<sup>210</sup>

By means of this provision the original parties as well as the interested governments may and, indeed, have participated in the proceedings before the European Court. It is to be emphasized that under Articles 169 and 170 of the E.E.C. Treaty, the Commission and the Member States, respectively, have the right to refer to the European Court cases alleging violations of a Member's obligations under the treaty. As the European Court declared in the *van Gend en Loos* case:

The fact that the Treaty, in the aforementioned Articles [169 and 170], allows the Commission and the member-States to bring before the Court a State which has not carried out its obligations, does not imply that individuals may not invoke these obligations, in appropriate cases, before a national court; and likewise, the fact that the Treaty puts at the disposal of the Commission means to ensure respect for the duties imposed on those subject to it does not exclude the possibility of invoking violation of these obligations in litigation between individuals before national courts. . . . Reliance on these Articles would risk being ineffective if it had to be exercised after the enforcement of a national decision which misrepresented the requirements of the Treaty. The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169 and 170 to the diligence of the Commission and the member-States.<sup>211</sup>

One of the chief virtues of the preliminary decision procedure is that it is prophylactic in effect; it is designed to prevent a decision by national tribunals which could be regarded as violative of a treaty. The procedure also involves the real persons in interest, the individuals or corporations who are at variance as to their respective rights under a convention. While it does not preclude state-against-state litigation, it normally takes the "adversary" out of adversary proceedings, for no state is required to decide whether or not to cite another state before the bar of international justice. The preliminary decision procedure completely depoliticizes the appeal to the Court. No state appears before the Court as applicant or respondent. No state need appear in the procedure at all unless it desires to submit written comments. The preliminary decision procedure has some features of advisory proceedings—such as the absence of parties—and an important feature of the contentious procedure—a binding decision on the proper interpretation of a treaty.

The difficulty national tribunals may face when called upon to interpret a treaty or a principle of international law is that, being national institutions, their impartiality may not be above suspicion. The point need not be labored. Suffice it to recall the divergent judgments of the courts in Aden, Rome and Tokyo in the wake of the purported nationalization of the

<sup>210</sup> 298 U.N.T.S. 147, 152 (1958).

<sup>211</sup> N. V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Tariefcommissie, 2 Common Market Law Reports 105, 130 (1963).

Anglo-Iranian Oil Company, or the divergent judgments of the courts in Hamburg and Rotterdam on the Indonesian nationalization of Dutch tobacco plantations. The point was put with complete clarity by the Supreme Court of the United States in the *Sabbatino* case. Referring to the respondent's contention "that United States courts could make a significant contribution to the growth of international law, a contribution whose importance, it is said, would be magnified by the relative paucity of decisional law by international bodies," Mr. Justice Harlan declared:

But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural. Moreover, it rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.<sup>212</sup>

One may wonder whether the Supreme Court or other tribunals faced with similar problems would not have been glad to refer the question to the International Court of Justice for a preliminary decision. Moreover, the judgments of national tribunals on controversial aspects of international law must not only be impartial but they must also appear to be impartial.

The preliminary decision procedure of Article 177 applies in three situations, of which the first two appear relevant in the present context—the interpretation of treaties and the validity and interpretation of acts of organs of the United Nations or other international institutions. A third category would embrace the interpretation of principles of customary international law. The introduction of the preliminary decision procedure into the Statute of the International Court would probably be least resisted with respect to treaties, whether bilateral or multilateral. Once the Statute is revised so as to admit this procedure, it would be up to states to take advantage of it and include a suitably drafted jurisdictional clause. The question of the validity and interpretation of acts of international organizations might present greater difficulty. One can easily imagine a case before a domestic tribunal involving an embargo upon trade with a given state imposed, say, by the Security Council or the General Assembly. To confer upon the Court competence to give a preliminary decision on the validity of such a resolution would be equivalent to instituting a system of judicial review of the constitutionality of acts of organs of the United Nations.<sup>213</sup> Proposals to this effect have been considered but have not garnered much support.

The third category, questions of customary international law, may appear as involving too radical an innovation.<sup>214</sup> On the other hand, it would be the easiest to implement. For once the Court is made competent to give

<sup>212</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 434-435 (1964); 58 A.J.I.L. 795 (1964).

<sup>213</sup> See E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations," in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* 88-102 (1965).

<sup>214</sup> Jenks, note 2 above, at 167.



preliminary but binding interpretations on such questions, it could be left to the discretion of each state whether, through national legislation, it desired to empower its tribunals to refer such questions to the Court.<sup>215</sup> States which have shown a predisposition for the development of the rule of law might be among the first to take the necessary initiative. As in connection with giving access to the Court to international organizations, the important first step appears to be to make the necessary changes in the Statute of the Court. Other matters may be worked out as need and experience indicate. Surely a revision along these lines would be most likely to increase the volume of business before the Court. It need hardly be emphasized that it would be strictly legal business and completely in line with the function of the Court as the principal judicial organ of the international community. The Court could establish chambers, if it saw fit, to handle such cases and, if necessary, such chambers could meet at the seat of the national tribunal which referred the question to the International Court. The Statute already provides in Article 26 for the establishment of chambers for dealing with particular categories of cases, for example, labor cases and cases relating to transit and communications. A chamber for dealing with disputes relating to bilateral or multilateral trade agreements might be useful. Questions of the validity or interpretation of acts of international organs and of general international law might be left to the full Court.

A reform along these lines would not involve any curtailment of national sovereignty. Consent of the state or states concerned would be required in any event, and the application of the law would remain in the hands of national tribunals. It is well to remember that the judgment of a national tribunal on a question of international law is not conclusive on other states and may, indeed, be the first step in a diplomatic controversy which may ultimately be submitted to an international tribunal for a decision. The preliminary decision procedure has the virtue of preventing such controversies and of removing from busy foreign offices an often unwelcome burden. In any event, no better guarantee could be offered to litigants before national tribunals that justice will be done in accordance with the highest available standards.

### XIII

#### COMPULSORY JURISDICTION (Article 36 (2) of the Statute)

The question of compulsory jurisdiction has already been discussed earlier in this paper. It remains to point out possible ways of strengthening it.

In 1954 Lauterpacht expressed a widely held view that the absence of compulsory jurisdiction "signifies a fundamental defect in the organization

<sup>215</sup> It may be noted that, if states were authorized to request advisory opinions (see p. 321 below), this procedure could be used to obtain authoritative interpretations of international law pending before a national tribunal.

of international society" which "should be subject to repeated examination." He proposed, as a first step, to elevate "the compulsory jurisdiction of the Court to the position of a governing principle" and to give "individual states the right to contract out from that principle by a special declaration."<sup>216</sup> That proposal was before the San Francisco Conference, which did not adopt it and gave preference to the old system of contracting-in.<sup>217</sup> If it is true that "the chief importance of the system of compulsory jurisdiction is psychological,"<sup>218</sup> then it might be worth while to consider the possibility of introducing the contracting-out principle in place of the contracting-in principle which has now been in force for close to 50 years. The change may not increase decisively the effectiveness of the system of compulsory jurisdiction but its psychological value may be quite substantial. It would also have the beneficial effect of showing to the world at large that the Members of the United Nations attach great significance to the settlement of disputes by the judicial technique. States which, for a variety of reasons, may have hesitated to contract in might be glad to have the decision made for them, and they may be under no pressure to contract out. But even if they did, they would not be likely to contract out completely. It is more likely that the contracting-out would take the form of formulating reservations which, even at their worst, might still leave a residuum of usable compulsory jurisdiction.

The frequent use of reservations of increasingly arbitrary character in declarations accepting the compulsory jurisdiction of the Court has been a matter of serious concern to publicists and governments.<sup>219</sup> The self-judging reservation of domestic jurisdiction has already been discussed, along with the 1959 Resolution of the Institute of International Law.<sup>220</sup> The Institute, besides calling for the withdrawal of this type of reservation, also declared:

In order to maintain the effectiveness of the engagements undertaken, it is highly desirable that declarations accepting the jurisdiction of the International Court of Justice in virtue of Article 36, paragraph 2, of the Statute of the Court should be valid for a period which, in principle, should not be less than five years. Such declarations should also provide that on the expiration of each such period they will, unless notice of denunciation is given not less than twelve months before the expiration of the current period, be tacitly renewed for a new period of not less than five years.<sup>221</sup>

It would seem highly desirable if the General Assembly could be induced to consider and eventually adopt a resolution on the subject of reserva-

<sup>216</sup> 45 *Annuaire* 536-537 (II, 1954). In this sense also Schlochauer, note 166 above, at 447.

<sup>217</sup> Rosenne, note 147 above, at 365 f.

<sup>218</sup> Rosenne, *ibid.* at 419. Rosenne goes on to say: "It is an instrument for disseminating, among the public and among professional diplomats, the idea that judicial settlement of international disputes is both possible and desirable. It enhances the general prestige and standing of the Court."

<sup>219</sup> Waldock, "The Decline of the Optional Clause," 32 *British Year Book of International Law* 244-287 (1955-1956).

<sup>220</sup> Above, pp. 271, 272.

<sup>221</sup> 48 *Annuaire* 382 (II, 1959); 54 *A.J.I.L.* 135 at 136-137 (1960).

tions *ratione temporis*. Particularly objectionable are reservations which provide that the declaration can be terminated or amended *ratione materiae* by notice to the Secretary General of the United Nations and that such notice should have immediate effect. It is well established that states may make such reservations, but they nonetheless "appear to be inconsistent with the effectiveness of the (Optional) Clause."<sup>222</sup> The Assembly could propose a model clause to states or amend the Statute by including such a model clause in the Statute itself.<sup>223</sup>

Until and unless the inventiveness of states in hedging their declarations is curbed, other states can take, and have taken, defensive measures. Thus the Government of Portugal, almost immediately upon being admitted to membership of the United Nations, deposited on December 19, 1955, a Declaration of the same date, in which it stated: "The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations."<sup>224</sup> Portugal promptly instituted proceedings against India in what has come to be known as the *Right of Passage* case, and the Court upheld the validity of the Declaration.<sup>225</sup> The Court did this while admitting

that during the interval between the date of a notification to the Secretary-General and its receipt by the Parties to the Statute, there may exist some element of uncertainty. However, such uncertainty is inherent in the operation of the system of the Optional Clause . . .<sup>226</sup>

There is no need to be fatalistic about annoying uncertainties. All that is needed is a slight change in Article 36 (4) to provide that declarations shall be deposited with the Registrar of the Court and that in any event they shall not enter into force until a month or so after their deposit.

The defense of the United Kingdom against this form of reservation *ratione temporis* appears in paragraph (iii) of its Declaration of January 1, 1969, whereby disputes are excluded

where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.<sup>227</sup>

The point hardly needs to be labored that a uniform regulation of the temporal elements of declarations would be superior to individual solutions.

As regards exclusions *ratione materiae* or *personae*<sup>228</sup> there have been no

<sup>222</sup> Jenks, note 2 above, at 108. While the term "Optional Clause" is still widely used, it is inappropriate in connection with the present Court and its Statute. Rosenne, note 147 above, at 365, note 6.

<sup>223</sup> C. Derbasch, "La Compétence Ratione Temporis de la Cour Internationale de Justice dans le Système de la Clause Facultative de Jurisdiction Obligatoire," 64 *Revue Générale de Droit International Public* 230-259, at 234 (1960).

<sup>224</sup> 1968-1969 I.C.J. Yearbook 66.

<sup>225</sup> *Right of Passage* case (Preliminary Objections), [1957] I.C.J. Rep. 125, at 141.

<sup>226</sup> *Ibid.* at 143.

<sup>227</sup> 1968-1969 I.C.J. Yearbook at 71.

<sup>228</sup> An example of the latter exclusion is the Declaration of Israel which does not apply to "any dispute between the State of Israel and any other State . . . which does not recognize Israel or which refuses to establish or to maintain normal diplomatic re-

complaints, although the former have frequently led to arguments before the Court and to preliminary objections to jurisdiction. It is moot whether it is still necessary to exclude disputes relating to matters which are claimed to fall within the domestic jurisdiction of the applicant or respondent states.<sup>229</sup>

The validity of reservations may be challenged by states which have accepted the compulsory jurisdiction of the Court, as was done by Sweden with respect to the afore-cited Declaration of 1955 made by Portugal. It has been said that "theoretically, in the event of a difference arising, the Secretary-General or the State concerned could bring it before the General Assembly."<sup>230</sup> This is certainly possible, but it is open to question whether a political body should be seized of a delicate and essentially legal matter. It may be desirable to consider, in connection with a revision of the Statute, whether the Court itself should not be enabled to rule on the conformity of declarations with its own system of compulsory jurisdiction. The Court could be empowered to do so *ex officio* or at the request of any state which is a party to the system of compulsory jurisdiction.

Article 36 (2) lists four classes of disputes with respect to which compulsory jurisdiction may be accepted. It has been proposed to enlarge the listing to 30 specific subjects with respect to which states would have the option to accept compulsory jurisdiction.<sup>231</sup> This proposal merits consideration, particularly if it is deemed that a particularization of the present list would stimulate a wider acceptance of compulsory jurisdiction. To include a long list in the text of the Statute may not be the best way to accomplish the proposed objective. It may be possible, however, to draw the attention of states to the proposed list. To reconcile this with the present Article 36 (2), it may be necessary to change its wording in such a manner that parties to the Statute would have the option of accepting the compulsory jurisdiction of the Court with respect to "all legal disputes concerning any question of international law." As it is, sub-paragraphs a, c, and d of Article 36 (2) are in a sense redundant, for they are mere particularizations of sub-paragraph b, which would be preserved in the proposed formulation.

---

lations with Israel. . . ." *Ibid.* at 53. Frequent also are exclusions of disputes between members of the Commonwealth. See Declarations of India, *ibid.* at 52, and the United Kingdom, *ibid.* at 71. For an example of the former exclusion *cf.* the Canadian Declaration of April 7, 1970, par. 2(d), 1969-1970 I.C.J. Yearbook at 55: "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada."

<sup>229</sup> Rosenne, note 147 above, at 393-395. <sup>230</sup> *Ibid.* at 391-392.

<sup>231</sup> L. B. Sohn, "Step-by-Step Acceptance of the Jurisdiction of the I.C.J.," 1964 Proceedings, Am. Soc. Int. Law at 131. For a detailed elaboration of several alternatives along similar lines, see International Law Association, Report of the Fifty-first Conference, Tokyo, pp. 65-96, 79-117, and xiii-xiv, which is the text of the unanimously adopted resolution on this subject.

As an alternative to the above proposal or in addition to it, declarations could accept the jurisdiction of the Court with respect to disputes relating to the interpretation and application of specific treaties. States could include such a list in the declaration or in an annex thereto.

#### XIV

##### SOURCES OF LAW (Article 38 of the Statute)

The criticism of the Court's conception and application of law relates to its jurisprudence and not to Article 38. To be sure, there are suggestions for re-wording sub-paragraph b of paragraph 1 of Article 38 relating to customary international law, and to include judicial decisions or, at any rate, decisions of international tribunals among the formal sources of law. Insofar as the complaint is concerned with the lack of confidence in the law which the Court has applied, three areas may be distinguished: first, the application of customary international law, second, codification of this law, and, third, the Court's attitude toward United Nations law.

Taking the second point, codification, first, it has been said that states would have greater confidence in the law which the Court applies if the law were brought up to date and reflected the interests not merely of the states which were dominant in the era of colonialism and imperialism but of the new states as well.<sup>232</sup> No doubt the certainty of the law and its predictability would be enhanced if it were codified and progressively developed to a greater extent than is the case at present. The International Law Commission has achieved remarkable results, but they seem to fall short of the expectation of new states. If any measures can usefully be taken to accelerate progress in this work, they should receive the most serious consideration from the General Assembly and the Commission. However, as long as the Commission is organized as it is and holds only one session annually, it is unreasonable to expect more rapid progress.

Turning to the first point, the concept and application of customary international law, it is well to recall that, when the Permanent Court of International Justice was established, it was expected that it would not merely clear up dubious points but also, in the absence of an international legislature, contribute to the development of the law. It is generally agreed that in some of its judgments—for instance, the *Corfu Channel* and the *Fisheries* cases—the International Court has made significant contributions to the development of the law. The same may be said of some of its advisory opinions, such as those in the *Reparation* and *Reservations* cases. However, there is still a sense of disappointment with the performance of the Court over the years. Nowhere has this been expressed more cogently than in the words of Jenks:

Taken together these nineteen propositions may appear to verge upon the extreme positivist position that no State is bound by custom

<sup>232</sup> See p. 254 above.

in the absence of proof of its own recognition of the alleged custom in deference to an *opinio juris sive necessitatis*. This position involves a frontal challenge to any possibility of the development of international law by means of international adjudication. If this is indeed the logic of these decisions of the International Court we are confronted with the most tragic paradox in the development of international law and international institutions. A court which holds that international law permits whatever it does not specifically prohibit, which will not presume that consent to a rule in the absence of proof of a sense of legal obligation, which accepts dissent from or repudiation of a custom as proof that it is inapplicable, which regards a divergence of views in a political assembly as evidence that there is no generally accepted rule of law, and which views with reserve as constituent elements of custom treaty obligations, the practice of international organisations, municipal judicial decisions and the views of publicists, thereby debars itself from playing a constructive part in the progressive crystallisation of custom into law. . . .<sup>283</sup>

It must not be overlooked, however, that consent to the law is still a crucial requirement, and while it may appeal to a progressive audience to urge the Court to abandon the "sovereign state" oriented approach in favor of a "community" oriented approach, the time has not yet come for so radical a reorientation. There is a real dilemma here: If the Court should indulge in judicial lawmaking and should make light of the consent of states to the law, it might abruptly find itself in the position of a leader without a following.<sup>284</sup> In a typical situation, one state before the Court may seek security through existing law while its opponent may seek satisfaction through a change in the law. It is not easy for the Court to find a solution which will seem solidly based in existing law and yet be innovative at the same time. We are here, to some extent, in an area of subjectivities.

In any event, a change for the better is not likely to come from a revision of Article 38 of the Statute. If a better mix of law and international public policy is desired than is found in the jurisprudence of the Court, such a change can come only from the Court. And this brings us back to the question which has already been aired at length, namely, the question of the composition of the Court.

The attitude of the Court to United Nations law brings us back to what has already been said about codification, progressive development, and customary international law. Typically, changes in the law are the result of treaties, but such changes, barring exceptions, are slow. Therefore, the possibility of achieving progressive development of the law through resolutions and declarations of the United Nations seems enormously attractive to states and academic circles. It is unnecessary to review here the arguments *pro* and *con* on the attribution of legislative competence to the General Assembly or the Security Council and the legal force of their

<sup>283</sup> Jenks, note 2 above, at 237 f.

<sup>284</sup> Gross, "The International Court of Justice and the United Nations," note 19 above, at 370 and 430. See also p. 267 above.

resolutions.<sup>235</sup> The question was extensively analyzed in the Dissenting Opinions of Judge Jessup and Judge Tanaka in the *South West Africa* cases (Second Phase).<sup>236</sup> It is a pity that the Court did not give an authoritative pronouncement on the subject. The Court, in a different composition, may see fit, and indeed may have to come to grips with the question in connection with the pending request of the Security Council for an advisory opinion on the question: "What are the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970)?"<sup>237</sup>

In view of this it may seem advisable to postpone consideration of the matter. On the other hand, one could consider possible ways in which Article 38 could be amended so as to include "United Nations law." Two possibilities seem to be open: One would be to include it among the formal sources of law; the other would be to include a reference to United Nations law in sub-paragraph d of paragraph 1 of Article 38. In the latter case, the Court would be called upon to consider resolutions and declarations of the General Assembly and Security Council (and conceivably equivalent acts of specialized agencies, regional organizations, etc.) "as subsidiary means for the determination of rules of law."<sup>238</sup> It would be well to place these words ahead of judicial decisions and publicists. A revision along these lines would express the conviction, which may well be universal, that resolutions and declarations of the Assembly and Council play a significant rôle in the development of the law.

The first alternative would require a paragraph directing the Court to apply "lawmaking resolutions and declarations of the General Assembly and the Security Council" and equivalent acts of other international agencies. Whether a particular resolution or declaration is indeed "lawmaking" would be decided, as are all questions of law and fact, by the Court on the basis of the written and oral pleadings of the parties to a dispute. Obviously not all resolutions and declarations are lawmaking in intent or character. Nothing might be lost if the qualification "lawmaking" were omitted from the proposed text, at least so long as the opening paragraph in Article 38(1) provides that the Court's function is "to decide in accordance with international law such disputes as are submitted to it." It may be argued that this is inherent in the Court's adjudicative function.

Finally, reference may be made to the view that the distinction in Article 38(1) between binding and non-binding sources of law "was becoming increasingly irrelevant and unrealistic."<sup>239</sup> This may be so, and in any

<sup>235</sup> Gross, *ibid.* at 374 ff., and see Rosalyn Higgins, "The United Nations and Lawmaking: The Political Organs," 64 A.J.I.L. (Proceedings, Am. Soc. Int. Law) at 37-48 (1970).

<sup>236</sup> For Judge Tanaka's view *cf.* [1966] I.C.J. Rep. 6, at 291-294; and Judge Jessup's views, *ibid.* at 432-433, 441. See also Gross, *loc. cit.* above, at 380 ff.

<sup>237</sup> 1969-1970 I.C.J. Yearbook at 5.

<sup>238</sup> This has been proposed by the writer in "The United Nations and the Role of Law," 19 International Organization 537-561, at 557 (1965).

<sup>239</sup> Oliver J. Lissitzyn, in R. N. Swift (ed.), *Annual Review of United Nations Affairs, 1963-1964*, at 127 (1965).

event the distinction, if it has been made, may be not so much irrelevant as incorrect. A more tenable distinction may be made between sources of law and evidence of law, and between sources of law and sources of obligation. It would be beyond the scope of this paper to examine the latter distinction. As to the former, it would appear that it is the distinction which is actually made in Article 38(1), sub-paragraphs a (treaties), b (customary international law) and c (general principles of law) being statements of the sources of law, and sub-paragraph d being a statement of the evidence of the law.

A discussion of the general principles of law in the jurisprudence of the Court must be omitted for lack of space.<sup>240</sup> If the Court is to be called upon to make more frequent use of general principles, the judges can accomplish this on their own, and no statement in Article 38 is needed. The composition of the Court and the kind of cases which the Court may have occasion to adjudicate in the future will be the determinants.

## XV

### ADVISORY PROCEEDINGS

(Article 96 of the Charter and Articles 65-68 of the Statute)

The Charter confers authority upon the General Assembly and the Security Council to request advisory opinions on any legal question (Article 96 (1)). Furthermore, the Charter empowers the Assembly to confer authority upon other organs of the United Nations and specialized agencies to request opinions "on legal questions arising within the scope of their activities" (Article 96 (2)). Six organs of the United Nations (including the Assembly and Council) and 13 agencies (including the International Atomic Energy Agency)—a total of 19 organs and agencies—are at present authorized to request opinions. However, only twelve requests have been made and one, the first to be made by the Security Council, is pending. It is not necessary to review once again the reasons for this conspicuous non-use of the advisory function of the Court.<sup>241</sup>

One proposal for widening access to the advisory jurisdiction of the Court, made by the International Law Association in 1956, would amend Article 96 of the Charter in order "to empower the General Assembly to authorize other public international organizations, whether general or regional, to request advisory opinions of the Court."<sup>242</sup> It has also been proposed to extend this faculty to organizations and organs which are not wholly composed of states or representatives of states.<sup>243</sup> Both proposals would require only an amendment of Article 96 (2) of the Charter, as

<sup>240</sup> See p. 318 above.

<sup>241</sup> See Alexy, "Die Inanspruchnahme des IGH durch die Organe der Vereinten Nationen," 21 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 473-510 (1961); Pierre L. Zollikofer, *Les Relations Prévuees entre les Institutions Spécialisées des Nations Unies et la Cour Internationale de Justice* at 72-75 (1955).

<sup>242</sup> Report, at viii (1956). See also p. 276, above.

<sup>243</sup> K. Herndl in 3 Strupp-Schlochauer, *Wörterbuch des Völkerrechts* at 34 (1962).



Article 65 of the Statute is broad enough to enable the Court to receive requests "of whatever body may be authorized . . . in accordance with the Charter of the United Nations to make such a request." The informal study group on the International Court of Justice expressed itself in 1963 as being in favor of conferring the necessary authority on public international organizations, including regional organizations.

The International Law Association in 1956 also proposed that

Article 96 of the Charter should be amended so as to impose upon the organs of the United Nations the obligation to request from the International Court of Justice and [*sic!*] advisory opinion concerning any situation in which the claim is made by a member that the organ had exceeded its jurisdiction under the Charter.<sup>244</sup>

This attempt to make a Member "put up or shut up" is not likely to achieve its object, even if the Charter were amended. No request could be made without the necessary majority, and there is no way to compel the majority of Members to vote in favor of a request.

The informal study group on the Court considered the possibility of making the advisory procedure available to states.<sup>245</sup> There would be some advantage in this innovation, which would require amendments of both the Charter and the Statute. As long as states consider being brought before the Court as an unfriendly act, a request for an advisory opinion made jointly or even unilaterally under a sort of compulsory advisory jurisdictional clause in a treaty might seem a more acceptable way of settling a dispute than the adversary procedure in a contentious case. It could be left open to states, and indeed states could be urged, to agree to consider the opinion given by the Court as binding. Such an agreement "to abide by the result of advisory proceedings is valid."<sup>246</sup> Consequential changes will have to be made in the Statute. It would be a matter for further reflection whether advisory opinions accepted in advance as binding by the states concerned should be placed under the authority of the Security Council pursuant to Article 94 (2) of the Charter. The obvious argument against this notion is that it would deprive the suggested innovation of its flexibility and reintroduce the element of coercion inherent in contentious proceedings and in the ensuing judgment, which many states regard as unacceptable. On the other hand, the dignity and authority of the Court

<sup>244</sup> Note 242 above.

<sup>245</sup> In this connection attention may be drawn to Art. 64 of the American Convention on Human Rights which reads as follows:

"1. The Member States of the Organization may consult the [Inter-American] Court [of Human Rights] regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

"2. The Court, at the request of a Member State of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." See note 78 above, p. 273.

<sup>246</sup> Jenks, note 2 above, at 141.

must be safeguarded; and unless this is done, the Court may decline, on the ground of judicial propriety, to give the requested opinion.

The desired objective could be achieved in a more informal way, and without any amendment of either Charter or Statute, if the General Assembly could be persuaded to act as a channel for states which desire the assistance of the Court. In the dispute between the United Kingdom and France over the latter's nationality decrees in Tunisia and Morocco, the League of Nations in substance channeled the dispute to the Court in the form of a request for an advisory opinion, and the opinion given by the Court enabled the two governments to reach an agreement. There is no reason why the General Assembly should not be willing to assist states at variance in a similar fashion. It may be desirable for the Assembly to delegate this task to a subsidiary organ by analogy to the existing Committee on Applications for Review of Administrative Tribunal Judgments, and to confer upon such a subsidiary body the authority to request an advisory opinion. In fact, though not in form, this body would act on behalf of the states at variance.<sup>247</sup>

A further step along these lines might involve an amendment of Article 36 (3) of the Charter. This clause has been used only once, in the *Corfu Channel* case. The political organs of the United Nations might be enabled to recommend to the parties to refer the dispute to the Court for an advisory opinion through the channel outlined above. It is conceivable that the political organs might feel more at ease in recommending such a procedure and consequently make more frequent use of it than they have of the existing Article 36 (3). It may be better attuned to the sensitivities of states, both old and new.

Finally, for the sake of assuring equality of the "parties" and a sound administration of justice, it seems desirable to open access to the Court to individuals whose interests are involved in a request for an advisory opinion. The starting point for this is the *Complaints against UNESCO* case. It will be recalled that the officials concerned could not address written statements directly to the Court, and the Court dispensed with oral hearings because it could not permit the officials or their counsel to participate in them. The Court, in that case, was satisfied that the principle of equality of the parties which follows from the requirements of good administration of justice "has not been impaired."<sup>248</sup> This is so, but all the same the procedure was a truncated one. It has been suggested that it may be "feasible to hear both sides as witnesses only," or the Court may hear, on the basis of Article 66 (2) of its Statute, the Federation of International Civil Servants' Associations.<sup>249</sup> These are palliatives at best. Moreover, the first alternative may be resented by the international organization on the ground that it is reduced to the status of a witness, and the latter might be unacceptable to the Court on the ground that the "international organization" referred to in Article 66 (2) clearly means the

<sup>247</sup> See p. 276 above.

<sup>248</sup> [1956] I.C.J. Rep. at 86.

<sup>249</sup> Jenks, note 2 above, at 144.

sort of international organization which normally appears in advisory proceedings.

If this is so, the Statute should be amended to enable the organization and its officials to participate in both the written and oral phases of the advisory procedure on a footing of complete equality. They enjoy equality before the Administrative Tribunal, and they should continue to do so before the Court, when it acts, in substance though not in form, as a court of appeal from the Administrative Tribunal. Officials still remain at a disadvantage because only the organization or, in the case of the United Nations, only the Committee on Applications for Review of Administrative Tribunal Judgments is competent to make the request to the Court for an advisory opinion.

Finally, the question may be raised whether arbitral tribunals or permanent international tribunals established pursuant to treaties should have access to the Court in advisory proceedings. In this connection Article 46 of the "United States Draft of United Nations Convention on the International Seabed Area" of August 3, 1970, is pertinent. Paragraph 1 of Article 46 defines the jurisdiction of the tribunal to be established pursuant to this Draft and declares that "in its decisions and advisory opinions the Tribunal shall also apply relevant principles of international law." Paragraph 2 of Article 46 reads as follows:

Subject to an authorization under Article 96 of the Charter of the United Nations, the Tribunal may request the International Court of Justice to give an advisory opinion on any question of international law.<sup>250</sup>

Presumably this proposal assumes that the General Assembly will be inclined to interpret broadly its power under Article 96 (2), as it has done in authorizing the International Atomic Energy Agency to request advisory opinions of the Court. As there is room for doubt as to the propriety of such an interpretation,<sup>251</sup> it may be preferable to consider an amendment to Article 96 (2) of the Charter so as to enable the Assembly to authorize intergovernmental organizations, international public corporations, states, international officials, and international tribunals to request advisory opinions.

In the case of a tribunal of arbitration, it is obvious that the states concerned would have to include in the special agreement the authorization for the tribunal to request an advisory opinion of the Court. In this case, as well as in the case of a permanent tribunal as envisioned in the Draft Seabed Convention, the autonomy of the states would be fully safeguarded. What needs to be done is to open the advisory jurisdiction of the Court to judicial organs, be they permanent or *ad hoc*, truly international or regional.

<sup>250</sup> 9 Int. Legal Materials 1046, at 1060 (1970).

<sup>251</sup> See pp. 276-277, 320 above.

## ANNEX 1

## Judges Elected to the International Court of Justice

<i>G.A. Session</i>	<i>Afro- Asian</i>	<i>Common- wealth</i>	<i>Latin American</i>	<i>Eastern European</i>	<i>Western European</i>	<i>Others</i>
I	Abdel Hamid Badawi* (Egypt)	Arnold McNair (U.K.) John Read (Canada)	Jose G. Guerrero (El Salvador) J. P. de Barros Azevedo (Brazil) Alejandro Alvarez (Chile) Fabela Alfaro** (Mexico)	Sergei Krylov** (USSR) Bohdan Winarski* (Poland) Milovan Zoricic* (Yugoslavia)	Jules Basdevant (France) Charles de Visscher** (Belgium) Helge Klaestad** (Norway)	Green H. Hackworth** (U.S.) Hsu Mo* (China)
III	Abdel Hamid Badawi (Egypt)	John Read (Canada)		Bohdan Winarski (Poland) Milovan Zoricic (Yugoslavia)		Hsu Mo (China)
VI	Benegal R. Rau (India) [C]		Levi F. Carneiro*** (Brazil) E. C. Armond- Ugon (Uruguay)	Sergei A. Golunsky (USSR)	Helge Klaestad (Norway)	Green H. Hackworth (U.S.)
VIII				Feodor I. Kojevnikov*** (USSR)		
IX	M. Zafrulla Khan*** [C] (Pakistan)	Hersch Lauterpacht (U.K.)	Jose G. Guerrero (El Salvador) Roberto Cordova (Mexico) Lucio M. M. Quintana (Argentina)		Jules Basdevant (France)	
XI						V. K. Wellington Koo*** (China)
XII	Abdel Hamid Badawi (Egypt)	Percy Spender (Australia)		Bohdan Winarski (Poland)	Jean Spiropoulos (Greece)	V. K. Wellington Koo (China)
XIV			Ricardo J. Alfaro*** (Panama)			
XV	Kotaro Tanaka (Japan)	Sir Gerald Fitzmaurice (U.K.)***	Jose Luis Bustamente y Rivero (Peru)	Valdimir M. Korotkiy (USSR)	Gaetano Morelli (Italy)	Philip C. Jessup (U.S.)
XVIII	Muhammed Zafrullah Khan (Pakistan) Isaac Forster (Senegal)	Sir Gerald Fitzmaurice (U.K.)	Luis Padilla Nervo (Mexico)		André Gros (France)	
XX	Fouad Ammoun*** (Lebanon)					
XXI	Fouad Ammoun (Lebanon) Cesar Benzon (Philippines) Charles I. Onyeama (Nigeria)			Manfred Lachs (Poland)	Sture Petrén (Sweden)	
XXIV	Louis Ignacio- Pinto (Dominica)		Eduardo Jiménez de Aréchaga (Uruguay)	Platon D. Morozov (USSR)	Federico de Castro (Spain)	Hardy C. Dillard (U.S.)

\*Elected for 3-year term;  
 \*\*Elected for 6-year term;  
 \*\*\*Elected to fill an unexpired term.  
 Also Commonwealth country.

## ANNEX 2

## Qualifications of Judges

	President, Prime Min., Sec. of Foreign Aff., or Cabinet Member in own Country	Solicitor, Legal Advisor, or Ambassador	Judge in High Court in own Country	United Nations Delegation	President of General Assembly	Attended UNCIO (San Francisco) 1945	Washington Conference of Jurists 1945	Member, Permanent Court of Arbitration	Judge of Permanent Ct. of International Justice	Member, International Law Commission	Professor of International Law in own Country
<i>Judge</i>	1	2	3	4	5	6	7	8	9	10	11
Guerrero (El Sal.)	X							X	X		
Basdevant (France)		X				X	X	X	X		X
Alvarez (Chile)								X			X
McNair (U.K.)		X						X			X
Hackworth (U.S.)		X				X	X	X			
Winiarski (Poland)		X									X
Zoricic (Yugo.)		X	X	X				X			
Klaestad (Norway)		X	X					X			
Badawi (Egypt)	X	X		X		X					X
Read (Canada)		X		X			X				X
Hsu Mo (China)		X	X	X		X	X				X
de Visscher (Belgium)		X				X	X	X	X		X
Krylov (U.S.S.R.)		X		X		X	X			X	X
Azevedo (Brazil)		X	X								X
Fabela (Mexico)	X	X						X			X
Carneiro (Brazil)		X						X			X
Armond-Ugon (Uruguay)			X	X							X
Rau (India)		X	X	X						X	
Golunsky (U.S.S.R.)		X				X	X			X	X
Kojevnikov (U.S.S.R.)		X								X	X
Khan (Pakistan)	X	X		X	X						
Koo (China)	X	X		X		X	X	X			
Lauterpacht (U.K.)		X						X		X	X
Quintana (Argentina)		X	X	X				X			X
Cordova (Mexico)		X		X		X	X			X	
Sponder (Australia)	X	X		X							
Spiropoulos (Greece)		X		X		X	X	X		X	X
Alfaro (Panama)	X	X		X		X				X	X
Fitzmaurice (U.K.)		X		X		X	X			X	
Koretsky (U.S.S.R.)		X		X						X	X
Tanaka (Japan)		X	X								X
Bustamante y Rivero (Peru)	X										X
Jessup (U.S.)		X		X		X	X				X
Morelli (Italy)		X						X			X
Forster (Senegal)		X	X								
Nervo (Mexico)	X			X	X	X				X	
Gros (France)		X		X				X		X	X
Ammoun (Lebanon)	X	X	X	X							
Benqzon (Philippines)			X								X

## ANNEX 2—(Continued)

	President, Prime Min., Sec. of Foreign Aff., or Cabinet Member in own Country	Solicitor, Legal Advisor, or Ambassador	Judge in High Court in own Country	United Nations Delegation	President of General Assembly	Attended UNCIO (San Francisco) 1945	Washington Conference of Jurists 1945	Member, Permanent Court of Arbitration	Judge of Permanent Ct. of International Justice	Member, International Law Commission	Professor of International Law in own Country
Oneyeama (Nigeria)			X								
Lachs (Poland)		X		X				X		X	X
Petrén (Sweden)		X	X	X				X			X
Ignacio-Pinto (Dahomey)	X	X	X	X						X	
Jimenez de Arechaga (Uruguay)	X			X						X	X
Morozov (U.S.S.R.)		X		X							
de Castro (Spain)		X		X				X			X
Dillard (U.S.)											X

The foregoing charts are reproduced, with permission, from Norman J. Padelford, "The Composition of the International Court of Justice," in Karl W. Deutsch and Stanley Hoffmann (eds.), *The Relevance of International Law* 232-234 (1968). They have been brought up to date by Harold Payson III of The Fletcher School of Law and Diplomacy.

## BARCELONA TRACTION: THE *JUS STANDI* OF BELGIUM

By Herbert W. Briggs\*

In its Judgment of February 5, 1970, in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application, 1962, Belgium v. Spain, Second Phase)*,<sup>1</sup> the International Court of Justice, by a vote of 15 to 1, rejected, for lack of *jus standi*, a Belgian claim of a right of diplomatic protection of alleged Belgian shareholders in a Canadian company allegedly victim of a series of denials of justice by Spanish authorities. Essentially, the Court's decision denies the existence of any general rule of international law or of any special circumstances or considerations of equity which confer a right of diplomatic protection of national shareholders in a foreign company where the acts complained of were directed by authorities of a third state against the company rather than against any legal rights of the shareholders as such. The opinion of the Court is, for the most part, soundly reasoned and comes after thorough argument of the precedents and brilliant presentation of opposing contentions of law and fact by distinguished counsel. Attorneys may safely advise clients that the Court's opinion sets forth the existing law and that any special protection of shareholders as such in a foreign company must be based on treaty stipulations or special agreements.<sup>2</sup>

Issues of procedural and substantive law raised by the Judgment and the Separate Opinions promise fertile occasion for future comment; but the observations which follow concentrate on the *jus standi* of Belgium.

### THE BELGIAN SUBMISSIONS OF JUNE 15, 1959

By an Application dated September 15, 1958, Belgium instituted proceedings against Spain before the International Court of Justice, seeking reparation for damage allegedly caused in violation of international law to Barcelona Traction, Light and Power Company, Ltd., a holding company incorporated in Canada in 1911 and having its head office in Toronto, Canada, but operating through subsidiaries, of which three were Canadian and over a dozen were incorporated under Spanish law. In the submissions of its Memorial of June 15, 1959, the Belgian Government asked the Court to decide, *inter alia*, that the behavior of organs of the Spanish state in declaring the Barcelona Traction Company in bankruptcy and seizing and liquidating its assets was contrary to international law, and that the Spanish state was responsible for the resulting injury; that

\* Of the Board of Editors. The writer counseled the Spanish Government in the preparation of its pleadings in this case over a period of seven years, from 1963 to 1969.

<sup>1</sup> [1970] I.C.J. Rep. 3; A.J.I.L. 653 (1970). The French text is authoritative.

<sup>2</sup> As the Court itself observes, *loc. cit.* 47, par. 90.

Spain was consequently obligated to restore integrally to the Barcelona Traction Company its property, rights, and interests and to indemnify the company through a payment to Belgium;<sup>3</sup> that, alternatively, in case *restitutio in integrum* was impossible, Spain must pay Belgium \$93,000,000 (Canadian) or its equivalent in Belgian francs, with interest, as indemnity for spoliation of the company; or, subsidiarily, 88% thereof for the *pro rata* share of the strongly preponderant interest of Belgian nationals in the company.

In Preliminary Objections dated May 21, 1960, the Spanish Government challenged, *inter alia*,<sup>4</sup> the admissibility of the Belgian claim to protect the Canadian company "for want of effective legal title (*légitimation active*) on the part of the Belgian Government, having regard to the lack of Belgian nationality in the case of the said company and the inadmissibility in the present case of international diplomatic or judicial action in favour of the shareholders of the company in respect of the prejudice suffered by the latter."<sup>5</sup>

Although the Belgian submissions of 1959 made no explicit reference to "shareholders," and referred only subsidiarily to the Belgian "interest" or "participation" in the Canadian company as a justification for demanding reparation for injuries to the company, the Spanish Government, in its Preliminary Objections, was careful to challenge not only the asserted claim to protect the company but also any implicit claim to protect national shareholders for alleged injury to a foreign company.

On the initiative of the Belgian private interests involved, the case was discontinued in 1961 with a view to settlement out of court.<sup>6</sup> The attempt failed; and, on June 19, 1962, the Belgian Government deposited a new Application (dated June 14, 1962) against Spain.<sup>7</sup>

#### THE BELGIAN SUBMISSIONS OF JUNE 14, 1962, AND THE SPANISH PRELIMINARY OBJECTIONS

In the knowledge of the 287-page *Exceptions Préliminaires* which the Spanish Government had filed in 1960, the Belgian Government was now

<sup>3</sup> The explicit nature of the Belgian claim to afford diplomatic protection to a Canadian company appears in the following Belgian Submission:

"II. Que l'Etat espagnol est en conséquence tenu de rétablir intégralement la Barcelona Traction dans ses biens, droits et intérêts tels qu'ils existaient avant le 12 février 1948 et qu'il est tenu de plus d'assurer l'indemnisation de cette société pour tous autres préjudices . . . souffert[s] par la Barcelona Traction . . . le montant de la dite indemnité à verser à l'Etat belge . . ." (C.I.J., Mémoire du Gouvernement Belge, June 15, 1959, p. 111, par. (262).) No reference to Belgian interests appears in the main or alternative Submissions. Only in the subsidiary plea are such references found.

<sup>4</sup> Other preliminary objections challenged the jurisdiction of the Court and asserted the inadmissibility of the claim for non-exhaustion of local remedies. See C.I.J., *Exceptions Préliminaires présentées par le Gouvernement Espagnol*, May 21, 1960, 287 pages, with three volumes of Annexes of some 1830 pages.

<sup>5</sup> Translation by the Registry. I.C.J. Distr. 60/145, Sept. 12, 1960, p. 273 (mimeo.). See also *Exceptions Préliminaires*, cited, p. 285.

<sup>6</sup> [1961] I.C.J. Rep. 9.

<sup>7</sup> [1962] I.C.J. Rep. 310.



able to modify its earlier submissions so as to avoid an explicit claim to afford diplomatic protection to a Canadian company. The new submissions of the June 14, 1962, Application (repeated almost verbatim in the Belgian Memorial of October 30, 1962) <sup>8</sup> called on the Court

1. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Application [Memorial] are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

and to decide that "this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals" as well as compensate Belgian nationals for, *inter alia*, "the deprivation of enjoyment of rights"; or, if *restitutio in integrum* was impossible, "to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent of the net value of the business on 12 February 1948."

Once again, the Spanish Government deposited Preliminary Objections (dated March 15, 1963) challenging the jurisdiction of the Court and the admissibility of the claim.<sup>9</sup> In accordance with Article 62, paragraph 3, of its Rules, the Court suspended proceedings on the merits in order to hear arguments on the Preliminary Objections.

By its Judgment of July 24, 1964, on the Preliminary Objections, the International Court of Justice "decided, in rejecting the first [Spanish] Preliminary Objection, that the discontinuance of the original proceedings did not bar the Applicant Government from reintroducing its claim, and . . . determined, in rejecting the second Preliminary Objection, that the Court has jurisdiction to entertain the Application." The Court also decided, by 9 votes to 7, to join to the merits the third Preliminary Objection dealing with the *jus standi* of Belgium and, by 10 votes to 6, the fourth Preliminary Objection dealing with the failure to exhaust local remedies.<sup>10</sup>

#### THE THIRD PRELIMINARY OBJECTION AS ARGUED BY SPAIN

The third Preliminary Objection, challenging the admissibility of the Belgian claim for lack of *jus standi* was crucial in the 1970 decision of the Court. As reformulated at the closure of the oral hearing on May 8, 1964, the Spanish Submission read:

<sup>8</sup> Cf. [1970] I.C.J. Rep. 12.

<sup>9</sup> I.C.J., Exceptions Préliminaires présentées par le Gouvernement Espagnol, March 15, 1963, 275 pp., with Annexes of 789 pp. Cf. also [1964] I.C.J. Rep. 11-12.

<sup>10</sup> [1964] I.C.J. Rep. 6, 41, 47; excerpted in 59 A.J.I.L. 131 (1965). The decisions rejecting the pleas to the jurisdiction of the Court are worth a separate study but will not be treated here. In addition to the Spanish Exceptions Préliminaires of March 15, 1963 (cited above in note 9), the following documentation should be consulted: C.I.J., Observations et Conclusions du Gouvernement Belge, dated Aug. 14, 1963, 280 pp., with Annexes, Vol. I, pp. 1-200; Vol. II, pp. 205-469; and I.C.J., Oral Proceedings, March 11 to May 19, 1964, in Barcelona Traction Co. case, 1019 pp., I.C.J. Distr. 65/5 and 65/5 bis.

*Thirdly*, since the Belgian Government is without capacity in the present case, having regard to the fact that the Barcelona Traction company, which is still the object of the claim referred to the Court, does not possess Belgian nationality; and having regard also to the fact that no claim whatsoever can be recognized in the present case on the basis of the protection of Belgian nationals, being shareholders of Barcelona Traction, as the principal of these nationals lacks the legal status of a shareholder of Barcelona Traction, and as international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company; . . .

to adjudge and declare:

that the Application filed by the Belgian Government on 14 June 1962 and the final Submissions presented by it are definitively inadmissible.<sup>11</sup>

As developed and argued in the Spanish pleadings, the Spanish Government was thus contending that Belgium lacked the *jus standi* (standing; capacity; *qualité*) to present the claim for the following reasons:

(1) Despite her pretense to the contrary, Belgium was still claiming a right to protect a Canadian company.

(2) Belgium had failed to establish the Belgian nationality of any shareholders of Barcelona Traction at the critical dates, but sought to rely on presumptions of national character.

(3) Additionally, Belgium had failed to prove the shareholder status (legal ownership rather than beneficial interest) of the alleged preponderant Belgian interest of Sidro (*Société Internationale d'Energie Hydro-Electrique*) in the Barcelona Traction Company, since the shares allegedly owned by Sidro were registered in the name of an American partnership, Charles Gordon & Co., at the date of the alleged injury (February 12, 1948, date of the Spanish bankruptcy decree against Barcelona Traction) and in the name of another American partnership, Newman & Co., on the date of the new Belgian Application to the International Court of Justice (June 14, 1962), and had been subject to a trustee relationship with Securitas, Ltd., the contracts on which the Belgian Government had persistently refused to produce.<sup>12</sup>

(4) Contrary to the Belgian contentions, no rules or principles of international law or considerations of equity confer any right of diplomatic protection of national shareholders in a foreign company allegedly injured by a third state in violation of international law.

#### THE JOINDER OF THE THIRD OBJECTION

In considering the Spanish plea of lack of Belgian *jus standi* as a preliminary objection to the admissibility of the Belgian claim, the Court noted,

<sup>11</sup> [1964] I.C.J. Rep. 15-16.

<sup>12</sup> Cf. Oral Pleading of Professor Ago, July 21, 1969, I.C.J., C.R. 69/63, pp. 57 ff. See also the Separate Opinion of Judge Philip C. Jessup, [1970] I.C.J. Rep. 202 ff., 211 ff., who would have found against Belgium on some of these points. Judge André Gros also believed that Belgium had failed to prove a real link between the investment of Belgian shareholders in Barcelona Traction and the Belgian economy. *Ibid.* 282-283.

in its Judgment of July 24, 1964, that, although the Spanish objection "clearly has certain aspects which are of a preliminary character, or involves elements which have hitherto tended to be regarded in that light," the issue presented went beyond the mere admissibility of the claim. The *jus standi*, observed the Court,

to protect the interests of shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical situation in respect of shareholding interests, as recognized by international law. . . . Hence the question whether international law does or does not confer those rights is of the essence of the matter. In short, a finding by the Court that the Applicant Government has no *jus standi*, would be tantamount to a finding that these rights did not exist, and that the claim was, for that reason, not well-founded in substance.<sup>13</sup>

It is true that the Court infelicitously stated the issue as being "whether international law recognizes *for the shareholders* in a company a separate and independent right or interest in respect of damage done to the company by a foreign government";<sup>14</sup> but the question it clearly had in mind was whether there exists in international law any right *for a state* to afford diplomatic protection to shareholders in the circumstances. What the Court appears to be saying, therefore, is that, although the issue of the Belgian national character of the interests sought to be protected by Belgium and the alleged right to protect shareholders in the circumstances both go to the *jus standi* of Belgium, the protection of shareholders issue goes beyond *jus standi* and "appears as one not simply of the admissibility of the claim, but of substantive legal rights pertaining to the merits."<sup>15</sup>

The phrase "pertaining to the merits" is ambiguous. The Court was later (in its 1970 Judgment) to find that it could decide the issue of substantive law relating to protection of shareholders without prejudging the merits of the Belgian complaints against Spain. In 1964, however, prior to hearing full arguments on the merits, it was the considered opinion of the Court that the Third Spanish Objection "involves a number of closely interwoven strands of mixed law, fact and status [Fr.: *qualité pour agir*], to a degree such that the Court could not pronounce upon it at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision."<sup>16</sup> The Court, therefore, decided, by 9 votes to 7, to join the Third Preliminary Objection to the merits.<sup>17</sup> In retrospect, this decision not to decide the issue before hearing argument on the merits seems wise. The ill-considered criticism of Secretary of State William P. Rogers, that the Court's finding, after a delay of seven years, that complainant had no standing to present the claim "has further eroded

<sup>13</sup> [1964] I.C.J. Rep. 45.

<sup>15</sup> *Ibid.*

<sup>14</sup> *Ibid.* 44. Italics added.

<sup>16</sup> *Ibid.* 46. The Court noted as implicit recognition of this conclusion by the parties the extent to which they had gone into questions of the merits in their written and oral pleadings ostensibly directed to the admissibility of the claim.

<sup>17</sup> *Ibid.* 46, 47. Of the seven judges voting against joinder, Judges Wellington Koo (*ibid.* 51 ff.) and Gaetano Morelli (*ibid.* 85, 110 ff.) would have rejected the objection.

confidence in the Court," reveals little knowledge of the case or the reasons for the delay.<sup>18</sup>

The written<sup>19</sup> and oral<sup>20</sup> pleadings after the 1964 Judgment were therefore directed to the Third and Fourth Spanish Preliminary Objections as well as to the merits. Since the Court's Judgment of February 5, 1970, refrains from examining the Fourth Preliminary Objection on non-exhaustion of local remedies, or the issue of the Belgian national character of the alleged Belgian shareholders in the Barcelona Traction Company, the comments which follow will be confined to the issue of Belgian *jus standi* to protect shareholders against injury in the circumstances of the case.

#### THE SPANISH CONTENTION THAT BELGIUM SOUGHT TO PROTECT A CANADIAN COMPANY

As noted above,<sup>21</sup> the Spanish Government contended in part that, despite the Belgian pretense that its New Application of June 14, 1962, was not a claim on behalf of the Canadian company but was made on behalf of the Belgian shareholders therein, in fact it is the "Barcelona Traction company, which is still the object of the claim referred to the Court," since the only acts of which Belgium complained were directed against the company as such and not its shareholders, and since the reparation sought was directed towards the restoration of the company's assets, to which the shareholders had no legal title. The point had been made by the Spanish Foreign Office prior to the institution of any proceedings before the Court<sup>22</sup> and had been consistently maintained by counsel for Spain throughout the proceedings before the Court. Indeed, on the last day of oral argument before the Court, July 22, 1969, Professor Robert Ago, counsel for Spain, noting "*les interminables considérants*" of the final Belgian sub-

<sup>18</sup> 62 Dept. of State Bulletin 625 (May 18, 1970) (Address of the Secretary of State to the American Society of International Law, April 25, 1970). The Court and several judges were explicit in charging the parties with responsibility for the protracted delays in the proceedings. Cf. [1970] I.C.J. Rep. 30 (par. 27), 113 (Fitzmaurice), 221 (Jessup).

<sup>19</sup> See C.I.J., *Mémoire du Gouvernement Belge*, Oct. 30, 1962, 197 pp., with Annexes of 1083 pp.; *Contre-Mémoire du Gouvernement Espagnol*, Dec. 31, 1965, 765 pp., with nine volumes of Annexes; *Réplique du Gouvernement Belge*, May 16, 1967, 783 pp., with Annexes of 847 pp.; *Duplique du Gouvernement Espagnol*, June 30, 1968, 1065 pp., with Annexes of 1772 pp. This documentation will later appear in the Court's publications, plus additional documents introduced during the oral pleadings, which, the Court notes in its Report for 1968-1969 to the General Assembly (G.A.O.R., 24th Sess., Supp. No. 5 (A/7605), par. 30), brought the total documentation in the case to some 18,000 pages.

<sup>20</sup> The oral hearings at the 64 public sittings between April 15 and July 22, 1969, added several thousand pages to the documentation of the case.

<sup>21</sup> Cf. p. 330 above.

<sup>22</sup> See, e.g., Spanish notes of Jan. 3, 1952, June 10, 1957, Sept. 30, 1957, Oct. 9, 1961, to the Belgian Government, Annexes 261, 264, 266 and 269, respectively, to *Mémoire Belge*, Oct. 30, 1962. See also Belgian claims to protect the Barcelona Traction Company in the Belgian note of Feb. 6, 1958, to the Spanish Government, *ibid.*, Annex 267; and, above, note 3, for the Belgian submissions in the discontinued claim brought in 1958.

missions of July 14, 1969,<sup>23</sup> contended that they referred exclusively to alleged injuries to the Canadian company and not to any rights or legally protected interests of Belgian nationals: the Belgian claim was thus inadmissible because it pretended to invoke on behalf of nationals alleged injuries to a national of another state.<sup>24</sup>

The Court exhibited marked inhospitality to this Spanish contention. In summarizing, in its Judgment of July 24, 1964, on the Spanish Preliminary Objections, the Third Spanish Objection, the Court actually omitted any reference to the Spanish contention that the New Application of 1962 (like the discontinued Belgian Application of 1958) was still an attempt to protect the Barcelona Traction company as such and, therefore, was inadmissible. The Court summarizes the Spanish claim as referring merely to lack of Belgian *jus standi* to claim on behalf of "Belgian interests" in a Canadian company.<sup>25</sup> In its Judgment of February 5, 1970, the Court at least refers to the Spanish contention that the Application pending before the Court is inadmissible as a disguised attempt by Belgium to protect the Canadian company. Observing, however, that a state is free to formulate a claim in its own way, the Court dismisses the contention abruptly: "The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government."<sup>26</sup>

Of the judges of the Court expressing separate opinions, only Judge Gaetano Morelli found that the 1962 Application of Belgium had the same object as its Application of 1958: in both applications the Belgian claim for reparation was for injuries allegedly committed in violation of international law by Spanish authorities against the Canadian Barcelona Traction company.<sup>27</sup> He pointed out, however, that the reason the two claims must be regarded as "objectively identical" was not the reason alleged by the Spanish Government, *viz.*, that, despite its outward appearance, the 1962 Application still claimed a right to extend Belgian diplomatic protection to a Canadian company. On this point he appears to agree with the majority when he writes:

... as between the two claims there is a difference in respect of the way in which Belgium seeks to prove that the measures complained of constitute a wrong done by Spain to Belgium. In its endeavour to prove this (and hence its right of reparation) Belgium ceased relying on the contention of damage suffered by a company in which there were allegedly preponderant Belgian interests and, on the contrary, based its claim on the purported fact that the measures complained of, although taken in respect of the company, indirectly injured the Belgian shareholders in it. But this new argument could not be rejected out of hand on the ground that it was only a means of disguising a different claim.<sup>28</sup>

<sup>23</sup> The final Belgian submissions cover no less than 14 pages (pp. 16-29) of [1970] I.C.J. Reports.

<sup>24</sup> I.C.J., C.R. 69/64, Verbatim Record (mimeo.) of July 22, 1969, pp. 62, 46-47, 77. See also Professor Ago's earlier pleadings of March 23, 1964, and June 20, 1969, on the point.

<sup>25</sup> [1964] I.C.J. Rep. 16.

<sup>27</sup> *Ibid.* 222 ff.

<sup>26</sup> [1970] I.C.J. Rep. 31, par. 29.

<sup>28</sup> *Ibid.* 225.

The dismissal of this Spanish contention made little difference in the event because the Court later accepted the object of the contention in observing (par. 88) that where an unlawful act is committed against a company representing foreign capital, "the general rule of international law authorizes the national State of the company alone to make a claim."<sup>29</sup> However, the Court's earlier observation that it is "bound to examine" a claim presented by a party "in accordance with the explicit content imparted to it" by the state presenting it should stop short of an obligation to accept a national characterization of a claim or plea which the Court might regard as unwarranted on the basis of the evidence. Otherwise phrased, the Court should be free to make its own interpretation and characterization of the real nature of pleas presented to it; it has not in the past regarded itself as bound by characterizations given by the parties to their submissions or pleas.<sup>30</sup>

#### MUST BELGIUM PROVE VIOLATION OF AN INTERNATIONAL OBLIGATION OWED BY SPAIN TO BELGIUM?

After hearing full arguments on the merits, the Court stated that it was logical to return to the issue of *jus standi* raised by the Third Spanish Preliminary Objection, which the Court now summarized as

the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.<sup>31</sup>

One of the contentions presented most insistently by counsel for Spain was that Belgium, in order to establish her *jus standi*, must prove that Spain had violated an obligation owed by Spain under international law to Belgium.<sup>32</sup> The Belgian Submissions in the Application of June 14, 1962, and the Memorial of October 30, 1962, both asserted "that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals . . . shareholders in Barcelona Traction."<sup>33</sup> However, when counsel for Spain asked what obligation owed by Spain to Belgium under international law had been violated by the behavior of the Spanish authorities in relation to Barcelona Trac-

<sup>29</sup> *Ibid.* 46.

<sup>30</sup> For extensive citations to cases in which the Permanent Court and the International Court of Justice have exercised this liberty of appreciation, see my pleadings on behalf of Honduras before the Court in the Arbitral Award of the King of Spain case (*Honduras v. Nicaragua*, 1960), I.C.J. Pleadings, II, 103-105.

<sup>31</sup> [1970] I.C.J. Rep. 32, par. 32.

<sup>32</sup> Cf. Oral Pleadings, Professor Ago, March 23, 1964, I.C.J. Distr. 65/5, C.R. 64/10, pp. 202 ff., and May 7, 1964, *ibid.*, C.R. 64/36, pp. 847 ff.; Contre-Mémoire Espagnol, Dec. 31, 1965, Ch. VI, Sec. I, §5, pp. 643 ff., pars. 11 ff., and Sec. III, §3, pp. 715 ff., pars. 95 ff.; Duplique Espagnol, June 30, 1968, Vol. II, Part III, Ch. II, §1, pp. 933 ff., and Sec. II, pp. 999 ff.; Oral Pleadings, Professor Ago, June 19, 20, 1969, I.C.J., C.R. 69/43 and 44, and July 22, 1969, *ibid.*, C.R. 69/64.

<sup>33</sup> [1970] I.C.J. Rep. 12. Cf. also, final Belgian submissions of July 14, 1969, *ibid.* 23, 25.

tion, a Canadian company, counsel for Belgium vehemently denied the necessity for proof of such an obligation *towards Belgium* and sought to evade the issue by talking of general rules of international law imposing obligations on all states in respect of rights of aliens.

As finally presented,<sup>34</sup> the Belgian contention on the point started from the premise set forth by the Permanent Court of International Justice in the *Macrommatis (Jurisdiction)* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.<sup>35</sup>

Applying this accepted statement of the general principles of diplomatic protection to the facts of the *Barcelona Traction* case, counsel for Belgium regarded it as sufficient to establish the *jus standi* of Belgium. It was not up to Belgium to prove a special right of diplomatic protection of shareholders in a foreign company: the injury to the company was at the same time an injury to the shareholders; the burden was on Spain to prove that general principles of diplomatic protection did not confer *jus standi* on Belgium in the circumstances.

The opposing Spanish contentions may be briefly summarized.<sup>36</sup> According to counsel for Spain, the acts and omissions of the Spanish authorities complained of in the Belgian submissions—*e.g.*, the abuse of rights, arbitrary and discriminatory behavior, usurpation of jurisdiction, denials of justice, the bankruptcy decree, the seizure of the assets of Barcelona Traction and its subsidiaries, the conduct of the bankruptcy proceedings, the reorganization of the enterprise, the sale of the assets, etc.—were, without exception, directed not towards Sidro or any Belgian national, but towards the Canadian company and its assets.<sup>37</sup> Although shareholders in a corporation had some legal rights of their own, no proof of the violation of any shareholder rights held by any Belgian national in Barcelona Traction Company had been proven; and, indeed, counsel for Belgium had, in reply to a question posed from the bench by Judge Sir

<sup>34</sup> Cf. Oral Pleadings of Professor Michel Virally, Counsel for Belgium, May 9, 1969, I.C.J., C.R. 69/18, pp. 37, 39 ff., and July 7, 1969, *ibid.*, C.R. 69/53, pp. 36 ff.; and E. Lauterpacht, July 7, 1969, *ibid.*, C.R. 69/53, pp. 16 ff. For earlier Belgian pleadings regarding her *jus standi*, see Observations Belges, Aug. 14, 1963, pp. 111 ff., par. 131; Oral Pleadings, Professor Georges Sauser-Hall, April 16 and 17, 1964, I.C.J. Distr. 65/5, C.R. 64/24, 25, pp. 545, 556 ff., and May 15, 1964, *ibid.*, 64/41, pp. 971 ff.; Oral Pleadings, Mr. Elihu Lauterpacht, May 14, 1964, *ibid.*, 64/41, pp. 947 ff.; Réplique Belge, May 16, 1967, Part III, Ch. II, Sec. I, pp. 634 ff., pars. 873 ff.

<sup>35</sup> P.C.I.J., Ser. A, No. 2, p. 12, Judgment of Aug. 30, 1924.

<sup>36</sup> See note 32 above, for citations.

<sup>37</sup> Cf. Oral Pleadings of Professor Roberto Ago, June 20, 1969, I.C.J., C.R. 69/44, pp. 26–27, and July 22, 1969, *ibid.*, C.R. 69/64, p. 46.

Gerald Fitzmaurice,<sup>38</sup> specifically denied that it was claiming damages for violation of any "direct rights of a shareholder as such."<sup>39</sup> Belgium had been unable to prove that any rules of law applicable in the present case, whether national or international, provided that an injury to a company *ipso facto* constituted a legal injury to its shareholders. Belgium could show no legal injury—no violation of the legally protected interests of any Belgian shareholders—but only that they had suffered economic repercussions from the bankruptcy of the Canadian company. No violation of any international rule binding on Spain had been established, in particular, no obligation owed by Spain to Belgium. Belgium, the Applicant, had, therefore, failed to establish its *jus standi* and could not evade the obligation by attempting to shift the burden of proof onto Spain to disprove what Belgium had failed to prove, *viz.*, a right of affording diplomatic protection to shareholders in the circumstances.

In its 1970 Judgment, the International Court of Justice decisively rejected the Belgian arguments and upheld the point so eloquently presented by Professor Ago on behalf of Spain. Distinguishing "obligations the performance of which is the subject of diplomatic protection" from "obligations of a State towards the international community as a whole" (*e.g.*, prevention of genocide, protection of basic human rights, as to which "all States can be held to have a legal interest in their protection"), the Court said that, in order to bring a claim in the exercise of diplomatic protection,

35. . . . a State must first establish its right to do so, for the rules on the subject rest on two suppositions [Fr.: *conditions*]:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949, pp. 181-182.*)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity. . . . It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. . . .<sup>40</sup>

The Court's precise restatement of the principles of international law governing capacity to bring an international claim soundly reflects not only the Court's own jurisprudence but the established law of state responsibil-

<sup>38</sup> *Ibid.*, C.R. 69/44, p. 12 (June 20, 1969).

<sup>39</sup> *Ibid.*, C.R. 69/54, pp. 12-14 (July 8, 1969). *Cf.* [1970] I.C.J. Rep., par. 49, where the Court notes "that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders."

<sup>40</sup> [1970] I.C.J. Rep. 32-33.



ity and international claims upon which the right of diplomatic protection is based.<sup>41</sup>

#### THE BELGIAN FAILURE TO ESTABLISH JUS STANDI

Having thus decided that Belgian *jus standi* must be established by proof that Spain had violated an obligation owed under international law to Belgium, the Court proceeded to consider and reject a dozen contentions put forward by counsel for Belgium in support of her *jus standi*.

Undue reliance was placed by Belgium on the "concurrent injury" argument or, as the Court phrased it, the plea that "it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself."<sup>42</sup> The Court quickly exposed the fallacy of this argument, by observing: "In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration."<sup>43</sup>

Closely related was the Belgian denial that there existed any rule of international law which prohibited the shareholders' state from exercising diplomatic protection in their behalf for illicit acts committed against the company in which they held shares; and this was coupled with an insistent plea that the burden of proof rested on Spain to establish the existence of such a prohibitive rule. This "negative proof" argument ("You cannot disprove what I have failed to prove") was employed as an argument of last resort by distinguished counsel for Belgium<sup>44</sup> and, more curiously, is accepted by Judges Tanaka<sup>45</sup> and Jessup<sup>46</sup> in their separate opinions.

The Court succinctly disposed of this argument—which it characterized as an appeal "to the silence of international law"—by observing: "This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State."<sup>47</sup>

<sup>41</sup> It is all the more surprising, therefore, to find Judge Sir Gerald Fitzmaurice stating in his Separate Opinion that he did not base his agreement with the Court's Judgment finding the Belgian claim inadmissible "on any consideration turning on the question of to whom, or to what entity, was the obligation owed in this case, not to act in a manner contrary to international law." *Ibid.* 65-66. His reasons for releasing claimant state from proving violation of an obligation owed to it by the respondent state are far from convincing and appear to be based, in part, upon his expressed preference for having the Court decide an abstract legal question (*cf.* his par. 5) rather than the actual issue before it, *viz.*, whether claimant had *jus standi* in the circumstances.

<sup>42</sup> [1970] I.C.J. Rep., par. 51. For the arguments as presented by counsel for Belgium, see Observations Belges, Aug. 14, 1963, pp. 179 ff., 184 ff., pars. 175 ff.; I.C.J. Distr. 65/5, Oral Pleadings, Georges Sauser-Hall, April 16, 17, 20, 1964, C.R. 64/24, 25, 26, pp. 545, 557, 559, 596, and May 15, 1964, C.R. 64/41, p. 971; Oral Pleadings, E. Lauterpacht, May 14, 1964, *ibid.*, pp. 948 ff., 958; Réplique Belge, May 15, 1967, pars. 873 ff.; Oral Pleadings, Michel Virally, May 12 and July 7, 1969, I.C.J., C.R. 69/19 and 53.

<sup>43</sup> [1970] I.C.J. Rep., par. 51.

<sup>44</sup> *Cf.* citations, note 42 above.

<sup>45</sup> [1970] I.C.J. Rep. 131.

<sup>46</sup> *Ibid.* 188, 194.

<sup>47</sup> *Ibid.* 37, 38.

Since diligent search by counsel of arbitral jurisprudence and the practice of states had failed to establish the existence of any rules of international law permitting diplomatic protection of shareholders as claimed by Belgium,<sup>48</sup> the Court observed that the continuous evolution of international law required that it recognize such influential municipal law institutions as the corporate entity, an institution whose importance in the economic life of nations transcended national frontiers. When

legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. . . .<sup>49</sup>

If the Court were to decide the case in disregard of the relevant institutions of municipal law it . . . would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.<sup>50</sup>

However widely their interpretations differed, both Belgium and Spain took as the point of departure of their reasoning the distinction, and the community, between the company and its shareholders, factors derived from municipal law.<sup>51</sup> Reference to the legal institutions of municipal law did not, as had been contended,<sup>52</sup> subordinate international law to categories of municipal law. However, in referring to municipal law rules which distinguish the rights of a company and its shareholders, "the Court cannot modify, still less deform them."<sup>53</sup>

Examining "rules generally accepted by municipal legal systems," the Court found that they determine the legal situation and interrelationship of limited liability companies and the persons who hold shares in them. The corporation and the shareholder each had a distinct set of rights; and, in particular, so long as the company remained in existence, the shareholder

<sup>48</sup> Cf., on the point, Oral Pleadings, Professor Ago, June 20, 1969, I.C.J., C.R. 69/44, pp. 34 ff.

<sup>49</sup> [1970] I.C.J. Rep., pars. 38, 37 and 39.

<sup>50</sup> *Ibid.*, par. 50.

<sup>51</sup> *Ibid.*

<sup>52</sup> Cf., e.g., Oral Pleadings, Professor Virally, May 12, 1969, I.C.J., C.R. 69/19, p. 24. This fallacy that the Court's *renvoi* to internal law leads to the subordination of international law is also embraced by Judge Gros, [1970] I.C.J. Rep. 272, and by Judge *ad hoc* Riphagen, *ibid.* 335 ff.

<sup>53</sup> *Ibid.*, pars. 38, 50. The thrust of much of the Separate Opinion of Judge Fitzmaurice was that while the municipal law distinctions between company and shareholder rights must be maintained in international law, limitations on the rights of corporate personality comparable to those found in domestic law should be developed by analogy in international law so as to permit diplomatic protection of shareholders as such. *Ibid.* 67, 71 ff.

However, the limitations envisaged by Belgium and Sir Gerald were the creature of certain legislative presumptions of national law and policy and the case law applying them (e.g., presumptions of share ownership for tax purposes, shareholders' derivative actions, etc.) which had no counterpart in international law. It was not open to the Court to create a new law by analogy, although at one point the late Professor Georges Sauser-Hall, as counsel for Belgium, called upon the Court to create and apply "out of whole cloth" ("*tailler en plein drap*") rules of international law applicable to the special case ("*cas d'espèce*"). Cf. I.C.J. Distr. 65/5, C.R. 64/26, pp. 596-597 (April 20, 1964). The plea was not pursued in the Belgian submissions.

had no right to corporate assets. If an injury were done to a company, its shareholders might suffer damage too; but this did not imply that both were entitled to claim compensation.<sup>54</sup> The Belgian contention, "that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction," must be rejected, said the Court:

Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.<sup>55</sup>

Since Belgium disclaimed any interest in injuries to the Barcelona Traction Company itself,<sup>56</sup> it was essential to the Belgian argument to prove that the acts taken by Spanish authorities in relation to the company and its management and assets actually reached the shareholders behind the corporate veil of the company. The final Belgian submissions of July 14, 1969, thus stated that, because of Spanish conduct "towards that company," "Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction" had "suffered *direct* and immediate injury to their interests and rights, which were voided of all value and effectiveness"; and that those acts and omissions "*directly* and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law."<sup>57</sup>

Considerable ingenuity was displayed by counsel for Belgium in providing the Court with arguments, sometimes contradictory and often variations of each other, for piercing the corporate veil. The case law—analyzed in detail by counsel for both parties—was found by the Court to be irrelevant to the claim presented by Belgium because it dealt with special situations such as treatment of enemy property and nationalization of foreign property and was thus *lex specialis*.<sup>58</sup> However, the Court thought that looking behind the corporate personality might have a legitimate rôle in international law and it was willing to examine special circumstances which might justify lifting the veil in the interest of shareholders.<sup>59</sup>

A Belgian plea that, although the Spanish behavior complained of may have been directed against the company in a formal sense, a company was purely a means of achieving the economic purpose of its shareholders, the "economic reality" behind the fiction, and therefore, a prejudice to the company is necessarily a wrong to the shareholders because a "community

<sup>54</sup> *Ibid.*, pars. 41–44.

<sup>55</sup> *Ibid.*, par. 46.

<sup>56</sup> Cf. Professor Virally: "Surtout que personne ne conteste ce point. La Belgique ne se préoccupe du préjudice subi par la Barcelona Traction elle-même—ce qui serait l'affaire du Canada—mais bien de celui qui a été supporté par ses propres nationaux, actionnaires de la société." I.C.J., C.R. 69/19, pp. 18–19, Oral Pleading of May 12, 1969.

<sup>57</sup> [1970] I.C.J. Rep. 23 (V), 25–26 (VI). Italics added. The Belgian contention based upon *indirect* injury to the shareholders through the direct injury to the Company is referred to above.

<sup>58</sup> *Ibid.*, pars. 55–63.

<sup>59</sup> *Ibid.*, par. 58.

of destiny" existed between them, was rejected by the Court because identity or community of economic interests would not constitute a denial of the legally distinct existence and rights of company and shareholders or avoid the possibility of diverging legal interests.<sup>60</sup>

A Belgian plea based on the allegation that international law permits the national state of the shareholders of a foreign company to afford them diplomatic protection when the company is "practically defunct" was also rejected by the Court. Not only did the description lack all legal precision, but the Barcelona Traction Company was in receivership in the Canadian courts and the Belgian shareholders had not in fact been deprived of all possibility of protection through the company: "it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise." The Court therefore found it unnecessary to pronounce upon the allegation.<sup>61</sup>

The Court next considered a question<sup>62</sup> which it phrased as the possible "lack of capacity of the company's national State to act on its behalf." Even if the Court had found such a lack of capacity in Canada, the Court would still have been confronted with the question whether in such circumstances the state of the shareholders necessarily acquired a right of diplomatic protection; but the Court did not reach this question, probably because it had already found that an injury to a company did not *ipso facto* constitute an injury to any legal rights of shareholders. It found that the traditional rule of international law "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."<sup>63</sup> Some states have required further or different links such as *siège social*, or control, or majority or substantial shareholding by nationals. However, "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance." In particular, "no analogy with the issues raised or the decision given" in *Nottebohm*<sup>64</sup> existed in the legal and factual aspects of diplomatic protection involved in the *Barcelona Traction* case.

Although intended by its founders from the beginning to operate abroad, Barcelona Traction had been voluntarily incorporated by them under Canadian law and the company had retained manifold links with Canada over half a century. The Canadian nationality of Barcelona Traction had been generally recognized—in particular by Spain, by Belgium, by Canada, by the United Kingdom, by the United States.<sup>65</sup> Moreover, the fact that the

<sup>60</sup> *Ibid.*, par. 45. Cf. Oral Pleading, Professor Virally, May 12, 1969, I.C.J., C.R. 69/19, p. 28. Judge Tanaka goes even beyond the Belgian arguments rejected by the Court in maintaining that only the shareholders of a company can be the object of diplomatic protection, "not the company itself which has nothing but a fictive existence and can only play the role of a technique . . ." [1970] I.C.J. Rep. 132.

<sup>61</sup> *Ibid.*, pars. 64-68.

<sup>62</sup> *Ibid.*, pars. 69-84.

<sup>63</sup> *Ibid.*, par. 70.

<sup>64</sup> [1955] I.C.J. Rep. 4; 49 A.J.I.L. 396 (1955). See further, on the irrelevance of *Nottebohm* to *Barcelona Traction*, below, pp. 342-343.

<sup>65</sup> [1970] I.C.J. Rep., pars. 71 ff.

Canadian Government, after exercising diplomatic protection on behalf of the company, had later refrained from further representation or from making a formal claim had not affected Canada's right of protection of its national. Said the Court:

78. . . . within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available . . .

79. . . . Since the claim of the State is not identical with that of the individual or corporate person whose cause it espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude [*e.g.*, by Canada], the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government [*e.g.*, Belgium], unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum. . . . To equate this [failure to seek a remedy] with the creation of a vacuum would be to equate a right with an obligation.<sup>66</sup>

Observing that Belgium "would be entitled to bring an international claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law," the Court denied that injury to the economic "interests" of a state through prejudice to the investments of its nationals abroad constituted a valid basis for an international claim in the absence of any injury involving the violation of a legal right.<sup>67</sup> It followed, said the Court,

that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.<sup>68</sup>

If it seemed surprising that international law had not evolved further in the protection of shareholder interests—particularly in light of the growth of foreign investments and the activities of multinational holding companies during the last half-century—this could be attributed to the intense conflict of economic systems and interests which had failed to produce the requisite consent to new rules. Thus, "in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed." No such instruments existed in the present case.<sup>69</sup> Moreover, no considerations of equity conferred *jus standi* on Belgium.<sup>70</sup>

<sup>66</sup> *Ibid.* 44.

<sup>68</sup> *Ibid.*, par. 88.

<sup>70</sup> *Ibid.*, pars. 92–101.

<sup>67</sup> *Ibid.*, pars. 85–87.

<sup>69</sup> *Ibid.*, pars. 89–90.

The Court, therefore, held that Belgium lacked *jus standi* because she had failed to establish the existence in international law of any right of protection of shareholders where the acts complained of were committed against a foreign company. Accordingly,

THE COURT rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.<sup>71</sup>

Further observations seem called for by two aspects of the Court's *dispositif*: (1) Why did the Court state that it "rejects" the claim rather than finding it "inadmissible" for lack of *jus standi*? (2) Why does the Court call special attention to the "dissenting" views of three concurring judges? One may commence with the second question.

#### THE IMPERTINENCE OF NOTTEBOHM

The Court's finding that, where a company is injured, the general rule of international law authorizes the company's state alone to claim has caused some anguish among those who seek a *jus standi* for the state or states of the shareholders. The fallacious assumption, that if Canada could only be disqualified from protecting the Barcelona Traction Company, then Belgium would automatically acquire *jus standi* to protect genuine Belgian shareholders in that company, appears to underlie, in one way or another, the "dissenting" views expressed by Judges Fitzmaurice, Jessup and Gros in their separate opinions. The reed upon which each judge places some reliance is the *Nottebohm* case, with which the Court found no analogy in the *Barcelona Traction* case.<sup>72</sup>

*Nottebohm*, it will be recalled, is the case in which the Court, by applying to a person who possessed only one nationality the criteria for choosing between two nationalities, merely succeeded in depriving him of any opportunity of diplomatic protection for the substantial injuries he had suffered. In spite of the fact that the decision turned on a point not argued by the parties, *Nottebohm* has been warmly supported because of its emphasis on the "genuine link" theory in appropriate cases. In its 1970 Judgment in the *Barcelona Traction* case, the Court finds the appropriate case to be one of dual nationality when it observes: "Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection."<sup>73</sup>

The attempt to stretch the genuine connection theory of *Nottebohm* to the legal and factual aspects of *Barcelona Traction* commences with a series of contrary-to-fact or unproved assumptions: e.g., that if Canada, instead of Belgium, were the Applicant before the Court in this case; and

<sup>71</sup> *Ibid.*, pars. 102-103. Cf. the Court's statement of the issue before it, *ibid.*, pars. 32, 35, 36.

<sup>72</sup> Cf. *ibid.* 42; 79 ff. (Fitzmaurice); 170 ff., 186 ff. (Jessup); 280 ff. (Gros). See above, p. 340.

<sup>73</sup> [1970] I.C.J. Rep., par. 98.

if the *Nottebohm* genuine-link theory could be applied to disqualify Canada because of the minor shareholding interest of Canadians in Barcelona Traction; and if international law applied the genuine-link theory to corporations, then Canada, the national state of the company, would lack (or lose—it is not clear which) *jus standi* to protect Barcelona Traction against Spain. Even then, however, the most important presumption remains to be made: *viz.*, that if the company's state is disqualified from making a claim based on acts committed against the company, then the state or states of the shareholders acquire a *jus standi* to protect the shareholders against the economic consequences of the same acts.

Judges Fitzmaurice and Jessup, overlooking the well-known aphorism of Mr. Justice Holmes, find the *jus standi* of shareholders' state in "logic"; Judge Fitzmaurice adds "in law," and Judge Jessup, "principle and logic—supported by State practice,"<sup>74</sup> although the most diligent efforts of counsel for Belgium failed to prove the existence of any right of the shareholders' state under international law or practice to protect them against injuries to the company. Judge Gros, regarding the Court's assertion of the Canadian nationality of Barcelona Traction as *obiter dictum*,<sup>75</sup> believes that the *Nottebohm* rule "can be applied with even greater reason to companies"<sup>76</sup> and finds the Belgian *jus standi* in "the right possessed by every State" to protect "substantial" foreign investments of its nationals, and the genuine link in the economic reality of shareholder interests as a part of the national economy of their state.<sup>77</sup>

However, the *jus standi* of one state cannot arise merely from the lack of *jus standi* by another; and there must be some legal basis for a right to bring an international claim beyond indirect injury to an economic interest. The devotion of these judges to the link theory falls short of finding a link in the chain of legal reasoning which would justify Belgian *jus standi* to protect shareholders or Belgian economic interests against a state which has violated no legal right of Belgium. Unable, like counsel for Belgium, to prove the existence of Belgian *jus standi*, they have sought to presume it on the basis of irrelevant emanations from *Nottebohm*.<sup>78</sup>

<sup>74</sup> *Ibid.* 80 (Fitzmaurice), 188 (Jessup). Judge Fitzmaurice appears to have had some doubts about the applicability of *Nottebohm*. *Ibid.* 76, 81. Judge Jessup, starting from the premise that Canada, the state of incorporation, had no right to claim on behalf of Barcelona Traction (*ibid.* 170), slipped easily into the Belgian negative proof argument that no rule or principle of international law "forbids" a right of diplomatic protection to the shareholders' state (*ibid.* 188, 194).

<sup>75</sup> *Ibid.* 280.

<sup>76</sup> *Ibid.* 281.

<sup>77</sup> *Ibid.* 279–280.

<sup>78</sup> In the event, Judges Jessup and Gros voted to dismiss the Belgian claim as inadmissible for lack of proof of Belgian national character of the claim. *Ibid.* 170, 202–220 (Jessup); 282–283 (Gros). Judge Fitzmaurice, "with some reluctance," found the claim inadmissible "broadly for the principal reason on which the Judgment is based—namely that in respect of an injury done to a company, *prima facie* the company's government alone can sustain an international claim." *Ibid.* 64. Judge Kotaro Tanaka, though voting with the majority, thought the Belgian claim should have been dismissed on the merits. *Ibid.* 114–160. It thus appears that the three judges referred to by implication in the Court's *dispositif* were Judges Gros, Jessup and Tanaka,

## WHY THE BELGIAN CLAIM WAS "REJECTED"

There remains the question why the Court "rejected" the Belgian claim rather than finding it "inadmissible" *in expressis verbis* for lack of *jus standi*. In *Interhandel*, for example, the Court, in its *dispositif*, "upholds the Third Preliminary Objection and holds that the Application of the Government of the Swiss Confederation is inadmissible."<sup>79</sup> In *Barcelona Traction*, the Court does not in its *dispositif* (par. 103) refer specifically to the Third Spanish Preliminary Objection, does not specifically state that it is upholding the objection after hearing argument on the merits, and does not use the term "inadmissible" in rejecting the Belgian claim.

However, the Court had earlier explicitly identified the question before it as the issue "presented as the subject-matter of the third preliminary objection," namely, the question of the right of Belgium to exercise diplomatic protection of shareholders in the Canadian company against which Spain had taken certain measures,<sup>80</sup> and had concluded, after hearing full argument on the merits, that Belgium had failed to establish the claimed right of protection of shareholders; and that, consequently, since no Belgian *jus standi* before the Court had been established, the Court could not "pronounce upon any other aspect of the case."<sup>81</sup> In the Court's view the absence of any rule of international law conferring the claimed right of protection of shareholders necessarily involved the dismissal of the claim for lack of *jus standi*, precisely as requested in the Spanish objection.

It is true that in the circumstances of the case a finding of lack of *jus standi* for want of a right of diplomatic protection of shareholders against injury to the company leads to the same results as a rejection of the claim on the merits. In neither situation does a legal basis for the claim exist and it must, therefore, be dismissed.

Despite the same result, however, a clear distinction remains between the reasons for a rejection of a claim on the merits and its dismissal for lack of *jus standi* of the applicant state. The decision of the Court that Belgium lacked *jus standi* because no rule of international law granted her the right of protection she claimed was obviously a decision on a point of substantive law. Just as obviously, however, it did not reach the merits of the Belgian complaint against Spain because, as the Court said (par. 102), the finding of lack of *jus standi* for the reason given *precluded* the Court from pronouncing upon any of the issues raised in the Belgian complaint regarding alleged denials of justice, usurpation of jurisdiction, abuse

---

although most of Judge Fitzmaurice's separate opinion also reads like a dissenting opinion. The only dissenting opinion labeled such was that of Judge Willem Riphagen, *ad hoc* Judge designated by Belgium.

One wonders about the propriety of separate opinions which go so far afield as some of those in this case. Perhaps judges, restrained as such from active publication, too eagerly seize the opportunity to write overly lengthy observations on matters they would prefer to decide rather than confining their observations precisely to the issues actually before the Court.

<sup>79</sup> [1959] I.C.J. Rep. 30.

<sup>80</sup> [1970] I.C.J. Rep., par. 32.

<sup>81</sup> *Ibid.*, par. 102.



of rights, or other Spanish behavior. As Judge *ad hoc* Enrique Armand-Ugon observed in his dissenting opinion in the earlier phase of this case: "Many questions can be in themselves questions of substance without on that account touching on the merits of the case."<sup>82</sup>

In the field of state responsibility and diplomatic protection there has sometimes been a tendency to confuse with the merits of a particular dispute issues of substantive law such as non-exhaustion of local remedies or lack of national character of a claim which cause dismissal of the claim and preclude a decision on the merits.<sup>83</sup> The Court itself may not have entirely escaped this confusion in some of its observations in its 1964 Judgment joining the Third and Fourth Preliminary Objections to the merits.<sup>84</sup> In its 1970 Judgment, however, it has carefully refrained from any implication that it is rejecting the Belgian claim on the merits.

Perhaps—and one can only speculate here—the Court "rejects" the Belgian claim for lack of *jus standi* instead of holding it "inadmissible" (for the same reason) in order to emphasize the ground upon which the lack of *jus standi* was decided, *i.e.*, the non-existence in law of the right of protection claimed by Belgium (rather than a mere lack of capacity based, for example, upon lack of national character of the claim). On this point, one may agree with the observation of Judge Morelli:

Consequently, to say that there is no rule which authorizes diplomatic protection of shareholders on account of measures taken in respect of the company is to exclude the existence of any obligation of Spain in this connection, vis-à-vis any other States. Belgium's right is thereby denied, not because such a right might hypothetically belong to a State other than Belgium (in other words, not for lack of capacity on the part of Belgium), but rather because no such right can be invoked by any State, since no rule exists from which it could derive.<sup>85</sup>

However, the finding of the Court that the right of protection of shareholders claimed by Belgium had no foundation in international law was at the same time a finding that Belgium lacked *jus standi* to bring a claim in their behalf.<sup>86</sup> Despite the expressed preference of some judges for the development of a rule permitting diplomatic protection of shareholders, they felt compelled to agree with the majority that Belgium lacked *jus standi* to afford diplomatic protection to any Belgian shareholders in the Canadian company.

<sup>82</sup> [1964] I.C.J. Rep. 164.

<sup>83</sup> Cf. the views of Judge Morelli, *ibid.* 110 ff.

<sup>84</sup> *Ibid.* 44–45; and see above, p. 331.

<sup>85</sup> [1970] I.C.J. Rep. 228.

<sup>86</sup> *Ibid.*, pars. 32, 88, 102.

## THE RANN OF KUTCH ARBITRATION

By J. Gillis Wetter \*

### INTRODUCTION

The boundary dispute between India and Pakistan in the *Rann of Kutch* case is one of the major instances of international arbitration in the post-war period.

The object of the *ad hoc* Tribunal was to determine a sector of the boundary between India and Pakistan in the southwestern region of the Indian subcontinent between what in British times was Sind, now forming part of the Islamic Republic of Pakistan, and the State of Kutch and other Native Indian States, which now form part of the Province of Gujarat in the Republic of India. The length of the boundary eventually established by the Tribunal was about 255 miles. The disputed territory, the area of which has been estimated to be 3,500 square miles, consisted for the most part of a portion of a tract known as the Great Rann of Kutch, or the Rann.

The Rann possesses unique geographical features which have justified its characterization as a territory without counterpart on the globe. The very nature of it became, in fact, a controversial issue in the case, since India maintained that it was land, while Pakistan argued that it was a marine feature. During a part of each year the Rann is a dry salt desert; for the remainder of each year it is flooded with water, the origin of which has not been clearly established. The depth of the water varies between a few feet and a few yards. Pakistan claimed the northern half of the Great Rann. India contended that all of it was Indian territory.

While the territorial dispute had century-old origins, it became acute shortly after the emergence of India and Pakistan as independent states in 1947. It formed the subject of an exchange of diplomatic correspondence between them in 1948 and thereafter, and eventually resulted in the outbreak of hostilities in April, 1965. After mediation by Prime Minister Harold Wilson, both parties, in a cease-fire agreement dated June 30, 1965, consented to effect a peaceful settlement by arbitration. In accordance with the agreement, India nominated as member of the Tribunal Ambassador Aleš Bebler, Judge of the Constitutional Court of Yugoslavia, and Pakistan Ambassador Nasrollah Entezam, former Minister of Foreign Affairs of Iran and former President of the General Assembly of the United Nations. The Secretary General of the United Nations appointed as Chairman Judge Gunnar Lagergren, President of the Court of Appeal for Western Sweden.

\* Of the Stockholm Bar; J.S.D. (University of Chicago). The author was Secretary General and Treasurer of the Indo-Pakistan Western Boundary Case Tribunal.

## PROCEEDINGS AND AWARD

The Tribunal was constituted in Geneva on February 15, 1966, and at that time determined procedural rules which governed the subsequent proceedings. It adopted the name of the Indo-Pakistan Western Boundary Case Tribunal and established time limits for the submission of written pleadings. Among the procedural rules, which were brief and simple in character, was one pertaining to discovery and inspection of documentary evidence on the territory of one party by the other party.<sup>1</sup> Within the period of six months following the constitution of the Tribunal, such inspection of documents and records did take place. A delegation from Pakistan visited New Delhi for the purpose of inspecting and obtaining copies of maps and documents in Indian Government archives, while a delegation from India visited Islamabad for the same purpose. Memorials, Counter-Memorials and Final Memorials were submitted within the strict time limits established by the Tribunal.<sup>2</sup>

Oral hearings began in Geneva in September, 1966, in the premises of the United Nations Office in Europe, which became the seat of the Tribunal by gracious invitation of Secretary General U Thant. The Tribunal otherwise was an independent institution, without connection with the United Nations, and financed by the parties. The hearings continued until July 14, 1967. In all, 172 sessions were held, and oral argument was presented during about 550 hours.<sup>3</sup> The verbatim record spans some 10,000 typed pages. The number of maps exhibited in the case was about 350, while approximately 1,000 pieces of other exhibits were filed. All the evidence in the case was documentary, and no witnesses were heard.

The Award was rendered on February 19, 1968, at which time the opinions of the members of the Tribunal were distributed, but the final edited

<sup>1</sup> The following rule was adopted by the Tribunal at the initiative of the parties:

*Discovery and Inspection*—A Party may, by notice in writing, call upon the other Party to make available to it for inspection any document which is or is likely to be in the possession or under the control of such other Party; and thereupon such other Party shall, if the document is in its possession or under its control, provide adequate and expeditious facilities to the Party to take inspection and copies of the document and, on request of such Party and at its cost, shall furnish to it such number of photostat copies as it requires and also produce the document before the Tribunal. If the document is not in the possession or under the control of the other Party, an affidavit shall be filed to that effect before the Tribunal. (Award, Vol. I, p. 6.)

<sup>2</sup> All the materials in the case are unprinted except for the memorials of the parties. Complete sets of the entire documentation in the case are available in the Library of the United Nations Office in Europe at Geneva (which also acts as custodian of certain original documents) and in the Harvard Law Library. Excerpts from the Award have appeared in 7 Int. Legal Materials 633-704 (1968).

<sup>3</sup> During the oral hearings, India was represented by a delegation of 15 counsel, experts and aides, headed by Mr. B. N. Lokur (now Judge of the High Court at Allahabad) as Agent and the late Dr. K. Krishna Rao as Deputy Agent. India's leading counsel was Mr. C. K. Daphtary, Attorney General, and oral argument was also presented by Mr. R. Palkhivala. Pakistan's delegation comprised 13 counsel, experts and aides, with Mr. I. U. Khan as Agent and Mr. Shahid M. Amin as Deputy Agent. Pakistan's leading counsel was Mr. Manzur Qadir, who presented Pakistan's oral argument.

text of the Award was released only at a later time. The full text of the Award, including the opinions, represents 970 typed pages.

The decision of the Tribunal was by majority vote. Mr. Entezam concurred in the opinion of the Chairman, while Mr. Bebler dissented. The Tribunal determined a boundary which recognized about 90 percent of the disputed territory to be Indian and upheld Pakistan's sovereignty over the balance.

By the cease-fire agreement, the parties had undertaken to "implement the findings of the Tribunal in full as quickly as possible" and had agreed that the Tribunal should remain in being until its findings had been so implemented. After the rendering of the Award, the entire boundary was demarcated on the ground by the parties jointly, and once this task had been accomplished in the summer of 1969, the Tribunal was formally dissolved at a meeting in Stockholm held for the purpose on September 22, 1969.<sup>4</sup> Thus, in a little more than four years, the peaceful resolution of an unusually complex territorial dispute, contested to the point of war between two major nations, was accomplished by means of international arbitration.

#### FACTS AND ISSUES

So intricate and manifold were the relevant facts presented and argued by the parties that the Tribunal required over 700 pages to summarize them in a systematic fashion. The broad outlines of this exposition, on the elaboration of which a comment will later be made, appear from a list of the main chapter headings, viz.: "The Nature of the Rann, and the 'Median Line' Concept," "Historical Background," "Boundaries within India under British Rule," "Surveys and Maps," "The Issue of Rights in Parts of the Rann," "Certain Non-Cartographical Evidence," "The Sind-Kutch Boundary as an Issue in British Times" and "Acts of 'Jurisdiction' in the Northern Half of the Rann."

As a preliminary question, the Tribunal during its first session in February, 1966, dismissed a motion made by Pakistan and opposed by India that the Tribunal should declare that it had the power to decide the case *ex aequo et bono*. The Tribunal held that no such power had been conferred upon it by mutual agreement between the parties, but it noted that equity forms part of international law and that the parties were free to present and develop their cases with reliance on principles of equity. The arbitration proceedings were thus judicial in character.

The claims of the parties ultimately were determined with reference to the depiction of a border on claim maps, which in the case of India was a composite map showing the boundaries as depicted on each constituent published map, while in the case of Pakistan the claimed boundary was a thick line imposed upon a freely drawn map produced for the purpose. In the course of the proceedings, two terminal points at either end of the disputed territory were agreed upon by both parties, thereby leaving out-

<sup>4</sup> An agreement on the procedure for demarcation of the boundary was reached by the parties before the end of the oral hearings. It is attached as an Annex to the Award.

side of the jurisdiction of the Tribunal a small portion of the boundary in the extreme southwest. The parties acknowledged that the Tribunal would be free to declare a line different from either claim line to be the boundary. It was likewise established as a premise that the boundary was continuous between the two nations.

In its final assessment of the case, the Tribunal stated that the dispute which it was called upon to decide did not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony and where a judgment has to be rendered on the relative strength of the cases made out by two parties.<sup>5</sup>

In summary, the *Rann of Kutch* case was decided exclusively on the facts. Only in small measure were the arguments of the parties and the decision of the Tribunal focused on abstract legal precepts, and the Award did not enunciate or expound principles of international law other than incidentally.

The issues may most aptly be described by citing the summary of them made by the Tribunal.

#### *First Issue*

The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both parties submit that the boundary as claimed by each of them is of such a character.

#### *Second Issue*

The second main issue is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of "the Rann" in the context of related documents.

#### *Third Issue*

The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan; or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.<sup>6</sup>

#### FINDINGS OF THE TRIBUNAL<sup>7</sup>

With respect to the *first issue*, as thus defined, the Tribunal found that one small portion of the boundary in the second decade of the 20th cen-

<sup>5</sup> Award, Vol. II, pp. 890, 955.

<sup>6</sup> *Ibid.*, pp. 895-896.

<sup>7</sup> As intimated earlier, the decision of the Tribunal was by majority vote. Before the Award was rendered each member of the Tribunal prepared one opinion. Thus, Mr.

ture had been determined to be the boundary between the State of Kutch and Sind and had been demarcated as such. The circumstances, the Tribunal held, were "necessarily such as to preclude Pakistan from claiming that this demarcated boundary be put in issue," for it was "not open to the Tribunal to disturb a boundary settled in this manner by the British Administration and accepted and acted upon by it, as well as by the State of Kutch, for nearly a quarter of a century."<sup>8</sup>

In examining the first issue as regards the remaining and greater part of the boundary, the Tribunal examined and analyzed voluminous documentary evidence dating largely from the period between 1870 and 1947 and falling within the broad categories of maps and non-cartographical evidence, such as official pronouncements and statements in the form of administration reports, etc., incidents when boundaries in the region had been put in issue, and acts of exercise of government authority in disputed territory.

---

Entezam wrote an opinion which is included in the Award (Vol. II, pp. 846-887) and is entitled "Proposal of Mr. Nasrollah Entezam Submitted on 17 November 1967"; the conclusion advocated in it was to uphold Pakistan's claim in its entirety by determining that the boundary should run in the middle of the Great Rann. Mr. Bebler, on the contrary, concluded that India's sovereignty over the entire territory had been established and that the boundary should lie as shown on the latest authoritative map of the area. His main reasons for so holding were that the Sind-Kutch border had been authoritatively depicted on maps published by the Survey of India and that the Great Rann had been officially treated by the British Administration as Kutch territory. The correctness of the alignment of the boundary drawn on the first survey maps in 1870 had "stood the test of time and withstood all vicissitudes of the internal history of the British Indian Empire from the time it first appeared, in 1870, till the end of British rule in India in 1947"; and "throughout this period its correctness was never challenged or doubted either by the Government of India, or by the Government of Bombay, or, after 1935, by the Government of Sind" (Award, Vol. II, p. 842). Mr. Bebler found also that

"The display of British State authority in the Rann, as far as it was not an activity of the British as the Paramount Power over the whole of India—as in the case of patrolling by customs officials—was sporadic both in time and in space and evidently lacked the most elementary requirements for the establishment of a historic title, i.e., continuity, intention and possession '*à titre de souverain*'. It is, therefore, far from sufficient to disturb the recognised and depicted boundary.

"On the other hand, the instances cited by India regarding display of authority by Kutch confirm the boundary as recognised by the two neighbours and depicted in official maps." (*Ibid.*, pp. 844-845.)

Mr. Bebler's opinion eventually became his dissenting opinion, while the Chairman's opinion became the decision of the Tribunal by virtue of Mr. Entezam's filing a subsequent opinion reading as follows:

"In an early stage I considered that Pakistan had made out a clear title to the northern half of the area shown in the Survey Maps as the Rann. I have now had the advantage of reading the Opinion of the learned Chairman, and in the light of it I concur in and endorse the judgment of the learned Chairman." (*Ibid.*, p. 970.)

The findings of the Tribunal referred to and quoted in the text below thus appear in the Chairman's opinion.

<sup>8</sup> *Ibid.*, pp. 897-898.

India's case rested largely on maps produced in the course of several main surveys of the region made by the British Administration. The Tribunal concluded that none of the original survey maps made of the disputed territory depicted an established conterminous boundary between Sind and Kutch or other States forming part of the States of Western India, explicitly determined as such by the British Government.<sup>9</sup> The Tribunal further noted that none of the maps compiled from such surveys and cited in evidence could be held to be invested with a greater degree of authority than would be conferred upon them by the mere fact of their issue. In analyzing the first issue, however, the Tribunal deferred considering until a later point the weight of the argument that the cumulative effect of the publication of official maps, in conjunction with other acts or omissions by the British authorities, and of the interpretation placed on the maps by those concerned at the time might be such that the maps must be given decisive weight in determining the issues confronting the Tribunal.<sup>10</sup>

On the basis of an appraisal of the evidence concerning the several incidents in the pre-partition period in which the disputed boundary had been in issue (*i.e.*, in the course of correspondence connected with surveys, the constitution of Sind as a Governor's Province, an attempt by Kutch to establish jurisdiction over certain areas used by Sind inhabitants for grazing purposes, etc.), the Tribunal concluded on the first issue that the evidence did not support the conclusion that the disputed boundary was a historically recognized and well-established boundary but indicated on the contrary that such a boundary did not exist at any relevant time.

With respect to the *second issue*, which was pressed by India in support of its claim, the evidence considered by the Tribunal consisted of various statements or declarations made by the British Administration prior to independence in the form mainly of official publications, such as Administration Reports for the State of Kutch or other administration areas. These reports included notations implying that the Great Rann as a whole was Kutch territory. In the opinion of the Tribunal, special significance must be attached to statements made by competent British authorities in official government publications which included acknowledgments to this effect. Certain maps were also considered in this context by virtue of their having been published by the British authorities, and a large number of them were found to "depict with striking uniformity a conterminous boundary lying along the northern edge of the Rann"; moreover, some such maps had been seen and approved by the highest British authorities.<sup>11</sup>

Another argument upon which India placed great reliance was that the Rao of Kutch had laid claim to the disputed territory for over half a century by stating that the territory was his, without having encountered denials of his assertions by the British Administration. Since there was no demonstrable connection between the statements made in British publications and the assertions made by the Maharao, the former could be

<sup>9</sup> *Ibid.*, p. 913.

<sup>10</sup> *Ibid.*, p. 915.

<sup>11</sup> *Ibid.*, p. 936.

seen as a relinquishment by the British Government of potential rights rather than as an explicit acceptance of claimed rights. The Tribunal acknowledged that it could be argued that the British administrative acts,

being in the nature of unilateral acts conferring benefits upon a third party, as it were, of grace, or by policy and not as of right, the actions should be restrictively interpreted in favour of the conceding party and its successor in title.<sup>12</sup>

The Tribunal held that the question of the extent to which the third party beneficiary acted in reliance upon such acts, or remained passive, would have an important bearing upon their legal effects.

The resolution of these questions was deferred by the Tribunal until after an analysis had been made of the third issue.

Citing the Award of Judge Huber in the *Island of Palmas* case, the Tribunal held on the *third issue* that available evidence relating to the exercise of sovereign rights and the discharge of sovereign duties over the disputed territory must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions had exclusively or predominantly vested. Clearly, the greater part of the disputed territory was waste land of a forbidding character, where in the nature of things very few human activities could be undertaken. Another circumstance of significance noted by the Tribunal was that at the time relevant in the proceedings the rival sovereign entities were agricultural societies. The activities and functions of government were limited to the imposition of customs duties and taxes on land, livestock and agricultural produce, and to the maintenance of peace and order. Moreover, because of the close dependence of the tax system on land and agricultural production, state and private interests coincided. It would therefore be improper to draw as sharp a distinction between them as in the context of a modern industrial economy.

Against this background, the Tribunal examined the evidence relating to what came to be known in the proceedings as acts of jurisdiction in the disputed territory, that is, instances of display of sovereign functions, "sovereign" being taken in that special sense which has just been indicated. Pakistan placed considerable reliance on the evidence concerning acts of jurisdiction in contending that at all relevant times the British Government exercised exclusive control over the territory. The evidence fell largely into four categories, *viz.*, customs activities, police surveillance and police jurisdiction, criminal jurisdiction and material of a varied character relating to certain portions of the territory, principally the areas known as Dhara Banni and Chhad Bet. These places, which on most maps exhibited in the case appear as an extension of the mainland of Sind, are raised above the level of the Rann and are usable as grazing pastures. Leaving aside the particular areas now referred to, its assessment of the evidence led the Tribunal to conclude as positively established that the police and criminal jurisdiction of Sind authorities had extended to certain parts of the territory, but not to others. No evidence showed that Kutch

<sup>12</sup> *Ibid.*, p. 937.



had either assumed or exercised such jurisdiction over any part of the disputed territory.

Great attention was focused in argument upon the areas of Dhara Banni and Chhad Bet. The Tribunal took it as established that these areas had never been cultivated, nor had they been the site of any permanent habitation. They had, however, been used by Sind inhabitants as grazing grounds at all relevant times; moreover, the State of Kutch had not exercised any active jurisdiction over them before 1926. In that year the Rao of Kutch attempted to collect taxes from those Sind inhabitants who used the grazing grounds. While the tax was nominal, the attempted levy was treated by the Maharao as an act of exercise of government authority. Payment of the tax was refused, and the issue brought into focus was whether and to what extent the collection of the taxes had met with opposition on the part of Sind authorities, including Sind police, or the British Government. Prominently figuring in the evidence was an order by a tax official in one of the Sind districts, who in 1927 pronounced upon a petition by the Sind villagers that the territory was British and that no tax was leviable by Kutch. Shortly thereafter the efforts by Kutch to collect such taxes were discontinued, but in 1944 they were revived on Chhad Bet, and at this time a Kutch patrol arrested certain Sind villagers on account of their refusal to pay the tax. This event gave rise to a claim by the Sind police that the Kutch officials were guilty of wrongful confinement and beating and led in subsequent years to a request for their extradition to the British authorities. The Tribunal held that it was not established that the request for extradition was opposed by Kutch, and it concluded that consequently, shortly before independence, the British authorities considered Chhad Bet to be Sind territory and acted accordingly vis-à-vis Kutch.

In summary, the Tribunal held that for over one hundred years the sole benefits which could be derived from Dhara Banni and Chhad Bet were enjoyed by inhabitants of Sind. While it had not been suggested that British taxes were levied on the grazing, the assumption seemed to be justified that the task of maintaining law and order was discharged by the Sind authorities; it had not even been argued that Kutch viewed that as part of its duties. The activities of Kutch in seeking to levy taxes never became fully effective and, moreover, were opposed by the British Government authorities. Thus, they could not be deemed to constitute continuous and effective exercise of sovereign authority.

Having thus analyzed the three main issues arising for consideration in the case, the Tribunal noted that the dispute was one of great complexity and that the evidence adduced by the parties in support of their respective claims was "in respect of certain parts of the territory at issue almost evenly balanced." The Tribunal stated that "the ultimate determination therefore is both difficult and in exceptional measure dictated by considerations which do not heavily outweigh those considerations that would have motivated a different solution."<sup>13</sup>

<sup>13</sup> *Ibid.*, p. 955.

In summarizing its conclusions, the Tribunal at first disposed of an argument by Pakistan that a regional custom applied in the area of the Great Rann and the Little Rann to the effect that the Rann itself was acknowledged to appertain to the territorial units abutting upon it, to the shores of which it, and the elevated areas within it, were nearest; no constant and uniform usage of such a character was held to be established.

The Tribunal next examined the three grounds upon which the case of India rested. The first was that the assertions of the Rao of Kutch that the Rann was his territory had not been contradicted by the British authorities for about three-quarters of a century before independence. This ground was found to be fragile, because until 1926 the assertion had no foundation in concrete government action; hence the Rao had not acted in reliance upon his own assertions.

The second ground of India's claim was statements made in reports both by the Rao and by the British that the Rann was Kutch territory, and particularly those statements in certain gazetteers in which the area of Kutch had been qualified by the words "exclusive of the Rann," etc. It was not certain whether "the Rann" in this context included the elevated areas, and the Tribunal held that any uncertainty in that respect ought properly to be resolved in favor of Pakistan because of the form in which the unilateral claim by the Maharao had been made and because it was unsupported by other action.

The third ground of India's claim was the depiction on maps published by the British Government in India of a conterminous boundary roughly coinciding with India's claim line; such a boundary in fact became a constant feature on all maps produced by the Survey of India after 1907. This, the Tribunal found, was the most convincing ground of India's case. However, the Tribunal observed, they were maps, and when viewed in the context of the political system in India during British times, none of them was a conclusive and authoritative source of title to territory except that particular map depicting a small demarcated portion of the boundary which the Tribunal had already determined to be settled. The boundary depicted on the maps in question, and on which India's case principally rested, could not have been intended to offer more than a rather tentative indication of the actual extension of sovereign territorial rights. For in the British political system in India, whenever the true extension of sovereignty over a territory was in issue, the evidentiary value of maps was lessened, and the maps were made to yield to evidence of superior weight. The maps relied upon by India therefore were held not to be conclusive support for a positive claim of sovereign title.

The three grounds of India's case were noted to have the feature in common of being acts of relinquishment, and these acts, the Tribunal concluded, had the effect of leaving, as it were, the greater part of the disputed territory in the hands of the sovereign or sovereigns who by reason of geographical proximity were there to receive it.

In examining the bases of the title claimed by Pakistan, the Tribunal noted that authorities in Sind on several occasions had given expression to

the view that the disputed territory was British. It analyzed particularly the evidence relied upon by Pakistan which demonstrated the display of State activity. The Tribunal found that it had not been proved that Sind exercised continuous and effective jurisdiction and authority over the whole of the disputed territory, but Kutch had not been found to do so either, if indeed at all. On the other hand, Sind had been shown to have established a presence in certain specific areas in a manner which came "as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances."<sup>14</sup>

In a concluding paragraph, the Tribunal decided that in respect of those portions of the disputed territory in which there was no specific, or insufficient, evidence of display of Sind authority, the territory was Indian. Pakistan, however, had made out a better and superior title to those sectors where it had established a continuous and, for the region, intensive Sind activity, meeting with no effective opposition from the Kutch side. In reaching this conclusion, the Tribunal had regard to the true extent of sovereignty before independence, and the evidence relating to the post-independence period was dismissed as immaterial.

The boundary determined by the Tribunal was depicted on a composite Award Map made for the purpose. The Tribunal stated that straight lines had sometimes been adopted because of the imprecise topography of the region and the impossibility of exactly delimiting many acts of State authority.

For the most part the boundary followed the northern edge of the Rann. This edge is in places a jagged one, and includes in particular a large peninsula with a narrow base, called Nagar Parkar, on either side of which there is a deep, narrow inlet. The boundary determined by the Tribunal cut across these inlets. The reason given by the Tribunal for awarding them to Pakistan was that

it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.<sup>15</sup>

It is believed that if the issue of the sovereignty over the Nagar Parkar inlets had been presented differently in argument, they would have been recognized as Pakistan territory on another legal ground, in that the Tribunal would probably have pronounced that Sind could be deemed to have exercised exclusive control over the inlets at all relevant times.

#### IMPLEMENTATION OF THE FINDINGS

As noted earlier, an agreement was reached between the parties before the conclusion of the oral hearings as to the manner in which the boundary determined by the Tribunal should be demarcated on the ground by the parties jointly. The governments proceeded to do so in the spring of 1968, and the work was completed in the summer of 1969 by the erection of a

<sup>14</sup> *Ibid.*, p. 965.

<sup>15</sup> *Ibid.*, p. 968.

total of 847 pillars and the execution of final maps. The Tribunal was kept advised of the progress of these activities by monthly reports but was never called upon to resolve any differences arising in the course thereof. The demarcation work was one of great magnitude and had to be carried out under arduous conditions.

#### PROCEDURAL AND ADMINISTRATIVE ASPECTS

The rules governing the procedure in this arbitration were few, and a general characteristic of the conduct of the proceedings was that they were flexible throughout. Argument concerned predominantly documentary evidence. While the number of secondary and alternative issues presented in the case was large, the positions of the parties were continuously made precise in written statements formulated by them or by the Tribunal, and approved by both parties in official minutes of each meeting.

It is believed that the rule on discovery and inspection referred to above<sup>16</sup> may have been an innovation. The Tribunal found occasion to commend the parties for having, in unique measure, assisted the Tribunal and each other in the production and search for evidence. In fact, it may be asserted that documents produced from Indian Government archives and forming a cornerstone of Pakistan's argument had a decisive bearing on the outcome of the case.

A comment should also be made on the manner in which the expository part of the Award was prepared for the purpose of expediting its completion. The various chapters were initially drafted partly by the Tribunal and partly by the parties. They were thereafter reviewed by the Tribunal and by both parties, which submitted voluminous comments on the text, and counter-comments on each other's comments. On the basis of this material, the Tribunal edited the final text of the expository nine chapters devoted to a summary of facts and evidence. The Tribunal was unanimous with respect to the greater part of the text, but Mr. Bebler presented separate versions of certain sections of the chapter devoted to surveys and maps and that dealing with the areas of Dhara Banni, Chhad Bet and Pirol Valo Kun, which were among the areas declared in the Award to be Pakistan territory. The Award includes thus, as it were, a dissenting opinion affecting certain parts of the expository chapters of it.

#### CONCLUSION

The scope of the *Rann of Kutch* case, as intimated earlier, may be seen as limited to the close confines of the particular facts at issue. Even those facts, which are intimately interwoven with the concepts of the British Government system evolved on the Indian subcontinent before independence, may appear not to have substantial significance outside of the compass of the case. However, the arbitration may be said to command special legal interest in certain areas.

First, the case offers a profound insight into the government system applied in India under British rule. It is submitted that especially the con-

<sup>16</sup> Note 1 above.

cepts of sovereignty and the nature of territorial rights developed within that system are of great interest to the student of international law. The record is replete with documentary material referring to many aspects of those subjects.

Second, the Award includes an important analysis of the evidentiary weight which should properly be accorded to various authoritative grounds on which sovereign territorial rights may be asserted, and particularly of the relative importance of maps as against the display of sovereign functions. It is believed that map-making processes never have been so incisively described and analyzed as in this case.

Third, the procedural and administrative aspects of the arbitration proceedings illustrate the potential efficiency and flexibility of an *ad hoc* arbitral tribunal resolving a matter of great factual complexity. Experience supports the conclusion that this feature of the proceedings, together with their intimacy and privacy, enhance the trust placed by sovereign parties in a tribunal, which is an essential prerequisite of ultimate success.

Above all, however, the *Rann of Kutch* arbitration demonstrates that even today a peaceful settlement can be reached in a dispute affecting large nations which, though superficially insignificant, has been the cause of war. It is therefore to be hoped that it will serve as a precedent for the settlement of other disputes of like character in which an exhaustive and impartial judicial examination may be a proper vehicle for assuring a peaceful resolution of justiciable issues.

# VAE VICTIS OR WOE TO THE NEGOTIATORS! YOUR TREATY OR OUR "INTERPRETATION" OF IT?

(REVIEW ARTICLE)

By Sir Gerald Fitzmaurice \*

Bliss was it in that dawn to be alive;  
But to be young was very heaven!  
Wordsworth, *The Prelude*, Book 11.

Where Alph, the sacred river ran  
Through caverns measureless to man  
Down to a sunless sea.  
Coleridge, *Kubla Khan*.

## I

### AIMS AND OBJECTS

The length of time which has unfortunately (owing entirely to the procrastinations and backslidings of this reviewer) elapsed since the date when this (by any standards) most original and arresting work was first published in April, 1967,<sup>1</sup> makes it scarcely necessary to supply that systematic description of its contents which, up to a point, any well-ordered review ought to seek to do,—for by this time all those who are interested in its subject matter will have read or at least looked through it. We shall therefore concentrate on those salient aspects of it which, even after the familiarity of three years has softened their outlines, still seem to stand out with special prominence.

Arresting and original—yes. But this is and remains a very difficult work to assimilate and, partly for that reason, to be fair to. We doubt whether we shall in fact succeed in being fair to it, and think it best to declare ourselves in that sense at the outset. Not only do the authors make the task exceptionally difficult, for reasons that will appear and which indeed constitute a major part of our complaint, but, in addition, the book is peculiarly well calculated to run foul of some of our most dearly cherished predilections! Having said this, however, we hope we can claim to have complied, or tried to comply, with at least one of the recommendations the authors make to “decision-makers,” namely (p. 383), to carry out the operation of “*examining the self . . . for bias*” (italics in the original), as a first step towards modifying one’s outlook.<sup>2</sup> If, however, having taken this step, and

\* Judge of the International Court of Justice.

<sup>1</sup> The Interpretation of Agreements and World Public Order. Principles of Content and Procedure. By Myres S. McDougal, Harold D. Lasswell and James C. Miller. New Haven & London, Yale University Press, 1967. pp. xxii, 410. Index. \$9.75; £3.60.

<sup>2</sup> Both the validity and the practical utility of such a recommendation, when addressed to persons acting in a judicial capacity, may be questioned in the context of

considered the results, we still find ourselves with a different outlook from that of our authors—indeed perhaps surveying a different scene—and if this is to be accounted unto us as bias—then we must suffer the imputation as best we may.

*“Down to a sunless sea”*—The title given to the last chapter of the book is, symbolically, “Past Inadequacies, and Future Promise.” It is indeed a new dawn of treaty interpretation that is heralded by this promise, if we will only employ the recommended techniques. Gone will be the old confusions, uncertainties and inconsistencies, and it will be a case of

The world’s great age begins anew,  
The golden years return . . .<sup>3</sup>

Alas, it is to no smiling ocean, with all the winds and currents setting in the right direction, that the authors channel the sacred stream, but to a sunless sea without beacons, buoys or landfalls;—for this is one of the great paradoxes of this book, that, intended to place the “decision-maker” on a sort of conveyor belt which will lead him, as it were painlessly, if not always to the right spot precisely, then to some haven very close to it, an exactly contrary impression of near disorientation is left on the mind of the reader. It is a world in which almost anything can happen. One is told how to punch the cards, and in what order to feed them to the computer, but there is no knowing what will come out;—for although one of the chief aims professed by the authors is to give effect to the “shared expectations” of the parties and, for that purpose, to achieve a reasonable degree of certainty in the process of treaty interpretation (what they call the principle of “stable future expectations”), yet enough jokers and wild cards have been hidden in the machine to ensure that negotiators can never know what will happen,—until it does!

This matter we shall revert to later. But first we must take a look at those caverns, indeed “measureless to man”—or at least to this reviewer,—through which we are to be led on the way. There, insofar as the tenuous and uncertain light allows us to see them, we shall find, like Christian passing through the Valley of the Shadow, many new strange and repellent monsters lurking.

---

this work, and generally;—for (1) the “decision-makers’” duty of impartiality is elementary, though fundamental,—it exists in all circumstances and whatever the character of the dispute or point involved,—it is in no way peculiar to treaty law or interpretation as such; (2) a judge whose bias is presumable, because of some such thing as a concrete (*e.g.* financial) interest in the subject matter of the dispute, and so on, is in any case bound to stand down, and therefore ceases to be, for that case, a “decision-maker,” so that *cadit quaestio*; (3) if the judge’s prejudices are of a subjective character, but are not such that he could be successfully challenged in the given case, the matter must be left to his own conscience,—but simply as part of his normal judicial duty which involves other, hardly less important obligations, such as to study the applicable law, inform himself of the precedents, etc.

<sup>3</sup> Shelley, *Hellas*.

## II

## STYLE AND LANGUAGE

Hence loathed Melancholy  
 Of Cerberus <sup>4</sup> and blackest Midnight born,  
 In Stygian caves forlorn,  
 'Mongst horrid shapes, and shrieks, and sights unholy.  
Milton, *l'Allegro*

*Stygian waters* <sup>5</sup> and *Cimmerian darkness*,<sup>6</sup> or the new *obscurantism*—We would never presume, and it would indeed be totally non-representative of our real attitude towards the three very distinguished authors of this book, to describe their own outlook as Stygian or Cimmerian,—yet it remains the fact that one reason why, as already mentioned, it is no easy task to be fair to this book, is that it is written in a highly esoteric private language,—we do not say jargon, but a kind of juridical code which renders large tracts of it virtually incomprehensible to the uninitiated (or at least to the unpracticed and unversed), short of a word by word “construe,” such as we did in school with our Latin unseens. Even so, the reader, professional though he may be (and this is hardly a book that can have been intended for students), will frequently be left with a feeling of honest doubt as to whether he has really—or fully—grasped the intended significance of what he has been reading.

That these strictures are not merely the carplings of a disgruntled reviewer forced for once to study and reflect, instead of only to skim and to scold, will soon be demonstrated.<sup>7</sup> In passing, it is worth noticing that the offense with which Milton taxed Melancholy was the fact, not of her existence, but of her appearance in the wrong place. Indeed, in the *Penseroso* he commends her qualities of heart and mind which make for repose and *gravitas*. He even apostrophizes her as “divinest Melancholy,”—but he is quick to add

Whose saintly image is too bright  
 To hit the sense of human sight.

And this very neatly expresses the crux of the complaint we are making here; for a brilliant effulgence there may be, but it defeats its purpose if it

<sup>4</sup> This creature is defined in Chambers' Twentieth Century Dictionary (1962 ed.) as “the monster that guarded the entrance to Hades, a dog with (*at least*) three heads”—italics ours!

<sup>5</sup> The same source defines “Stygian” as “of the Styx, one of the rivers of Hades, across which Charon ferries the shades of the departed: hellish, infernal: black as the Styx.” The 1965 Penguin English Dictionary says “of or like the underworld river Styx: dark, gloomy.”

<sup>6</sup> The Cimmerii were a tribe fabled to have lived in perpetual darkness.

<sup>7</sup> The very title of the work (see note 1 above) gives rise to doubts,—for the category of general multilateral conventions that chiefly involves questions of “world order” is a comparatively small one, and the book is clearly not intended to be restricted to agreements of this kind. Equally there are doubts in respect of the subtitle: “Principles of Content and Procedure,” for the *content* of a treaty is what the parties in fact put into it. There are no principles as to what they must put into it. And by principles of *procedure* is presumably meant methods or technique—of interpretation—yet interpretation is not a *procedural* but a substantive process.



is too bright "to hit the sense of human sight." In *l'Allegro*, therefore, Milton's point was that in a world in which all should be sweetness and light, Melancholy was not wanted—and so "Hence loathed Melancholy" of the Cerberean birth, etc.

Is it over-fanciful thus to perceive an analogy? Is an inspissated<sup>8</sup> obscurity any more justified in a work on treaty interpretation than melancholy in the realm of good cheer? The old saw is irresistible: *Quis custodiet ipsos custodes?* Who shall interpret the interpreters, and ought it to be necessary to do so? If a work on interpretation requires itself to be "interpreted" and practically transliterated into ordinary language before it can be understood, what value are we to attach to the views on interpretation expressed in this, itself most interpretation-requiring of works?<sup>9</sup>

The call is not for simplicity in the sense of absence of complexity, for interpretation, whether of treaties, contracts, statutes, wills, leases, conveyances, etc. is, and always will be, a difficult and complex matter;—which, however, renders clarity of exposition, and the use of terms that do not require a glossary for their elucidation, all the more important.

It is now time to show that these animadversions are not just the fuddy-duddy outpourings of a senile and saurian purism. To that end we shall cite (with, where possible, elucidations) a few passages from various parts of the work. We admit that these have not been chosen exactly at random, —nor have they been specially selected, except in respect of the final sentence of the last of them (for reasons which will appear). They are in fact matched by many other passages of a like nature, occurring in key places, thus showing that the use of this kind of language is no mere case of the occasional abstruse or difficult sentence or expression,—that it is in fact a deliberately employed technique. We also admit that the passages cited are taken out of context, but submit that the usual objection to this practice does not apply here,—for that objection is that, by so doing, the meaning is falsified or distorted. Here the issue is different, namely, whether there is any readily discoverable meaning at all.

The following passage taken from page 351 of the book, under the heading of "The Operation of Estimating Agreement Probability,"<sup>10</sup> may be

<sup>8</sup> The—in the context—decidedly felicitous dictionary meaning of this adjective is "thickened"; "rendered more dense"—see references given in notes 4 and 5 above, and also R. H. Hill's *Dictionary of Difficult Words* (Arrow Books Edition, 1963).

<sup>9</sup> In fact, it would be difficult to find a better expression for describing the general style of the book than that of "linguistic esotericism" which the authors themselves use (p. 269, line 8) in alluding to an interpretative process they disapprove of,—an almost classic example of the pot and kettle syndromel

<sup>10</sup> A not at all clear definition or attempted explanation of the notion of "estimating agreement probability" is given on p. 60 of the work. It is apparently intended to denote the process of having regard to the surrounding circumstances, and in particular to the presence or absence of other similar agreements in the field concerned, in order to judge whether it is likely that the parties would in fact have entered into an agreement on the lines alleged—(alleged that is to say, by one of them,—for if both allege it, there is no dispute on the point)—and whether the agreement is of the kind that would probably have been concluded in the given case.

regarded as a fairly typical example of the authors' methods of exposition:—

The pragmatic dimension of communication analysis, to which agreement probability relates, has been examined in part by decision-makers as one aspect of the overall contextual approach. The contextual survey of the participants' shared demands and expectations, tracing these factors from early through current conditions, has nonetheless failed to make use of available operations in examining the "causes" of a communicated message. Past techniques developed for examining the "consequences" or "effects" of communication have failed to produce any more adequate results. The main references to the effects of communication have resulted, as we saw above, in analyses of its effects on the decision-making process and upon the participants as manifested in their subsequent courses of conduct. But the predominant emphasis of the pragmatic dimension of analysis has most frequently been limited to considerations of the "reasonableness" of reliance upon the communicated message. The operations designed to assess this feature of the agreement process, however, are scarcely representative of the operation of estimating agreement probability to which we refer.

Even though, after reading three hundred and fifty pages of the book, some skill may have been acquired in breaking the authors' cypher, this portentous passage frankly continues to baffle the present reviewer, if not as to its basic drift,<sup>11</sup> then as to the possibility of re-stating it in simpler and more readily comprehensible terms. We will not therefore here attempt such a re-statement, as we do in the case of certain other passages to be quoted later. True it may be that a number of the more recondite expressions employed are defined or explained, or attempted so to be, elsewhere in the book.<sup>12</sup> But an exegesis on interpretation should use terms that can be understood even when standing alone. Nor should writers assume that all utilizers of their work are going to be persons who will read it straight through as written. Quite as often,—and even habitually if they are practitioners—they will consult the table of contents, and/or index, and turn straight to the relevant paragraph.

We cite next the following, relatively speaking, much simpler but still highly elliptical passage, from page 42 of the book, in which the attempt to achieve synthesis by means of an advanced degree of compression is merely self-defeating:

We may further specify our recommended integrative goals by emphasizing the consequences of interpretation for the aggregate agreement process. Since clarity of expectation may be encouraged in fu-

<sup>11</sup> From the authors' immediately following references to the 1962 South West Africa case (I.C.J. Reports, 1962, p. 319) it appears that the sort of problem envisaged was such a quite simply stated one as whether the Mandate for South West Africa amounted to an international agreement,—did those concerned treat it as such?—were other League of Nations Mandates regarded as treaties or agreements?—etc.

<sup>12</sup> The following expressions contained in the passage quoted would require elucidation by anyone coming upon them *for the first time* in such a context as that of this work: "pragmatic dimension"; "communication analysis"; "agreement probability"; "decision-makers"; "contextual approach"; "shared demands and expectations"; "communicated message"; "effects of communication"; "analyses of its effects [*i.e.* of the effects of the "effects of communication"] on the decision-making process"; etc.

ture agreement-making if decision-makers give deference to carefully worked out arrangements, we include among the objectives of interpretation the encouragement of deliberate efforts among the parties to future agreements to obtain definiteness of expectation.

This seems to mean (or does it?) that if you interpret agreements in the way the parties wanted (although the question of what they *then* (jointly) wanted is, of course, precisely what is in issue and now to be determined),<sup>18</sup> they will be encouraged in future agreements to make what they want clearer. It seems permissible to discern the lurking shadows of a *circulus inextricabilis* here, even though the exact meaning to be given to the expression "clarity (or "definiteness") of expectation" eludes the reviewer.

A further example of the same propensity for synthesis and compression, occurs on page 266 where the following sentence is to be found: "The absence of indicia of explicit rationality in the promulgative arena need not, thus, necessarily indicate that explicit rationality was not employed in the cameral arena." Being translated, this means no more than something like the following: "Because a tribunal does not give reasons for its findings, this does not entail that it did not have and discuss any during its private deliberations,"—same number of words but several magnitudes clearer, we hope.

It is of course obvious—and this is relevant to almost every sentence in the book—that when the authors use expressions such as "the promulgative arena," "the cameral arena," etc., their aim is to use terms which can cover any one of a number of different manifestations of the same process: thus one can seek to subsume under a single term such things as, for instance, (a) anything "handed down," be it judgment, decision, award, ruling, finding, order, decree, etc.; or (b) any "decision-making" *entity*, be it a court, a tribunal, a commission, a committee or even one man behind a desk sorting out an office squabble. But in the context of treaty interpretation such attempts to invest the subject with a pseudo-scientific aura are unrealistic and vain. It is as if an oculist should say to his client: "The fact that an aid to vision does not re-act adequately to normally-to-be-expected conditions of luminosity is not necessarily an indication of more than the existence of an adjustment-requiring situation." Such language may have the abstract virtue of applying to many more "aids to vision" than spectacles—for instance, telescopes, field glasses, opera glasses, microscopes,

<sup>18</sup> The difficulty is that the parties do not both, or all, want the same thing. If they did, there would be no dispute, and no occasion for any decision on interpretation. This fence, which constantly recurs, the authors seem to ignore. Phrases such as "the shared expectations" (whether "genuine" or not!) of the parties—or even the more traditional "intentions of the parties"—really only cause confusion, because the parties invariably appear in court as not *sharing* any expectations at all, and as having no common intentions. They may originally have done so, and this of course is what the court has to discover. But it would save a great deal of trouble if, instead of this unrealistic phraseology, reference were made to the intention or intentions, object or objectives, of the *treaty*, in which the parties are supposed to have embodied their (then) common desiderata. This, however, is something our authors are bound to dislike—see end of note 18 below.

reflectors, magnifiers, dioramas, view-finders, range-finders, telescopic sights and even, at a pinch, lighthouses, heliographs and cameras. But the client might well be forgiven for replying: "You mean I need different lenses."

Less defensible still, is the use of such an expression as "explicit rationality," which does not even have the (though quite superfluous) merit of being a portmanteau term. Since, in the context, the "absence of indicia of specific rationality" simply means a failure to give grounds for a decision, it has to be inferred, or guessed, that "specific rationality" means the process of giving such grounds. Even so, there is an element of uncertainty, for elsewhere (page 64) the authors indicate that what they mean is not so much stating the actual reasons, as stating the principles (of interpretation) upon which the actual reasons are based. In practice, no doubt, it comes to much the same thing,—but why use such an ambiguous expression as "rationality," the *primary* meaning of which is the quality or process of being rational? And where does "specific" come in?

We turn next to page 319, where the following passage is to be found:

The most frequent application of the lexical operation has been in analyses of the cultural features of the largest shared audiences of particular communications made in the agreement process. In recent years a more general form of this concern has emerged in which the explicit specification of lexical operations in relation to the largest shared audiences has become paramount. . . .

It would seem (but only by reference to quite a different part of the book, page 216 *et seq.*) that the expression "the largest shared audiences" is intended to denote either the community at large or that part of it to which the particular agreement has reference. Thus the principle of interpretation according to the "plain" or "ordinary" meaning of terms, contemplates that meaning which would appear to be the "plain" or "ordinary" one to, say, the man in the street;—or if the agreement is about some health matter, that which members of the medical profession would regard as being, in the medical sense, the plain or ordinary meaning of the words used,—and so on. If that is the case, then, although the exact significance of the expression "the lexical operation" remains somewhat obscure,<sup>14</sup> it would seem that the first sentence of the paragraph under discussion can be explained in the following way, namely, that in the interpretation of an agreement it is necessary to analyze the linguistic usages of that section of the community to which the parties belong or to which the agreement has reference. The second sentence continues to be baffling. What, in particular, is the "specification" of the lexical operation? Perhaps the sentence simply means that in recent years there has been a tendency to make use of a wider context or frame of reference in carrying out the analyses necessary for the process of interpretation? Now in the ideas underlying this passage, the language of which we have been criticizing, there is much of quite acceptable substance. Why not therefore express it in a way which the normal intelligence can grasp without recourse to the so-called "lexical operation"?

<sup>14</sup> The dictionary meaning of "lexical" is "belonging to a lexicon." Is there an *operation* of belonging to a lexicon?

We shall finally cite the following passage taken from page 188:

It should not be surprising that more extensive references by decision-makers to explicit anticipated solutions of subsequent disputes are seldom found, since in the degree to which solutions are spelled out either in the text or in preparatory work the probability of the dispute reaching the level of community decision obviously decreases. However, the increasing diversity in the various indices of expectations in modern multilateral agreements, as indicated by recent holdings of the International Court,<sup>15</sup> may serve to encourage litigation even in cases where one of these indices clearly outlines an anticipated solution. In addition, as Beckett has pointed out, participants may be induced to present claims, for various reasons of prestige or diplomatic advantage, even in the presence of explicitly communicated anticipations of present contingencies.

Before attempting any analysis of this passage it must be said in parenthesis that Sir Eric Beckett (then principal Legal Adviser to the Foreign Office, in London), who was well known for his exceptional clarity of thought and expression, could never possibly have said anything at all in the *form* here attributed to him by the authors. They do not give the reference, but we have identified it, as now set out in the footnote below,<sup>16</sup> —and if the authors' description of what Beckett said is read in conjunction with what he actually said, it seems to amount to this—that parties to a treaty may sometimes have political reasons for bringing a case under it, even though they have reason to anticipate that they will lose. But nothing as simple as that can be said to be apparent in the phrase "explicitly communicated anticipations of present contingencies."

Turning now to the first two sentences of the paragraph we are discussing (on page 188 of the book), it seems, from what immediately precedes them on pages 186–187, that the expression "anticipated solution" is intended to denote what may eventually come to pass, by way of outcome, in

<sup>15</sup> What "holdings" of the Court are being referred to is not specified, but the case of Reservations to the Genocide Convention is cited a paragraph earlier (pp. 187–188). It also seems from various passages elsewhere that another case the authors might have had in mind would be that of Certain Expenses of the United Nations. By "indices of expectations" the authors appear to mean the existence of pointers to what the parties to the agreement would have wanted, had they anticipated what subsequently occurred, which of course they did not, or the dispute, of which this non-anticipation constitutes the real issue, would not have arisen.

<sup>16</sup> The reference is to a passage on p. 440 of Vol. 43 (I, 1950) of the *Annuaire de l'Institut de Droit International* (Bath Session). Beckett was answering (*inter alia*) a contention of Lauterpacht's to the effect that *ex hypothesi* there never *could* be a "plain sense of the words" in the case of disputed treaty clauses, for if the sense was really plain there would be no dispute about it. Beckett thought that it was not correct,

as a matter of practice, and experience, to state that the meaning of a treaty provision cannot be clear or otherwise the States concerned would not be going to the trouble and expense of litigating about it. It certainly happens that the meaning of a treaty provision is perfectly clear but that one or another party to the treaty has for one reason or another found the provision inconvenient.

And, finding this inconvenient, it sees in a reference to adjudication (in which it may win but will be no worse off than before for losing) a possible solution. Beckett added: "The political position of the State concerned may be such that it can only give way on the basis of an international legal decision."

a position in which the parties, during their negotiations, discussed a possible course, which, however, without actually rejecting it, they did not eventually embody in the final text of their treaty. This could be either because they thought the situation it related to would not materialize, or because they were not really in agreement about it and trusted it would not. Or again—something to which both Hudson and Beckett<sup>17</sup> had drawn attention—it could be that the parties did not think about the matter at all, in which case there could not truly be even an “anticipated” solution.

In all these cases, however, whether the parties did not think about the matter, or did think about it but did not deal with it in the treaty, the so-called “anticipated solution” must evidently consist in practice of the view which the adjudicator himself takes as to what the parties *would* have done about the matter if they had both thought about it and dealt with it in the treaty.<sup>18</sup>

We shall comment later on the basic merits of this idea. The authors’ defense of it is, however, far from convincing. In the first sentence of the paragraph which we are citing from page 188 of the book, it is admitted that there is not much judicial authority for the doctrine of the anticipated solution because, insofar as the parties did in fact anticipate a solution, the matter will probably not reach the “decision-makers” at all. This seems an obvious but a somewhat lame conclusion. However—so the authors hopefully continue (this is the second sentence of the quoted passage)—there may yet be some litigation if the courts are willing to have regard to the “increasing diversity” of pointers<sup>19</sup> to be found in “modern multi-lateral agreements,”—that is to say, pointers as to what the parties may or might have intended about something they did not clearly deal with, or

<sup>17</sup> Manley O. Hudson, *The Permanent Court of International Justice* (1943), p. 644; Beckett, *Annuaire of the Institute of International Law*, Vol. 43 (I, 1950), p. 438.

<sup>18</sup> There is only limited substance in the charge which the authors make against Beckett at the end of their note 226 on p. 187, namely, that he “failed to consider the possibility of determining, by an analysis of *travaux [préparatoires]*, just what issues were deadlocked and what anticipated conflicts were resolved or left unresolved by such a conference” [*i.e.*, a private meeting of heads of delegations];—for Beckett’s whole point was that meetings of this kind, being private, nothing appeared about them in the official record. One may of course be justified in thinking that when the record peters out on a particular issue, this is because that issue has become deadlocked. But it may equally well be due to other causes: the issue has been overtaken in some way, or become secondary, or the participants have tacitly agreed to bypass or drop it. Beckett’s point was that if an issue *is* deadlocked and is resolved at private off-the-record meetings, no indication of the *way* in which it was resolved will appear *except in the text of the treaty itself*. But, for our distinguished authors, to have to rely on the mere text of the treaty alone, without any other aid, amounts to a fate almost worse than death!

<sup>19</sup> Some such term as “pointers” seems preferable to the authors’ favorite “indices” or “indicia,” which are either ambiguous or incorrectly employed. The word “index” has two plurals, “indexes” and “indices,” but the latter is strictly of mathematical connotation, meaning, in the exponential sense, the power to which a quantity is to be raised by successive multiplications of itself. “Indicia” is not a plural alternative to “indices” but the plural of the Latin “*indictum*,” which can mean an indication but has several other meanings such as disclosure, evidence, proof, and even permits or rewards given in connection with testifying.

did not deal with at all;—because, even if there is one pointer obviously tending in a particular direction that the parties, or some of them, do not like (and this is the implication), there will always remain the possibility for the court to decide on the basis of a different though *ex hypothesi* less clear but, to some at least of those interested, more welcome pointer.

The authors seem to see nothing strange in the idea that a court should deliberately act in this way,—that is to say, ignore a clear pointer in favor of others less clear but, presumably, leading to a better result for *some* of the parties. Here again the authors overlook the fact (see note 13 above) that the parties are not both or all wanting the same thing, or there would be no dispute, and that a decision in favor of the one side, on the basis of *less* clear pointers, must run counter to the right of the other side to succeed on the basis of the clearer pointer. The implication, in short, is that in the case to which the authors specifically refer in the sentence under discussion, namely, that of “modern multilateral conventions,” a court, balancing the various legal factors involved, might be justified in reaching what would in effect be a policy decision not necessarily based on the real juridical weight of these factors. We cannot share that view.

### III

#### DOCTRINE AND SUBSTANCE

With the concluding part of the last section we have moved over from the manner to the substance of what the authors say. If there is any single leit-motiv in what is an extremely complex theme, it seems to consist in a powerful plea for a completely “open-ended” technique of interpretation. In a sense it is the same plea that Sir Hersch Lauterpacht put forward fifteen years before this book was written,—but quite a different method is proposed for reaching the desired result. Lauterpacht’s contention was, in essence, that principles or rules of interpretation were of little practical value, and should be disregarded, or at least used only as rough guides. The traditional rules tended to be contradictory and to cancel one another out. Each case involving the interpretation of a text was *sui generis*, and a conclusion should be arrived at only in the light of *all* the factors that might affect it.<sup>20</sup>

In the present work, exactly the opposite method is advocated. Every conceivable principle and rule of interpretation is instanced (including, it must be said, a number that one does not think one has ever heard of before), and these are listed in certain ordered categories, so that, whereas Lauterpacht wanted, paradoxically, to cover the ground by first clearing it of everything, in the present work the ground is, with equal paradox,

<sup>20</sup> See Lauterpacht’s Report to the Institute of International Law in the *Annuaire* for 1950, Vol. 43(I). For a convenient summary of the controversy between Lauterpacht and Beckett (see note 16 above) on this and certain other questions of treaty interpretation, see Fitzmaurice and Vallat’s article on Beckett and his work in 17 *International and Comparative Law Quarterly* (April, 1968) at pp. 302–313, more particularly pp. 303 and 310–313.

covered so comprehensively with everything that little of it remains visible—the wood cannot be seen for the trees.<sup>21</sup>

At the same time, Lauterpacht did think that if (contrary to his view) the traditional principles and rules of interpretation were to be retained, then at least an attempt should be made to place them in some kind of logical array, and to establish a sort of hierarchy indicative of the order of weight or precedence which they should be regarded as having *inter se*.<sup>22</sup> In this, our authors seem to agree with him (as did Beckett at the time),<sup>23</sup> and this book consists indeed, in large measure, in a useful, if only partially effectual attempt at such an arrangement (see in particular at pages 35–77),—a summary of recapitulation of the results arrived at being given towards the end (pages 382–390). But to this reviewer, these results appear to amount to little more than a listing of techniques of interpretation (“check-points”) or goings through of motions, *all* of which are to be indiscriminately applied<sup>24</sup>—in a certain temporal order it may be—but not one adequately related to weight or precedence,<sup>25</sup> except that an overriding preponderance is given to certain notions of a very general, wide and far-reaching character which we shall discuss later (but these are notions which, as will be seen, are hardly in the nature of interpretation as such, but intended rather to go beyond that and, in effect, to amend the agreement or even cancel it altogether).

*Vae victis*—Hence therefore our cry of lamentation and foreboding: woe to the negotiators, for indeed would they be vanquished, and woe would it be unto them, if much that is contained in this book had to be taken literally. It would not be *their* treaty that would emerge from the fray, but another that someone else thought was the one they should have entered into. However, to start with something relatively minor, though not unimportant—for it is by its over-inclusiveness that much of this system errs—what, for instance, is to be made, and what are the implications, of the following passages read together?—

Page 372:

The *conception* of agreement as a process of communication, then, involves viewing *all signs and acts* (our italics here) of collaboration between the parties as an effort on their part to mediate all relevant subjectivities of commitment.<sup>26</sup> Seen in this way, communication involves the transmission of *signs . . . to targets*<sup>27</sup> or *audiences* (our italics) with the goal of mutual understanding on the part both of the sender and receiver of the messages. It is the possible inadequacies in transmission—usually through the inherent shortcomings in the capability

<sup>21</sup> It is tempting to make the contrast that in Lauterpacht's conception the wood hid the trees, but he really wanted to do away with the trees altogether!

<sup>22</sup> See Lauterpacht, *loc. cit.*, note 20 above, p. 367.

<sup>23</sup> *Ibid.*, p. 439; and see Fitzmaurice and Vallat, *loc. cit.*, note 20, p. 310.

<sup>24</sup> See Metzger in 61 A.J.I.L. at p. 1011 (1967).

<sup>25</sup> An example of the sort of operation that is really needed was given in *loc. cit.*, notes 20 and 23 above, at pp. 312–313.

<sup>26</sup> We do not know what this expression “subjectivities of commitment” really means.

<sup>27</sup> “Audiences” can be understood, but what “targets” are in mind here?—and, can a “sign” be transmitted to a target?



of words *and other signs* (our italics) to communicate shared subjectivities—that place the communications analyst on guard . . .

*Ibid.*:

It would be quite impossible, we believe, for a competent analyst who is acquainted with the study of language *and gesture* (our italics) to commit himself seriously to the one-sided assertions that clutter the literature of interpretation. . . .

And on page 388:

We do not neglect to note the operation of *assessing gestures and deeds* (italics in the original), since several techniques are already at hand for accomplishing this purpose, making it possible to choose among inferences that depend on judgment of the methods used. . . .

In the auction room, it is true, agreements are frequently reached, at least in principle, by means of signs and gestures. The bidder nods to the auctioneer, or raises a finger, and this commits him to his bid. The auctioneer brings down his hammer, and this commits his client to a sale, subject to any announced reservations or conditions. But treaties and other international agreements, and perhaps even more especially the general multilateral conventions the authors are mainly concerned with, are not and should not be concluded by the methods of the sale room, which are totally out of keeping with the occasion.

No doubt the doctrine of signs and gestures is not meant to be carried to extremes: yet if the passages just quoted were taken at their face value they could lead to some singular results. A negotiator, in accepting a certain condition or proviso, is seen to wink broadly; but the condition is written into the text, which is subsequently signed and ratified. Is evidence of the wink afterwards to be admitted to show that the condition was not really accepted, or that it is doubtful whether it was? The case may seem far-fetched, but the suppositions behind it are not; for it is very much part of the authors' philosophy—and a great deal of the book is concerned with this—that the text as written is inherently suspect: only by going behind it can the truth be arrived at. But if so, is there much point in reducing to writing what was supposedly agreed, and embodying it in a text?

It is not in reality signs and gestures—(for these constitute an altogether too uncertain and rickety basis on which to found any definite conclusion)—but the official acts and conduct of the parties that may be material. It is, for instance, now generally accepted that the conduct of the parties relative to a given provision, manifested in the ordinary course of the execution or application of the treaty, may be a very reliable and even the best guide as to the correct interpretation of that provision, *so long as* it is the mutual or common conduct of both or all of them, and not merely of one or some;—for in the latter case what may precisely be in issue, and calling for decision, is whether such conduct did not involve a *breach* of the treaty based on an incorrect interpretation of it.<sup>28</sup>

<sup>28</sup> In point of fact, however, it is not necessarily, or even principally, in the particular context of treaty interpretation that the acts and conduct of the parties may be material. In the case of the Temple of Preah Vihear (I.C.J. Reports, 1962, p. 6 *et seq.*)

But doth suffer a sea-change  
Into something rich, and strange <sup>20</sup>

The most striking feature of the authors' system is, however, that it subordinates the interpretation of a treaty—or rather (for the matter has little to do with interpretation *stricto sensu*) <sup>30</sup> its application—to the attainment of certain objectives,—a process which is summed up (see, for instance, page 41 of the book) under the head of the “policing . . . goal.” This is defined in general terms (page 42) as “requiring the rejection of the parties' explicit expectations which [sc. if and insofar as they] contradict community policies.” In other words the intentions of the parties, even if clear and ascertained and—what is even more important—common to them both, or all (in short the intentions of the *treaty*—see note 13 above), are not to be given effect to if, in the opinion of the “decision-maker,” such intentions are inconsistent with (page 44) “the goals of public order.” Since it is thus left to the adjudicator to decide not only whether there is such inconsistency but also what *are* the goals of public order (and of which public order) to be taken into account, it is evident that on this wide-ranging, indeed almost illimitable basis, the parties could never be sure how their treaty would be applied or whether it would be applied at all. The process would, in fact, confer on the “decision-maker” a discretion of a kind altogether exceeding the normal limits of the judicial function, amounting rather to the exercise of an administrative rôle.

This is well illustrated by the character of the only “community goal” which, so far as this reviewer can see, the authors themselves actually specify, namely, that of the preservation of “human dignity” which is coupled with what is called (page 383) “the operation of *examining the self* (italics in the original) for predispositions incompatible with the goal of human dignity”—an admirable desideratum, one aspects of which (the duty of impartiality) has already received some comment earlier herein.<sup>31</sup> No one of course can quarrel with the ideal of the preservation of human dignity, and the avoidance of action incompatible with it, as an essential objective. But without further and much more precise definition, this criterion and others like it which the authors specify, such as “overriding community goals” or “basic constitutive policies,” etc. are too subjective to be of practical value to the adjudicator, or in the alternative would invest him with an almost arbitrary power. As Professor Leo Gross has well said,

---

the International Court relied markedly on such acts and conduct,—but this was not strictly with reference to the interpretation of the boundary treaty that underlay that case, but as affording evidence of the *acceptance* by the parties of a certain map line as constituting the correct boundary in the disputed area.

<sup>29</sup> Shakespeare, *The Tempest*.

<sup>30</sup> An agreement must already *be* interpreted in order to be “policed” (see below), for it is only on the basis of a particular and declared interpretation of it, that it can be shown to require policing in the authors' sense of that notion.

<sup>31</sup> See in particular note 2 above; but this might be the place to add something,—for certain of the events of the last few years and the many decided cases passed in review by the authors of this work from the standpoint of their doctrines, may suggest that examination of the self for bias is desirable not only for the decision-maker but also for those who comment upon the decision-maker's decisions!

such concepts "are pregnant with ambiguity far greater than ever confronted an international tribunal in interpreting . . . a treaty."<sup>32</sup> He adds, pointing to a further difficulty: "Reference is apparently made to communities of various orders ranging from a relatively compact community comprising the parties and the tribunal . . . to a world-wide community."<sup>33</sup> Everyone knows, for instance, that in private life some people will regard as an affront to their dignity things which others will not even notice; and in the international field also there is a wide range of possible variables.<sup>34</sup>

At bottom, the theory is one which proposes indirectly to import into treaty law an extensively conceived element of *ius cogens* without, however, any adequate definition of the *ius* which is to be "*cogendum*." The Vienna Convention on the Law of Treaties which, even so, is considered by some to go too far in this respect, does at least, in providing for the voidance of treaties if they conflict with "a peremptory norm of general international law (*ius cogens*)," define such a norm as being one that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."<sup>35</sup> This definition may not itself be entirely satisfactory,<sup>36</sup> but it does give the adjudicator something to go by, at all events as to the *nature* of the notion involved.

Similarly, in the domestic field, the notion of "overriding community goals" is already to a limited extent reflected in the concept of "public policy," but in a highly modified, indeed quite different form. The latter policy is the policy of the law, and only indirectly of the community, considered apart from the law,—and it operates only within the confines of the law.<sup>37</sup> The law will not, for instance, enforce certain types of contracts,

<sup>32</sup> "Treaty Interpretation: The Proper Rôle of an International Tribunal," 1969 Proceedings, American Society of International Law at p. 114.

<sup>33</sup> *Ibid.*

<sup>34</sup> It would be easy, but it would be invidious to point to widespread practices sanctioned by law, religion and social usage, which would nevertheless be held by many to conflict with human dignity.

<sup>35</sup> Article 53.

<sup>36</sup> The expression "having the same character" at the end of this provision presumably means having the same character of being "a norm from which no derogation is permitted,"—for if it also included having the same character of being "a subsequent norm of general international law having the same character," an obvious element of circularity or infinite regress would be introduced. All the same there seems to be a latent ambiguity here. Furthermore, although even a *peremptory* norm can be rendered otiose or no longer applicable by a subsequent change of *circumstances* or conditions, there seems to be something a little queer about the idea of a norm that is peremptory, yet capable of being modified by another norm, also peremptory, but equally capable of modification, and so on *ad infinitum*. There would seem to be something dubious about the true peremptoriness of all such norms in the sense of being *ius cogens*, i.e., their peremptoriness would seem to be lent to them rather than inherent. There are of course norms that are "*higher*" than others, but this is a different thing. They do not conflict with or modify the "*lower*" norm, but on the contrary confer upon it a validity it might not otherwise have by its own force.

<sup>37</sup> On this subject see the interesting remarks of Professor Gross, citing Jenks, in *loc. cit.* note 32 above, at pp. 114–115.

as being usurious, as involving gambling transactions, as being directed to immoral purposes, etc. But, except in very special circumstances, these disqualifications are known to the parties in advance, not imposed *ex post facto* at the discretion of the adjudicator.

Nor is the policing of agreements in the sense of, in effect, voiding them for "conflict with community policies," by any means the only doom with which this work confronts the negotiators. An equal hazard, tending in certain circumstances to bring about, over the parties' heads, an even greater sea-change in a given treaty situation, is to be anticipated from what the authors call their second goal,—the first being (page 40) to make "a disciplined, responsible effort to ascertain the genuine shared expectations of the . . . parties . . .," because (pages 40–41) "to defend the dignity of man is to respect *his* (authors' italics) choices and not, *save for overriding common interest* (our italics here), to impose the choices of others upon him,"—admirable sentiments of course, but we have seen where, in the pursuit of the third (policing) goal, that saving clause about the "overriding common interest" can lead.

The *second* goal contemplates the case where the search for (page 41) the "genuine shared expectations" of the parties "must falter or fail because of gaps, contradictions or ambiguities" in their "communication"—(an unclear term which might mean in the course of the negotiations leading up to the agreement, or in the agreement itself). In such event (*ibid.*) "a decision-maker should supplement or *augment* (our italics) the relatively more explicit expressions of the parties [sc. what they actually wrote into the agreement] by making reference to the basic constitutive policies of the larger community. . . ." Here again, therefore, community policies come in as a criterion, and also, once more, human dignity,—for (*ibid.*) "no conceivable alternative goal" could be "in accord with the aspiration to defend and expand a social system compatible with the overriding objectives of human dignity."

This, of course, however excellent, is not law but sociology; and although the aim is said to be "in support of search for the genuine shared expectations of the parties," it would in many cases have—and is perhaps subconsciously designed to have—quite a different effect, namely, in the guise of interpretation, to substitute the will of the adjudicator for that of the parties, since the intentions of the latter are, by definition (in the given circumstances) unascertainable because not sufficiently clearly or fully expressed,—and therefore presumed intentions, based on what the adjudicator thinks would be good for the community, or in accordance with "overriding objectives of human dignity" etc., must be attributed to them.

Now the process of, so to speak, curing the deficiencies of a text is, within certain limits, a perfectly legitimate one, constantly employed by courts and tribunals. For instance, where the intention or object of the agreement is plain, no court would allow a party to get out of what was a clear undertaking, merely on account of some drafting lapse, wrong reference, incorrect description or manifest omission, and such like deficiencies of a technical not substantive character—(this indeed, when the "explicit

rationality" is cut away, can be seen to be the real basis of the decision of the International Court in the first (preliminary objection) phase of the *Temple* case).<sup>38</sup> Another example is afforded by the principle *ut res magis valeat quam pereat*, the effect of which is that where a text is ambiguous or defective, but a possible, though uncertain, interpretation of it would give the agreement some effect, whereas otherwise it would have none, a court is entitled to adopt that interpretation, on the legitimate assumption that the parties must have intended their agreement to have some effect, not none.

Significantly, however, the maxim *ut magis* is all too frequently misunderstood as denoting that agreements should always be given their *maximum possible* effect, whereas its real object is merely ("*quam pereat*") to prevent them failing altogether. This affords a very good pointer to the limits of a doctrine which, if allowed free play, would result in parties finding themselves saddled with obligations they never intended to enter into, in relation to situations they never contemplated, and which often they could not even have anticipated. Is it unfair to ascribe to the authors of this work the championship of such a doctrine? Let them (page 388) be heard for themselves:

Modern logical tools may disclose implications that were undreamed of when the parties were hammering out their understanding.

Of what use then is it to "hammer out" an understanding (not surely any casual process) if implications then "undreamed of" are later to be imported, and given obligatory force?

#### IV

##### VALEDICTORY

Despite its intrinsic interest, its stimulating character, and its many merits, of which the present review confessedly gives little indication, this is a work that leaves a somber impression on the mind. Aiming at order and liberality, its concepts, by their very breadth, open the door to anarchy and abuse. Down the centuries of close upon two millennia of years there come, still echoing, the lines of the great Mantuan:

*Facilis descensus Averno;  
Noctes atque dies patet atri janua Ditis;  
Sed revocare gradum superasque evadere ad auras,  
Hoc opus, hic labor est.*<sup>39</sup>

<sup>38</sup> Cited in note 28 above.

<sup>39</sup> Vergil, *The Aeneid*, Book VI. A free rhyming translation might read:

Down to Avernus smooth and easy winds the trail,  
Where noon and night the dark God's portals open stay:  
But to return from thence into the light of common day,  
Not ease nor rest but only striving can avail.

Apologies, however, to the memory of Wordsworth for this somewhat oblique use of his well-known figure of speech "the light of common day"—(*Ode on Intimations of Immortality from Recollections of Early Childhood*, verse V, last line).

## EDITORIAL COMMENT

### THE CONNALLY RESERVATION REVISITED AND, HOPEFULLY, CONTAINED

Towards the close of their instructive study of "Legal Aspects of the Geneva Protocol of 1925"<sup>1</sup> the Editor-in-Chief and Professor Buergenthal considered the following "modes of clearing up disagreement" about the Protocol: United States adherence to the Protocol, together with a statement of understanding that it does not apply to certain chemicals,

might lead a state to bring an action against the United States within the contentious jurisdiction of the Court. In that event, the United States would be forced to assert the defense of the Connally Reservation, whereby the United States excludes from its acceptance of the compulsory jurisdiction of the Court "matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." The United States would probably be protected by its assertion that the use of irritant chemicals and anti-plant chemicals in warfare is within the domestic jurisdiction of the United States as determined by this country. That defense could be waived but probably only with the consent of the Senate.

The reference to the Connally Reservation was *obiter* the principal discussion and probably did not represent considered views. But it reflects, I believe, misconception and misconstruction and, since the Connally Reservation, alas, does not face early repeal, it should not be allowed to acquire meanings which aggravate its unhappy import.

In my view, the United States would not be entitled to invoke the Connally defense in the circumstances envisaged, and failure to do so would not entail a "waiver" of the defense; in any event, the United States would not be "forced" to invoke the Connally Reservation if it did not wish to; and it could agree to go to the Court without seeking the consent of the United States Senate.

My principal difficulty is with the implication that a suit against the United States alleging violation of the 1925 Protocol<sup>2</sup> would entitle (if not require) the United States to reject the Court's jurisdiction. That assumes either that the Connally Reservation gives the United States the right to refuse to go to court at will, or that United States compliance *vel non* with the 1925 Protocol would be an issue which the United States could properly deem "domestic." Both assumptions are untenable.<sup>3</sup>

<sup>1</sup> 64 A.J.I.L. 853 at 879 (1970), footnotes omitted.

<sup>2</sup> The authors apparently assume a contentious proceeding against the United States based on its assertion of an "erroneous" understanding of the Protocol. There may be some question whether the Court would have jurisdiction of a theoretical dispute over the interpretation of the Protocol as distinguished from a "case" arising from action in alleged violation of the Agreement.

<sup>3</sup> I draw here on a report which I helped prepare: "Pending Repeal of the Connally Reservation," Report by the Committee on International Law, Association of the Bar

Recall the history of the reservation. As unanimously reported by the Senate Foreign Relations Committee, the Senate resolution of consent to a declaration by the United States under Article 36(2) contained a proviso that the declaration should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America."<sup>4</sup> Had the United States said that and no more, the declaration would not have constituted a reservation, being in effect only a summary, negative restatement of the jurisdiction of the Court contemplated by Article 36(2).<sup>5</sup> In any proceeding against the United States, the International Court of Justice would have determined whether it had jurisdiction, exactly as if the United States declaration had contained no such proviso at all.

Senator Connally's amendment on the floor of the Senate, all know, added the words "as determined by the United States." The words, the context, and the discussion on the floor of the Senate leave no doubt that the United States reserved thereby, in effect, the final say that a case against it is not within the Court's jurisdiction under Article 36(2); it did not reserve a right to veto, on any grounds or on no grounds, any suit against it; it did not reserve the right to declare to be "essentially domestic" what under international law clearly is not. (That would have rendered its acceptance of "compulsory jurisdiction" not merely illusory but a cynical mockery.) Senator Connally himself was wholly clear:

Several Senators have argued that by this amendment the United States would put itself in the position of corruptly and improperly claiming that a question is domestic in nature when it is not, thereby taking advantage of an international dispute and saying that since the question is domestic, we will not abide by the decision of the Court. Mr. President, I have more faith in my Government than that. I do not believe the United States would adopt a subterfuge, a pretext, or a pretense in order to block the judgment of the Court on any such grounds.<sup>6</sup>

---

of the City of New York, February, 1964, 19 The Record of the Association of the Bar of the City of New York 162 (1964).

<sup>4</sup> Sen. Rep. No. 1835, 79th Cong., 2d Sess., pp. 1, 2, 5 (1946).

<sup>5</sup> "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation."

<sup>6</sup> 92 Cong. Rec. 10695 (1946). See also the statements of Senator Huffman and Senator Ferguson, *ibid.* at 10696. Compare a former Legal Adviser of the Department of State: "Moreover, I have a serious question whether 'as determined by the United States of America,' if fairly applied, would mean any more in the way of excluding the International Court from passing upon truly domestic issues than the words 'as determined by the principles of international law.'" Becker, 1958 Proceedings, American Society of International Law 267.

Once, indeed, the United States urged that "an arbitrary determination, in bad faith," an attempt to invoke a "Connally Reservation" in regard to a matter clearly not within a state's domestic jurisdiction under international law, could be rejected by the Court.<sup>7</sup> That position was later withdrawn and the United States agreed that when a party invoked the reservation the Court was bound thereby, "irrespective of the propriety or arbitrariness of the determination."<sup>8</sup> At the same time the United States agent confirmed that "the United States has adhered to the policy of not making any arbitrary determination" under its reservation.<sup>9</sup>

In sum, then, the United States declaration reserved a final say on a legal question—whether a proceeding against it raises issues within the jurisdiction of the Court under Article 36(2). Whether use by the United States in war of certain chemicals would be consistent with its undertakings in the Protocol would depend of course on the proper construction of that Protocol—obviously not a domestic question, obviously an issue within the Court's jurisdiction under Article 36(2).<sup>10</sup> For the United States to invoke the reservation in such a case would be "arbitrary"; would, in Senator Connally's words, "corruptly and improperly" assert that a question is domestic in nature when it clearly is not; would be "a subterfuge, a pretext, or a pretense in order to block" the jurisdiction of the Court.

If the United States could not properly invoke its reservation, not to invoke it is no "waiver" of any defense. But even if a proceeding against the United States involved matters which it believed, *bona fide*, to be essentially within its domestic jurisdiction under international law, it would not be "forced" <sup>11</sup> to invoke Connally. Nothing in the declaration or the reservation, nothing in international law or the laws of the United States, forbids the United States to waive its right to judge for itself and allow the Court to determine whether it had jurisdiction. And, under our Constitutional system, whether the United States is entitled to invoke Connally, whether if it is so entitled it should do so, are questions for the President, and the Senate has no Constitutional rôle in regard to them. The Connally Reservation reserved rights to the United States, not to the Senate.

Perhaps the argument is that by its reservation the Senate forbade the United States to submit to the risk that the Court might find it had jurisdiction where the United States is satisfied that the Court did not, and the United States could not take that risk unless the Senate removed its pro-

<sup>7</sup> Case concerning the Aerial Incident of 27 July 1955 (United States of America v. Bulgaria), I.C.J. Pleadings at 308, 322-325.

<sup>8</sup> *Ibid.* at 676-677.

<sup>9</sup> *Ibid.* 677.

<sup>10</sup> Since the discussion assumed that the United States would not enter a reservation but only assert an understanding, and, under one of the options considered, would do so, not as a condition of ratification, I assume that the contentious proceeding envisaged would charge violation of the Protocol. If there were also a preliminary issue as to whether the United States had effectively entered a controlling reservation, that too, surely, would not be a domestic matter.

<sup>11</sup> Perhaps the authors meant only that the United States would be forced to consider whether to invoke the reservation; or that it would have to invoke the reservation if it wished to block the suit; or that political forces within the United States might compel its invocation.



hibition. In my view that interpretation of Connally is fetched much too far: the evidence is that Senator Connally sought to protect the United States against possible abuse by the Court; there is no evidence that he sought also to protect the United States against the President of the United States. There is no evidence that he sought to prevent the President from doing what might well be the wise thing in many a case—to have the Court determine whether it had jurisdiction.

That interpretation of Connally, moreover, would achieve no purpose. Under Article 36(1) of the Statute of the Court, the United States can join with another party to refer a case to the Court, and the President can do that for the United States without Senate consent.<sup>12</sup> The Connally Reservation did not and could not<sup>13</sup> modify the rights and obligations of the United States (or the power of the President) under that article. If in a proceeding under Article 36(2) the United States decides not to invoke its reservation where it could properly do so, it is in practical effect as though the United States joined voluntarily with its adversary to refer the case to the Court under Article 36(1). Surely the Senate did not intend to compel the President to reject a proceeding under Article 36(2) and begin all over under Article 36(1).<sup>14</sup>

Given its proper interpretation, the Connally Reservation

would be small indeed (as was intended). The Reservation, then, would not render American acceptance of the Court's jurisdiction wholly illusory. The United States, then, would have accepted as compulsory the Court's jurisdiction for the large majority of disputes to which the United States is a party. The United States could then, in turn, bring to the Court its complaints involving international law or obligation, and urge and expect that other countries also refrain from invoking this reservation improperly or arbitrarily. The Connally Reservation, while damaging still to the national interest and ignoble to maintain, would be reduced to the small, remote and contingent import intended for it, pending its total abrogation.<sup>15</sup>

LOUIS HENKIN

<sup>12</sup> Compare the memorandum of the Legal Adviser of the Department of State, Eric H. Hager, in Hearings, May 17, 1960, before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess., pp. 14-15, reprinted in 54 A.J.I.L. 941 (1960); compare also Bishop and Myers, "Unwarranted Extension of Connally-Amendment Thinking," 55 A.J.I.L. 135 (1961).

<sup>13</sup> The United States, having adhered to the Statute of the Court with Senate consent, the Senate could not later limit the power of the United States (or of the President) under Art. 36(1). Compare *Fourteen Diamond Rings v. United States*, 183 U. S. 176 (1901).

<sup>14</sup> Under Art. 36(1), there is nothing to prevent the parties from submitting a dispute in which a preliminary issue is whether the matter in controversy is or is not "essentially domestic."

<sup>15</sup> See Report of the Committee on International Law, note 3 above, at 164-165.

## NOTES AND COMMENTS

### A CAUSE OF THE PRESENT CRISIS OF INTERNATIONAL LAW

I. International law is at present obviously facing a crisis. With the exception of the diplomatic and consular fields, almost all the rules of public international law have been constantly violated. Particularly subject to violation have been the rules concerning the use of force in international relations. The weak or weakened norms on the prohibition of the threat or use of force are not complied with; their binding force is not established. These phenomena reflect a lamentable truth of our age, that international relations are not governed by international law but by the balance of power.

The present-day crisis of international law stems from the fact that states, especially the larger ones, do not regard its rules as binding upon them. They treat the law as recommendations or as non-binding rules of international courtesy or morality. Such an attitude by states toward international law is dictated by many causes, the main one being the priority given to individual political interests. However, one of those causes is also the *over-politization* of international law in terms of denying independent existence to international legal norms.

II. Policy and law, foreign policy and international law are inseparably intertwined. In the final analysis law is determined by policy, a fact not challenged by anyone. Unfortunately this fact has in practice been translated into a strong influence of policy over the legal superstructure, an abuse of the law by policy, which cannot but harm international relations. In other words, by committing obvious anti-legal acts, states are not satisfied to claim political or other "exonerating" grounds; what they are trying to do is make reference to legal arguments which cannot but discredit international law itself. They try to have international lawyers defend them, as they have not forgotten the words of the King of Prussia, Frederick William II, in 1752 relating to the rôle of the legal profession after the aggressor was successful in invading an alien territory.

The inseparability of policy from law does not mean that the latter is subjected to the former. Science, at the beginning of the modern age, did not cease to be a servant of theology in order to become the slave of policy, but in order to become and remain free. This holds true for all sciences, including legal science. Therefore legal categories, while the result of social and political realities, have their own individuality and a relative independence. As such, these categories have been of a longer duration than the political ones. If this were not true, people would not treat the law as a separate science; instead, all of the social sciences would be studied in the framework of politics or the science of international relations. Hence, whereas the law exists as an independent social science

subject to all the qualifications mentioned, international law also cannot be treated as an extension of the foreign ministries of each particular state. The opposite view necessarily leads to the legitimization of a double standard which, despite its frequent use, is unthinkable in international law. According to this standard, a state in a situation concerning its own behavior or that of a state belonging to the same camp assumes that the prohibitory norms of international law do not apply; while in another situation, when the actions of an opponent of a different ideological or political orientation are at stake, it considers these norms fully applicable. Of course, such reasoning cannot but weaken the binding force of international law as a whole. A delict cannot be excused on the basis of law. In internal legal orders, the thief who is apprehended does not defend himself by arguing that the theft was legal but argues that he was hungry, that his family was without a roof, or simply that he was tempted. States that violate international law should at least do the same.

A delict in international law is a delict regardless of its author. If the government of a country overtly invites the population of another country to overthrow their government and simultaneously offers its help; if the government of one country tolerates subversive bands who intrude from its territory into the territory of a neighboring state and commit acts of terror there; if one state intervenes with armed forces in the territory of another state to overthrow its existing government in order to substitute another government or to protect the existing government from possible overthrow; if one belligerent violates a cease-fire—briefly, if one state commits legally prohibited acts, it thereby violates international law and incurs international responsibility regardless of its ideological orientation or that of the objects of those acts. Therefore, one cannot legally condemn intervention in internal affairs only when the intervening state is of ideological orientation "X" and legally justify it when the intervening state is of ideological orientation "Y".

However, suppose that a felt political need requires a state intentionally to depart at one point from the rules of international law. If this situation occurred, the state concerned could refer only to non-legal arguments and in no wise to legal ones. Otherwise, the contention that differential conduct is permitted, that the law is one thing or another depending on the given situation or on who is involved, threatens seriously to erode international law as a body of legal rules supposed to regulate the international conduct of states. In actual practice so far, the double standard has been highly detrimental to international law and has provoked the crisis in which we now find ourselves.

III. The frustration of the binding force of international legal rules is also enhanced by the body of doctrine which emphasizes the political nature of international law to an excess. In this way, international law becomes over-politicized. Thanks to those writings, the illegal acts of states are sought to be justified in the intimate link between law and policy which, in the final analysis, means in the legally non-binding force of the rules of international law. The legal nature of international law gives way to its

political function. An excessive insistence on the "political" has put in doubt the relative independence of legal norms, the separate existence of the law as a science, and mandatory rules of conduct.

The above elaboration suggests that this body of doctrine has harmed both international law and the cause of maintaining international peace. Aware that illegal actions may be defended by various legal theories based on an excessive impregnation of the law by policy and a denial of the autonomy of international law, states have more easily been able to neglect legal rules and particularly the rule on the prohibition of force in their day-to-day practice. This is why today both sides in a conflict—both the aggressor and the victim of aggression, both the delinquent and the victim of the delict—refer to international law. Some doctrines have diluted international legal rules, particularly the rules on threats to the peace, breaches of the peace and acts of aggression, and made of them only "*clauses de style*" referred to in diplomatic correspondence and political statements.

IV. International law bases itself on realities and acknowledges only factual situations. A state exists as the subject of international law regardless of the way in which it was started and whether or not recognized by all the members of the international community. Hence the rules of international law necessarily change in such a way as to reflect the realities of international relations in a given historical period. However, these rules have not changed every time it suited the pleasure of particular states. The adjustment of these rules or the substitution of new and better rules for the old ones takes place only when the majority of states favors it. And conversely, if the majority does not want existing rules to change, these rules continue to apply. Of course, the minority has the right, while abiding loyally by those rules, to seek in the political arena to persuade the other states to back the ideas of the minority as expressed in the drafts of new rules. Therefore, until the majority is prepared to accept the new rules, the minority has to comply with the existing law. The minority must not act in violation of the law just because it does not like its norms. Needless to say, only such an approach to the law by states can make its evolution legal and regular. If each state recognizes as international law only what suits its immediate political interest, perpetual crises and anarchy will result. It goes without saying that this critique of the over-politization of international law does not imply a complete depolitization of international law or its total separation from life.

The present crisis of international law has been the result of states' following their immediate political interests. The elimination of that crisis is neither an easy nor a short-term job. What international lawyers must do in this respect is to fight for a greater autonomy of legal norms. It is necessary to point out that the legal norms are more lasting than political ones, compliance with the former being an obligation of each member of the international community, even if such conduct may hamper its political interest or friendship with the delinquent state. If their political orienta-

tion precludes states from observing international law in a given situation, they should at least not make reference to it.

If international law is law, then it is political to the same extent as all other branches of law. Therefore the political dimension of international law cannot be other than the political dimension of the law in general.

MIODRAG SUKIJASOVIĆ

SIXTY-FIFTH ANNUAL MEETING OF THE SOCIETY  
APRIL 29–MAY 1, 1971

THE STATLER-HILTON HOTEL  
WASHINGTON, D. C.

PROGRAM

STRATEGIES FOR WORLD ORDER

THURSDAY, APRIL 29, 1971

9:00 a.m.–8:00 p.m.  
(and subsequent days)

Registration (Upper Lobby)

Books exhibits will be located in the Exhibit Galleries

9:30 a.m.

Meeting of the Executive Council (Ohio Room)

10:30 a.m.

*Chinese Participation in the United Nations*  
(Congressional Room)

Chairman: Dean Rusk, *University of Georgia School of Law*

Speakers: Jerome Cohen, *Harvard Law School*

Richard Goodman, *University of Alabama School of Law*

Commentators: Lung-Chu Chen, *Yale Law School*

His Excellency Shu-kai Chow, *Ambassador of the Republic  
of China to the United States*

Reporter: Claire Tweedy, *Georgetown University Law Center*

2:15 p.m.

*Self-Determination and Settlement of the Arab-Israeli Conflict*  
(Presidential Ballroom)

Chairman: Charles W. Yost, *former Permanent Representative of the United  
States to the United Nations*

Speakers: Cherif Bassiouni, *De Paul University College of Law*  
Leslie C. Green, *University of Alberta*

Commentators: W. Michael Reisman, *Yale Law School*  
Mohammed Burhan Hammad, *Deputy Permanent Observer of the League of Arab States to the United Nations*

Reporter: M. Jonathan Elbridge Colby, *Yale Law School*

*New Developments in the Law of International Aviation:*

*The Control of Aerial Hijacking*

(Congressional Room)

(Jointly sponsored with the Canadian Society of International Law)

Chairman: Edward McWhinney, *McGill University*

Speakers: John B. Rhineland, *Deputy Legal Adviser, U.S. Department of State*

Oliver J. Lissitzyn, *Columbia University School of Law*

Commentators: Andreas F. Lowenfeld, *New York University School of Law*  
Alona E. Evans, *Wellesley College*

Reporter: John E. Claydon, *University of Virginia*

Round Table: *The Social Scientist Looks at the International*

*Law of Conflict Management*

(Pan American Room)

Chairman: Inis L. Claude, Jr., *University of Virginia*

Participants: Richard A. Falk, *Princeton University*  
Michael Barkun, *Syracuse University*  
Louis Henkin, *Columbia University School of Law*  
Linda B. Miller, *Wellesley College*

Reporter: Natalie J. Ferringer, *University of Virginia*

6:00 p.m.—Reception (Presidential Ballroom)

8:30 p.m.

*Conflicting Approaches to the Control and Exploitation of the Oceans*

(Presidential Ballroom)

(Jointly sponsored with the American Branch of the  
International Law Association)

Chairman: Myres S. McDougal, *Yale Law School*

Speakers: John R. Stevenson, *The Legal Adviser, U.S. Department of State*  
Cecil J. Olmstead, *President, The American Branch of the International Law Association*

Commentators: J. Alan Beesley, *Legal Adviser, Department of External Affairs of Canada*  
Bernard H. Oxman, *Assistant Legal Adviser, U.S. Department of State*  
L. F. E. Goldie, *U.S. Naval War College*  
Leigh S. Ratiner, *Chairman, Defense Advisory Group on the Law of the Sea, U.S. Department of Defense*  
Reporter: P. S. Rao, *Woodrow Wilson International Center for Scholars, Smithsonian Institution*

*The Future of South West Africa (Namibia)*  
(Federal Room)

Chairman: Ernest A. Gross, *of the New York Bar*  
Speakers: Max Jakobson, *Permanent Representative of Finland to the United Nations*  
H. L. T. Taswell, *Ambassador of the Republic of South Africa to the United States*

Commentators: Clifford J. Hynning, *of the District of Columbia Bar*  
Allard K. Lowenstein, *former Member of Congress*

Reporter: Patricia L. Otto, *University of Virginia School of Law*

*Round Table: The Role of Congress in the Making of Foreign Policy*  
(Congressional Room)

Chairman: William D. Rogers, *of the District of Columbia Bar*  
Participants: Jacob Javits, *U.S. Senator from New York*  
Paul Findley, *Member of Congress from Illinois*  
George W. Ball, *Lehman Brothers*  
McGeorge Bundy, *President, The Ford Foundation*  
Reporter: John W. Carroll, *University of Pennsylvania Law School*

FRIDAY, APRIL 30, 1971

9:15 a.m.

*Conflicting Assumptions About International Trade: Neo-Protectionism or Reasonable Accommodation of National Interests?*  
(Presidential Ballroom)

Chairman: John H. Jackson, *University of Michigan Law School*  
Speakers: Bruce E. Clubb, *Commissioner, U.S. Tariff Commission*  
John B. Rehm, *of the District of Columbia Bar*  
Commentators: Eugene L. Stewart, *of the District of Columbia Bar*  
Monroe Leigh, *of the District of Columbia Bar*  
Warren Schwartz, *University of Virginia School of Law*  
Lawrence Krause, *The Brookings Institution*  
Reporter: Robert T. Greig, *University of Michigan Law School*

*Procedures for Protection of Civilians and Prisoners of War in Armed  
Conflicts: South East Asian Examples*  
(Congressional Room)

Chairman: John Carey, *of the New York Bar*

Speakers: Gidon A. G. Gottlieb, *New York University School of Law*  
Howard S. Levie, *St. Louis University School of Law*

Commentators: Jon M. Van Dyke, *Visiting Fellow, Center for the Study of  
Democratic Institutions*  
Frank Sieverts, *Special Assistant to the Under Secretary of  
State for Prisoner of War Matters*  
Peter D. Trooboff, *of the District of Columbia Bar*

Reporter: Ronald F. Stowe, *Office of the Legal Adviser, U.S. Department  
of State*

Discussion Group: *The Teaching of the International Aspects of  
Human Rights*  
(Pan American Room)

(Jointly sponsored with the United States Institute of Human Rights)

Chairman: Louis Henkin, *Columbia University School of Law*

Participants: Egon Schwelb, *Yale Law School*  
Thomas Buergenthal, *State University of New York at Buffalo  
School of Law*  
A. Luini del Russo, *Howard University School of Law*  
Vernon Van Dyke, *University of Iowa*

Reporter: Howard B. Hill, *Columbia University School of Law*

2:15 p.m.

*What Future for the International Court of Justice?*  
(Presidential Ballroom)

Chairman: Edvard Hambro, *President, United Nations General Assembly*

Speaker: Philip C. Jessup, *former Judge of the International Court of Justice*

Commentators: John Freeland, *Legal Adviser, United Kingdom Mission to  
the United Nations*  
Salo Engel, *University of Tennessee*  
Leo Gross, *Fletcher School of Law and Diplomacy, Tufts  
University*

Reporter: Robert Goldman, *University of Virginia School of Law*



Round Table: *New Proposals for Increasing the Role of International Law  
in Government Decision-Making*  
(Pan American Room)

Chairman: Roger D. Fisher, *Harvard Law School*

Participants: Louis B. Sohn, *Counselor on International Law, U.S. Department of State*  
Winston Lord, *National Security Council Staff*  
Hans A. Linde, *University of Oregon School of Law*

Reporter: David Corwin, *Harvard Law School*

Round Table: *The Dilemma of Foreign Investment in South Africa*  
(Congressional Room)  
(Jointly sponsored with the Association of Student International  
Law Societies)

Chairman: Douglas P. Wachholz, *President, Association of Student International Law Societies*

Participants: Robert S. Smith, *Deputy Assistant Secretary of State for African Affairs*  
Charles C. Diggs, Jr., *Member of Congress from Michigan*  
John N. Brander, *Georgetown University*  
Julius Duru, *University of Denver*

Reporter: Emile Julian, *Howard University School of Law*

6:30 p.m.—Reception (Congressional and Senate Rooms)

7:30 p.m.

ANNUAL DINNER (Presidential Ballroom)

Presiding: John Norton Moore, *Chairman, Committee on the Annual Meeting*

Address: Harold D. Lasswell, *President of the Society*

Address: John N. Irwin II, *Under Secretary of State*

10:00 p.m.

Reception, Association of Student International Law Societies  
(South American Room)

SATURDAY, MAY 1, 1971

9:30 a.m.

Business Meeting of the Society  
(South American Room)

Business Meeting of the Association of Student International Law Societies  
(Massachusetts Room)

11:30 a.m.

Meeting of the Executive Council  
(Parlor 509)

12:30 p.m.

Joint Luncheon with the Section on International and Comparative Law  
of the American Bar Association  
(South American Room)

Presiding: Ewell E. Murphy, Jr., *Chairman of the Section on International  
and Comparative Law of the American Bar Association*

Speaker: Constantin A. Stavropoulos, *Under Secretary General and Legal  
Counsel of the United Nations: "New Approaches to Interna-  
tional Conciliation and Dispute Settlement."*

2:30 p.m.

Round Table: *Toward More Adequate Diplomatic Protection of Private  
Claims: "Aris Gloves," "Barcelona Traction," and Beyond*  
(Senate Room)

(Jointly sponsored with the Deutsche Gesellschaft für Völkerrecht)

Chairman: Richard B. Lillich, *University of Virginia School of Law*

Participants: Martin Domke, *New York University School of Law*  
Ignaz Seidl-Hohenveldern, *University of Cologne*  
Lucius C. Cafilisch, *Woodrow Wilson International Center for  
Scholars, Smithsonian Institution*  
Burns H. Weston, *University of Iowa College of Law*  
Brian Flemming, *of the Nova Scotia Bar*  
Gordon A. Christenson, *State University of New York*

Reporter: Bert B. Lockwood, *University of Virginia School of Law*

3:00 p.m.

Final Round of the Philip C. Jessup International Law Moot Court  
Competition  
(South American Room)

*Aegea and Barcelona v. Franconia* (case arising out of an aerial hijacking  
incident)

Judges: Byron R. White, *Associate Justice of the Supreme Court of the  
United States*

Najeeb E. Halaby, *President and Chairman of the Board, Pan  
American World Airways*

Charles S. Rhyne, *President, World Peace Through Law Center*

Chairman of the Committee on the Annual Meeting: John Norton Moore,  
*University of Virginia School of Law*

## ANNUAL MEETING OF THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

The Philippine Society of International Law and the Philippine Commission of Jurists (national section of the International Commission of Jurists) held their joint annual meeting on the afternoon of January 23, 1971, in Memorial Hall, Ramon Magsaysay Center, in Manila. The subject of the meeting was the Japanese-Philippine Treaty of Commerce, Navigation and Friendship. The Honorable Vicente Abad Santos, Secretary of Justice and Vice President of the Philippine Society, presided as moderator of the discussion, which was opened by remarks of the Honorable Conrado V. Sanchez, Chairman of the Committee on Annual Meeting.

The speakers were the Honorable Perfecto Laguio, member of the Philippine Panel for the Negotiation of the Japanese-Philippine Treaty of Commerce; the Honorable Jovito Salonga, Senator of the Philippines; the Honorable Cesar Lanuza, Governor of the Board of Investments; and the Honorable Sixto K. Roxas, Chairman of BANCOR.

Following a general discussion, the meeting was closed by remarks of the Honorable Arturo A. Alafritz, of the Federated Bar Association of the Philippines and President of the Philippine Commission of Jurists; and of the Honorable Roberto Concepcion, Justice of the Supreme Court, and President of the Philippine Society of International Law.

E. H. F.

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, attorney in the Office of the Legal Adviser, Department of State.

The references in the headings are to sections of the *Digest of International Law* prepared by Marjorie M. Whiteman (1963 to date) dealing with the same subject matter as the material presented.

### LAW OF THE SEA

#### *United States Statement on Canadian Fisheries Closing Lines Announcement (4 Whiteman's Digest, passim)*

On December 18, 1970, the Department of State released the following statement:

Today, the Government of Canada announced the establishment of fisheries closing lines which purport to extend unilaterally Canadian jurisdiction over areas which are traditionally regarded as the high seas. The areas affected are: Strait of Belle Isle, Cabot Strait, Bay of Fundy, Queen Charlotte Sound, and Dixon Entrance.

The United States deeply regrets this action. The United States regards this unilateral act as totally without foundation in international law. The United States firmly opposes such unilateral extensions of jurisdiction and believes that outstanding issues concerning the oceans can only be resolved by effective international action.

In this respect, on December 17 the United Nations General Assembly approved by an overwhelming majority a resolution which scheduled a Law of the Sea Conference for 1973 which will deal with a wide range of oceans issues. Among the matters proposed for international action in the resolution are the question of preferential fishing rights for coastal states, conservation of living resources of the sea, and the protection of the marine environment, including the prevention of pollution. Canada, together with the United States and a number of other countries, was a co-sponsor of that resolution. Moreover, Canada, perhaps more than any other country, played a very important lead role in achieving a commitment by the international community to resolve these issues multilaterally.

Therefore, the United States is deeply disappointed and profoundly regrets that Canada has chosen to assert a unilateral claim of jurisdiction over ocean space *only one day* after the United Nations, with the approval of nearly all member states, including Canada, determined to resolve these problems regarding the law of the sea by international action.

(Dept. of State Press Release No. 357, Dec. 18, 1970; reprinted in  
64 Dept. of State Bulletin 139 (1971).)

## POLITICAL ASYLUM

*International Law Aspects of Attempted Defection of Lithuanian Seaman at Martha's Vineyard (Cf. 6 Whiteman's Digest, Ch. XV, §18)*

On November 23, 1970, the U. S. Coast Guard Cutter *Vigilant* moored alongside the Soviet vessel *Sovetskaya Litva*, part of the Soviet fishing fleet operating in the Atlantic off New England, for the purpose of holding a pre-arranged joint meeting between representatives of the U. S. fishing industry and the Soviet fleet. A member of the crew of the Soviet vessel boarded the Coast Guard Cutter and requested political asylum but was returned to the Soviet vessel by other members of the Soviet crew. The following memorandum was prepared by the Office of the Legal Adviser, Department of State, in connection with a review of this incident:

INTERNATIONAL LAW ASPECTS OF ATTEMPTED DEFECTION  
OF LITHUANIAN SEAMAN AT MARTHA'S VINEYARD

Questions have arisen in connection with the recent attempted defection of a Lithuanian seaman at Martha's Vineyard, occurring November 23, 1970, as to (1) whether the Soviets violated international law, (2) whether the United States Government had an obligation under international law to return the defector to the Soviet ship, and (3) whether the Coast Guard commander's actions in returning the defector constitute a violation of international law. Specifically, we have directed our attention to the Protocol Relating to the Status of Refugees, which entered into force with respect to the United States, November 1, 1968; the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations on December 10, 1948; and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on December 14, 1967.

It should be noted that at the time of the incident both the Soviet vessel which the Lithuanian seaman left and the United States Coast Guard vessel on which he sought asylum were in territorial waters of the United States. Since the seaman was recovered by Soviet crew members from the Coast Guard vessel with the permission of that vessel's commanding officer, it does not appear on the surface that the Soviet crew violated United States sovereignty or otherwise violated international law. As the Permanent Court of Arbitration at The Hague decided February 24, 1911, in the case entitled "Arrest and Return of Savarkar," where "the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory," there is nothing "in the nature of a violation of the sovereignty" of the country in whose territory refuge was sought. The result is no different if the cooperation of the Coast Guard is termed "an irregularity" or "a mistake," since, as the Permanent Court of Arbitration said in the aforementioned case, "there is no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by a foreign agent who delivered him up to that Power."

If, however, the cooperation of the United States Coast Guard was obtained by fraud, then the Soviet actions would constitute a breach of international law. In this connection it is noted, as the Commandant of the Coast Guard has stated publicly, that "the Soviet Master alleged that the defector had stolen \$2,000 from the ship's fund." If the decision to deliver the seaman to the Soviet ship was based on this allegation of theft, and such allegation was false, then the Soviet authorities would be guilty of a violation of international law, since their conduct would constitute fraud.

There is no provision of international law which required that the seaman be delivered by the Coast Guard vessel's commanding officer to the Soviet authorities. A defector may be retained in United States custody for a sufficient time to determine whether he is entitled to refugee status.

Article 33 of the Convention Relating to the Status of Refugees, which is applied by the Protocol Relating to the Status of Refugees, provides in paragraph 1 as follows:

"Prohibition of Expulsion or Return

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

A "refugee" to whom the Convention is applicable is defined in Article 1A (2) of the Convention, as modified by Article 1, paragraph 2 of the Protocol, as a "person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

While the experience of the Department of State is that most Lithuanians fleeing Soviet jurisdiction do qualify as refugees under the Convention and Protocol, a determination is required in each individual case based on the relevant facts. At the present time we are not in possession of sufficient information to determine whether the seaman involved was entitled to such refugee status. It is implicit in the Convention and Protocol that a reasonable inquiry be made to determine whether the defector is entitled to refugee status under the Convention and Protocol. If such an inquiry was not made in this case, serious questions under the Convention and Protocol would be raised.

Also relevant are the United Nations Universal Declaration of Human Rights, particularly Article 14, and the United Nations Declaration on Territorial Asylum, particularly Article 3, paragraph 1. Whatever the international legal status of these Declarations may be, they cover the same category as the Convention and Protocol and therefore effect no different result.

(Memorandum on file in the Office of the Legal Adviser,  
Department of State.)

## EXEMPTIONS FROM TERRITORIAL JURISDICTION

*Sovereign Immunity; Waiver of Immunity; and Counterclaims* (6 Whiteman's Digest, Ch. XV, §23)

The following letter from The Legal Adviser of the Department of State was contained in a memorandum submitted to the United States Supreme Court by the Solicitor General in connection with a petition (No. 846) for a writ of certiorari\* to the United States Court of Appeals for the Second Circuit (*First National City Bank v. Banco Nacional de Cuba*):

NOVEMBER 17, 1970

Honorable E. Robert Seaver

Clerk of the Court

United States Supreme Court

Dear Mr. Seaver:

The case of *First National City Bank v. Banco Nacional de Cuba* is before the Supreme Court on petition for a writ of certiorari, No. 846 filed October 13, 1970. The case involves a claim by Banco Nacional for excess collateral it had pledged with City Bank to secure a loan and a counterclaim by City Bank, up to the amount claimed by Banco Nacional, based upon Cuba's expropriation, without compensation, of property of City Bank in Cuba in 1960.<sup>1</sup> The Court of Appeals for the Second Circuit held that the exception to the Act of State doctrine created by 22 U.S.C. §2370 (e)(2)<sup>2</sup> did not apply to City Bank's claim against Cuba and that the Act of State doctrine, as expressed by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), barred adjudication of City Bank's counterclaim.

The Department of State believes this second holding involves matters

\* Certiorari granted Jan. 25, 1971, and case remanded for reconsideration by the Court of Appeals in the light of the views of the Department of State expressed in the letter below. See 65 A.J.I.L. 195 (1971).—Ed.

<sup>1</sup> The District Court determined that Banco Nacional and the Government of Cuba are one and the same for purposes of this litigation.

<sup>2</sup> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (Foreign Assistance Act of 1965, Sec. 620(e)(2), 22 U.S.C. §2370 (e)(2).)

of importance to the foreign policy interests of the United States and requests that our views be conveyed to the Supreme Court.<sup>3</sup>

The Executive's role in suggesting that the act of state doctrine should not be applied with respect to a certain case or class of cases has been recognized both by the Department of State and in court decisions. This role, the so-called *Bernstein* exception to the act of state doctrine as applied by United States courts, was first clearly established in *Bernstein v. N.V. Nederlandsche Amerikaansche, Etc.*, 210 F. 2d 375 (2nd Cir. 1954), where the court reversed its earlier holding, 173 F. 2d 71 (2nd Cir. 1949), that the act of state doctrine precluded the court's adjudication of the validity of certain acts of the (Nazi) German Government. The basis for this reversal was a statement by Jack B. Tate, Acting Legal Adviser, Department of State, indicating that

"The policy of the Executive, with respect to claims asserted in the United States for restitution of such property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

210 F. 2d at 376. Thus the Executive had indicated that the act of state doctrine need not be applied in a certain class of cases; the applicability of the statement was not limited to the *Bernstein* case.

In *Banco Nacional de Cuba v. Sabbatino*, *supra*, the Supreme Court held that the act of state doctrine precluded the examination of the validity of the act of a foreign sovereign within its own territory, even where that act was allegedly a violation of international law. 376 U.S. at 436-37. The ruling was based on the Court's recognition of the Executive's prerogatives in the area of foreign affairs; it found the act of state doctrine "arising out of the basic relationships between branches of government in a separation of powers." *Id.* at 423. However, the Court specifically avoided ruling on the validity of the *Bernstein* exception. *Id.* at 436.

While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.

<sup>3</sup> We regret that our views could not have been brought to the attention of the lower courts. Unfortunately, it was only after the not-yet-published opinion of the Second Circuit Court of Appeals was handed down that the question of the appropriateness of State Department action arose, since it did not become clear until that time that the Sabbatino Amendment would be considered inapplicable. No formal request for a statement by the Department was made in this case until October 14, 1970, one day after the petition for writ of *certiorari* was filed.



Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country.

The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in *National City Bank v. Republic of China*, 348 U.S. 356 (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U. S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case—that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff—is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

Sincerely yours,

JOHN R. STEVENSON

#### NATIONALITY

##### *Loss of Nationality* (8 Whiteman's Digest, Ch. XXI, §21)

In November and December of 1970, Mr. Leonid Rigerman and his mother, Mrs. Esther Michael-Rigerman, made attempts to visit the American Embassy in Moscow in order to establish their claims to American citizenship. Although they had made previous visits for this purpose with-

out incident, they were in these later instances denied access to the Embassy by Soviet authorities. It was subsequently determined that any attempt by the Embassy to obtain further information from the Rigermans was inadvisable, and, on December 19, 1970, the Embassy informed them that their applications for registration as United States citizens had been approved. The basis for that determination is set forth in the following memorandum prepared by the Office of the Legal Adviser:

The Department now finds it is in the position of having to determine the cases on the basis of the previous information obtained. Any attempt to obtain further information would submit them to unreasonable risks to their lives and liberties in order to present themselves to the Embassy to supply the information.

\* \* \* \* \*

#### 1. *Esther Michael-Rigerman*

Mrs. Rigerman was a United States citizen by birth. She was held by the Department to have expatriated herself on the basis of a note dated March 8, 1938 from the Peoples Commissariat for Foreign Affairs of the U.S.S.R. which returned Mrs. Rigerman's United States passport and advised the Embassy that Mrs. Rigerman was "accepted into the citizenship of the U.S.S.R., in accordance with her own petition, by a decision of the Presidium of the All-Russian Central Executive Committee dated December 10, 1937 (Protocol No. 91)."

The passport file in the case of Esther Michael-Rigerman contains inconsistent statements which caused the Passport Office to question her credibility. The inconsistent statements were made in the early passport applications of Mrs. Rigerman in the 1930's; such inconsistencies went to the date of birth, the marital status, and the destination indicated on the application.

In the questionnaire which Mrs. Rigerman filled out on September 7, 1970 at the United States Embassy in Moscow, Mrs. Rigerman made various statements which could be taken as indicating no intent on her part to divest herself of United States citizenship at the time she obtained Soviet citizenship.

Those statements were:

- a) "I am a native born American and always considered myself an American. I do not know whether formally I have lost my American citizenship after I had to become a Soviet citizen in 1937."
- b) In response to a questionnaire dealing with naturalization in a foreign country Mrs. Rigerman acknowledged having applied for Soviet naturalization and described the circumstances in which the application was made. She said:  
"I was requested to get a Soviet internal passport in 1937. Realizing already then in what terrible time I lived I could not dare to refuse and that is how I was naturalized in this country."
- c) "When performing the duties of employments . . . I produced my internal passport (issued to me in 1937) which said nothing about my citizenship."

It should be noted that in 1937 the Soviet Union was going through some of its worst purges and it is not unlikely that Mrs. Rigerman would have been forced by the Soviet Government to turn in her United States passport and obtain Soviet citizenship.

In view of the previous inconsistent statements given by Mrs. Rigerman, the Passport Office was of the view that further clarifying statements should be obtained as to her intention at the time she obtained Soviet citizenship. The fact that Mrs. Rigerman attempted to obtain entry into the United States Embassy to give such clarification tends to confirm her credibility. Moreover, it would be unreasonable now to request further clarification since to do so would subject her to unreasonable risks.

It would accordingly be proper to determine that Esther Michael-Rigerman's certificate of loss of nationality issued by Department on April 29, 1938 should be vacated based on the involuntary obtainment of Soviet citizenship in 1937. In addition, it could be held that under *Afroyim v. Rusk*, 387 U.S. 253 (1967)\* Mrs. Rigerman lacked a specific intent to relinquish or abandon citizenship.

## 2. Henry Rigerman

Henry Rigerman was born in Russia but claims citizenship through his father who was naturalized a United States citizen, January 7, 1924. He obtained a U. S. passport in 1931. There is no record of any further contact with Mr. Rigerman before his death in 1967. It is understood that Mr. Rigerman returned to the Soviet Union in 1931 and remained there until his death. In the view of the Passport Office, it was considered possible that Henry Rigerman took an oath of allegiance upon his return to the Soviet Union in connection with his work which was described as that of interpreter-translator. The file of Mrs. Rigerman contains several references to Henry Rigerman "as an alien" and "as a Soviet citizen" which further substantiated the view that Mr. Rigerman may have lost his United States citizenship pursuant to Section 2 of the Act of March 2, 1907 which is now Section 349(a)(2) of the Immigration and Nationality Act which holds that a national of the United States whether by birth or naturalization loses nationality by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof . . ."

The United States Government has insufficient evidence upon which to establish loss of citizenship in the case of Mr. Rigerman. Under the provisions of section 349(c) of the Immigration and Nationality Act, the burden of proof is upon the United States Government to establish that expatriation occurred. The inability of the United States Government to obtain any further information from Mrs. Rigerman without placing unreasonable risk on her leaves no legal alternative but to conclude that the United States Government is unable to meet the statutory burden of proof and is unable to sustain a finding of loss of nationality as previously indi-

\* Digested in 62 A.J.I.L. 189 (1968).

cated. Accordingly, there is no basis for determining Henry Rigerman's United States citizenship was affected.

### 3. *Leonid Rigerman*

Leonid Rigerman, the son of Henry and Esther Michael-Rigerman was born in the Soviet Union on August 23, 1940. It was the view of the Passport Office that Leonid Rigerman could not be considered to have derived United States citizenship through his mother in view of her expatriation by obtaining naturalization in the U.S.S.R. In view of the questions concerning Henry Rigerman's United States citizenship, the Passport Office believed that it could not properly conclude that Henry Rigerman transmitted U. S. citizenship to his son, Leonid. The Passport Office considered it possible that Henry Rigerman lost his United States citizenship prior to the birth of Leonid Rigerman in 1940. The Passport Office accordingly requested the Embassy to assist the Department in obtaining evidence or information upon which a determination could be made as to whether Henry Rigerman had taken an oath or affirmation of allegiance to the Soviet Union in connection with employment or otherwise.

Based on a complete review of all the facts available to the Department it would be proper to determine that both Henry Rigerman and Esther Michael-Rigerman were United States citizens at the time of Leonid's birth. Therefore, Leonid Rigerman should be held to have acquired United States citizenship pursuant to section 301(a)(3) of the Immigration and Nationality Act.

(Memorandum, dated December 16, 1970, on file in the Office of the Legal Adviser, Department of State.)

### THE UNITED NATIONS

#### *Maintenance of International Peace and Security: Role and Competence of the General Assembly* (13 Whiteman's *Digest*, Ch. XXXIX, §7)

The following is an excerpt from a letter, dated January 5, 1971, from Deputy Legal Adviser George H. Aldrich to Professor Jerome A. Cohen:

I read with considerable interest your editorial in the November 18 issue of the New York Times<sup>1</sup> commenting on the U. S. statement of November 12 in the General Assembly on the issue of Chinese representation. In that editorial you express your concern that we have introduced a new legal theory under which the substitution in the U.N. of the representatives of the People's Republic of China for those of the Republic of China would necessarily be subject, under the U.N. Charter, to a two-thirds vote in the General Assembly and an antecedent recommendation by the Security Council.

After studying our statement of November 12 and the similar statement made in the General Assembly in 1969 and after discussing the question with various officers in the Department, I am clear that the implications

<sup>1</sup> P. 45, col. 1.

you suggest were not intended by the U. S. Government. Admittedly, we did refer to the provisions of Article 18, paragraph 2, and Article 6, which provide the requirements for the expulsion of a Member. However, we did not intend to assert that these provisions apply as a matter of law to the question of Chinese representation. Rather, we were arguing by analogy that the Albanian Resolution<sup>2</sup> was in a practical sense akin to expulsion of a Member. In view of the fact that the Government of the Republic of China exercises effective control over a substantial area and a population of some 14 million people, and that it has been represented at the U.N. since the founding of that organization, the replacement of its representatives by those of the People's Republic of China would bear some striking resemblances to the act of expelling a Member regardless of the legal characterization of the act under the Charter. We were not arguing that the General Assembly had no discretion to decide whether or not the issue should be considered an important question, but we did believe it relevant to remind the Assembly of the strict requirements of the Charter for expulsion prior to its decision whether to treat the Albanian Resolution as an important question.

(Correspondence on file in the Office of the Legal Adviser,  
Department of State.)

<sup>2</sup> U.N. Doc. A/L.605 (1970).

## JUDICIAL DECISIONS

ALONA E. EVANS

*Inheritance by non-resident aliens—State statutory control over transmission of proceeds of inheritance to legatees residing in German Democratic Republic—authority of State to legislate on foreign relations—the law of New York*

BJARSCH v. DiFALCO. 314 F. Supp. 127.

U.S. Dist. Ct., Southern Dist., New York, June 8, 1970.

Plaintiffs, nationals and residents of the German Democratic Republic, brought an action against the Surrogates of New York County for summary judgment requiring the payment to plaintiffs of a legacy due them as remaindermen under the terms of a trust established in the will of a New York decedent. The funds had been paid to the Surrogate's Court pursuant to §2218 of the New York Surrogate's Court Procedure Act, which requires such procedure where an alien legatee resides in a country to which funds of the United States may not be sent under government regulations or where it appears that an alien legatee would not have the benefit, use, or control of such funds if they were transmitted to him.<sup>1</sup> Plaintiffs

<sup>1</sup> Section 2218 provides:

Deposit in court for benefit of legatee, distributee or beneficiary.

1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien

further requested a judgment declaring §2218 unconstitutional and a permanent injunction, restraining the enforcement of this section. They contended that §2218 constituted unlawful State interference with Federal control of foreign relations and that it deprived them of property without due process of law and of equal protection of the laws. The three-judge District Court denied plaintiffs' motions for summary judgment and a permanent injunction and dismissed the complaint.

At the outset, Judge Palmieri observed that the question of the Constitutionality of §2218 had been brought before the Supreme Court in several recent cases and that the court had not interfered with the operation of this law.<sup>2</sup> Furthermore, in both *Clark v. Allen*,<sup>3</sup> and *Zschernig v. Miller*,<sup>4</sup> the Supreme Court had examined similar provisions in the laws of California and Oregon, respectively. Judge Palmieri concluded:

The *Clark* and *Zschernig* decisions together can be construed to mean that statutes restricting the rights of alien beneficiaries to receive inheritances of United States citizens do not inherently constitute an intrusion into the foreign affairs area. At the same time, in applying such statutes, whether the law be a reciprocity provision or a benefit, use and control provision, they appear to warn the state courts not to inquire into or evaluate the administration of foreign law, or the credibility and policies of foreign governments. Thus, a court is limited to a "routine reading" of a foreign country's laws or a "just matching" of such laws with the laws of the state involved.<sup>5</sup> . . . In the *Leikind* case<sup>6</sup> . . . the New York Court of Appeals considered the impact of *Zschernig* on New York proceedings and stated its opinion that the Supreme Court decision did not preclude application of section 2218, "provided [New York] courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application." 22 N.Y.2d at 351, 352, 292 N.Y.S.2d at 685, 239 N.E.2d at 553. The opinion in *Leikind*, which the Supreme Court has declined to review at this time, indicates not only an awareness on the part of New York's highest court of the problems posed by *Zschernig* in the application of section 2218, but also a bona fide attempt to bring New York's practice into conformity with the views of the Supreme Court.<sup>7</sup>

---

beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him.

314 F. Supp. 127 at 119. Footnote by court. Other footnotes by court renumbered or omitted.

<sup>2</sup> *Leikind v. Attorney General of New York*, 397 U.S. 148 (1970) (dismissing appeal from *In re Estate of Leikind*, 22 N.Y.2d 346, 292 N.Y.S.2d 681 (1968) for lack of finality); *Goldstein v. Cox*, 396 U.S. 471 (1970) (dismissing appeal from *Goldstein v. Cox*, 299 F. Supp. 1389 (S.D.N.Y., 1968), 64 A.J.I.L. 417 (1970) on jurisdictional grounds); *Ioannou v. New York*, 371 U.S. 30 (1962) (dismissing appeal from *In re Marek's Estate*, 11 N.Y.2d 740, 226 N.Y.S.2d 444 (1962) for want of substantial Federal question), motion for rehearing denied, 391 U.S. 604 (1968). Cases cited by court, *ibid.* 132-133.

<sup>3</sup> 331 U.S. 503 (1947); 42 A.J.I.L. 201 (1948).

<sup>4</sup> 389 U.S. 429 (1968); 62 A.J.I.L. 971 (1968).

<sup>5</sup> Quoting *Zschernig v. Miller*, 389 U.S. 429 at 433.

<sup>6</sup> Cited note 2 above.

<sup>7</sup> 314 F. Supp. 127, 133-134.

It followed that §2218 did not constitute an attempt by New York State to intrude into the Federal domain of foreign relations.

Plaintiffs' contention that they had been deprived of property without due process of law was based upon the provision of §2218(1)(a) which required the deposit of a legacy in the Surrogate's Court once it had been shown that the alien legatee resided in a country listed under 31 C.F.R. §211.2 (Treasury List) as a country "... that the Secretary of the Treasury has determined that residents [of which] will be unable to negotiate checks or warrants drawn against funds of the United States government for full value."<sup>8</sup> They argued that alien legatees should have an opportunity to show whether they would have benefit, use, or control of their legacies before such funds were deposited pursuant to §2218(1)(a). It was clear that no provision was made for a hearing prior to deposit; the statute and practice thereunder provided no guidance as to whether a hearing on benefit, use, or control should be held after deposit, although ultimate payment of the funds would proceed on court order, hence interested persons would presumably have an opportunity at that time to establish their right to possession. The District Court refused to decide this issue in the absence of a decision by the New York Court of Appeals construing §2218(1)(a).

Plaintiffs also argued that their classification as alien residents of a country included in the Treasury List constituted discrimination as between them and alien residents of other countries or residents of New York State and so deprived them of equal protection of the laws. Judge Palmieri rejected this argument, holding that the classification met the traditional tests of equal protection in that it was both reasonable and related to the purpose of the statute.

*Jurisdiction—endowment policy issued in Cuba governed by Cuban law—effect of Cuban withdrawal from International Monetary Fund Agreement—insured's voluntary departure from Cuba did not effect unilateral change in terms of policy*

GONZALEZ Y CAMEJO v. SUN LIFE ASSURANCE CO. OF CANADA. 313 F. Supp. 1011.

U.S. Dist. Ct., Dist. Puerto Rico, April 23, 1970.

Plaintiff, a Cuban national residing in Puerto Rico, sued defendant, a Canadian corporation, for \$5,000 (U.S.) with interest and costs in payment of an endowment policy which had been taken out in Cuba by plaintiff's father on her behalf in 1954 and which had matured in Cuba by plaintiff's left Cuba voluntarily for the United States in 1962. The policy provided for payment of 5,000 pesos fifteen years after its effective date. In 1954 the Cuban peso was on a par with the United States dollar. Defendant was willing to pay the face value of the policy in Cuba in Cuban currency

<sup>8</sup> *Ibid.* 130 (footnote by court).



or to settle with plaintiff for a sum in United States dollars. Defendant moved for judgment on the pleadings on the ground that plaintiff had failed to state a claim upon which relief could be granted. The District Court granted defendant's motion.

Chief Judge Cancio, applying the Puerto Rican conflict of laws rule based upon the "points of contact" test, held that, as a contract concluded in Cuba, the policy was governed by Cuban law,<sup>1</sup> and that payment would have to be made in Cuban currency in Havana. The court saw no merit in plaintiff's argument that Cuba's withdrawal from the International Monetary Fund Agreement of 1945<sup>2</sup> released the company from any obligation to pay in Cuban currency because the application of the Puerto Rican conflict of laws rule in the instant case was not affected by Cuba's participation in this organization. The court noted that *Confederation Life Association v. Vega y Arminan*,<sup>3</sup> upon which plaintiff sought to rely, could be distinguished from the instant case because the former concerned a cash surrender value option and was decided under Florida's conflict of laws rule based upon the "situs of contract" test.

*War—legality of United States action in Viet-Nam*

BERK v. LAIRD. 429 F.2d 302.

U.S. Court of Appeals, 2nd Circuit, June 19, 1970.

Plaintiff, a private first class enlisted in the United States Army, who had been ordered to South Viet-Nam, brought an action for a judgment declaring that such orders were beyond the Constitutional authority of his superiors and for a permanent injunction forbidding them to send him to South Viet-Nam. He contended that these orders violated his rights under the Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution and under §5 of the New York Civil Rights Law.<sup>4</sup> In particular, he sought to show that the Executive power to commit troops abroad might be exercised only in pursuance of the Legislative power to declare war in accordance with the provision of Article I(8) of the Constitution and that the military action in Viet-Nam had not been undertaken in conformity with this requirement. The District Court denied plaintiff's motion for a preliminary injunction on the ground that such an order would open the way to other applications which, if granted, could hamper the war effort; the court also expressed doubt that plaintiff could establish a right to review in the matter.

<sup>1</sup> Citing *Present v. United States Life Insurance Co.*, 232 At.2d 863 (N. J. Sup. Ct., 1967); 62 A.J.I.L. 494 (1968). <sup>2</sup> 60 Stat. 1401; 2 U.N. Treaty Series 39.

<sup>3</sup> 207 So.2d 33 (D. Ct. App. Fla., 1968); 62 A.J.I.L. 986 (1968).

<sup>4</sup> Sec. 5 provides: "No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States." Quoted by court, 429 F.2d 302, 304. (Other footnotes by court omitted.)

The Court of Appeals affirmed this decision on the ground that plaintiff did not show sufficient probability of success on the merits to warrant the issuance of a preliminary injunction. Judge Anderson was satisfied that plaintiff's claim met the "general standard of justiciability" established in *Powell v. McCormack*, 395 U.S. 486, 516-518 (1969), and *Baker v. Carr*, 369 U.S. 186, 198 (1962),<sup>5</sup> but he ordered that the case be remanded for a hearing on the request for a permanent injunction and directed that plaintiff provide the District Court with "... a set of manageable standards . . . for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity"<sup>6</sup> which would enable the court to determine whether the complaint involved a political question.

*War—legality of United States action in Viet-Nam—potential war crimes charges*

SWITKES v. LAIRD. 316 F. Supp. 358.

U.S. Dist. Ct., Southern Dist., New York, July 2, 1970.

Petitioner, a psychiatrist and Captain in the United States Army, applied for a writ of habeas corpus to secure his discharge from the armed services as a conscientious objector or, in the alternative, a preliminary injunction restraining the armed services from sending him to Viet-Nam. Judge Wyatt held that the court had no jurisdiction to entertain the petition for habeas corpus as the petitioner was not being restrained within the Southern District of New York.

In moving for a preliminary injunction, Switkes questioned, *inter alia*, the legality of United States participation in the war in Viet-Nam and argued that his transfer to Viet-Nam would violate §5 of the New York Civil Rights Law.<sup>1</sup> Judge Wyatt observed that the Court of Appeals for the Second Circuit had denied a motion for a preliminary injunction in *Berk v. Laird*<sup>2</sup> on the grounds that similar claims probably would raise an "unmanageable political question" and that "... neither the likelihood of success nor the balance of equities inclines so strongly in [Berk's] favor that a preliminary injunction is required." (316 F. Supp. 364.)

Petitioner also contended that the conduct of the war in Viet-Nam violated international law, so that if he were sent to Viet-Nam, he would, in effect, become party to war crimes; moreover, he would be unable to challenge such offenses while in a combat zone. Judge Wyatt recognized the difficulty faced by a domestic tribunal in determining the validity of petitioner's contentions. The court said:

<sup>5</sup> Cited by court, *ibid.* 305.

<sup>6</sup> *Ibid.*

<sup>1</sup> Sec. 5 provides: "No citizen of this state can be constrained to arm himself, or to go out of this state, . . . without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States." 8 McKinney's Consolidated Laws of New York, §5.

<sup>2</sup> Above, p. 401.

These serious issues need not be decided because, even if they were decided in favor of Switkes, he would not be entitled to a preliminary injunction since there is no showing of any damage to him. The damage claimed is that he will become a war criminal. This is so unlikely as to require rejection of his claim. If he were a combat soldier or combat officer, the matter would stand differently. Switkes, however, is a medical officer specializing in psychiatry.

If war crimes are being committed in Indochina, not every member of the armed forces there is an accomplice to these crimes. See *United States v. Valentine*, 288 F. Supp. 957, 987 (D.P.R. 1968); *McDougal & Feliciano*, Law and Minimum World Public Order 530-534 (1961). (316 F. Supp. 365.)

*Act of state—sovereign immunity—Federal control of foreign relations of United States—State interference with foreign relations—alleged racial discrimination in provision of services by international air carrier—Republic of South Africa's visa policy—New York Human Rights Law*

*SOUTH AFRICAN AIRWAYS v. NEW YORK STATE DIVISION OF HUMAN RIGHTS.* 315 N.Y.S. 2d 651.

Supreme Court, New York County, Special Term, Part I. Nov. 9, 1970.

The Attorney General of New York filed a complaint in December, 1969, with the New York State Division of Human Rights (Division), charging that South African Airways (SAA), a commercial carrier owned by the Republic of South Africa, was practicing racial discrimination in the transportation of passengers to the Republic of South Africa. The complaint stated that SAA published advertisements inviting Americans to visit the Republic but that the Republic's Consulate in New York refused to issue unrestricted visas to black persons and that the carrier, in turn, would not transport persons lacking visas. It was charged that this practice violated Executive Law §296(2) (New York Human Rights Law) which "... makes it unlawful, directly or indirectly, (1) to refuse, withhold from or deny to any person, because of race or color, the accommodations, advantages, facilities or privileges of any place of public accommodation. . . ." <sup>1</sup> According to §292(9) of this law, aircraft are comprehended within the definition of "place of public accommodation." <sup>2</sup> SAA challenged the Division's jurisdiction in the matter on five grounds: such a proceeding "... would constitute an unconstitutional state interference in the foreign relations of this country"; it would amount to an attempt to interfere with United States commitments under international civil aviation agreements and Federal regulations pursuant thereto; it would contravene the "Federal act of state doctrine" and "principles of international law recognized and accepted by the United States," in that it would involve an inquiry into a foreign state's visa policy which is a matter "... not reviewable by courts or administra-

<sup>1</sup> Respondents' Memorandum in Support of Answer, p. 3.

<sup>2</sup> Respondents' Memorandum 3.

tive agencies in this country"; complainant had failed to join the Republic of South Africa as an indispensable party; and, finally, that §414 of the Federal Aviation Act, 49 U.S.C. §1384,<sup>3</sup> relieved SAA from any "restraints or prohibitions" which might be sought to be imposed under the terms of the New York Human Rights Law upon the carrier's requirement that passengers be provided with valid travel documents before embarkation.<sup>4</sup>

In January, 1970, the Regional Director of the Division ordered a public hearing on the complaint, apparently assuming the Division's jurisdiction in the matter, but he made no reference to SAA's objections thereto.<sup>5</sup> SAA then requested that the State Commissioner of Human Rights dismiss the complaint or, in the alternative, order a separate hearing on the issues raised by SAA. In March, the Commissioner denied this motion, holding that the Regional Director had jurisdiction in the matter. SAA appealed to the Human Rights Appeal Board, which dismissed the appeal on the raised by SAA. In March the Commissioner denied this motion, holding of a hearing on the complaint. The carrier appealed this decision to the New York Supreme Court, Appellate Division, First Department. In July the Appellate Division affirmed the Appeal Board's decision but observed that in so doing the court did not reach the merits of SAA's response to the complaint. Meanwhile, the Division had scheduled but had not held hearings on the complaint. With another hearing scheduled for September, SAA petitioned the New York Supreme Court under CPLR §7803(1) (2) (3) for a judgment prohibiting the Division from holding such hearing. The court granted SAA's motion.

Justice Fein said:

On the face of the complaint it is thus apparent that any action which respondent could take would necessarily be directed against a foreign government or its consular agent, exercising sovereign power. This it may not do, for such action would interfere with an act of state and with the foreign policy of the United States, which has seen fit to permit petitioner to operate in and out of the United States, carrying passengers to and from the Republic of South Africa. Foreign policy is a federal concern, not amenable to state action. (*Hines v. Davidowitz*, 312 U.S. 52, 63; *Zschernig v. Miller*, 389 U.S. 429; see *French v. Banco Nacional de Cuba*, 23 N. Y. 2d 46, 54). Even an administrative agency of the United States is precluded from such interference. (*McCullough v. Sociedad Nacional*, 372 U.S. 10). . . .

Accordingly, there is no warrant for requiring the petitioner to submit to a hearing on the merits, at which it might raise the jurisdictional issue, and then appeal to the courts if unsuccessful, as argued by the

<sup>3</sup> Section 414 of the Federal Aviation Act, 49 U.S.C. §1384, provides that any person affected by, *inter alia*, an order under Section 412 approving an agreement among airlines "shall be, and is hereby, relieved from the operations of the 'antitrust laws,' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." Quoted in Petitioner's Memorandum in Support of Its Application to Grant the Relief Requested in the Petition Herein, p. 37 (emphasis omitted).

<sup>4</sup> Petitioner's Memorandum 3-4.

<sup>5</sup> History of proceedings from Petitioner's Memorandum, pp. 4-7.

respondent. The doctrine that administrative remedies must be exhausted before seeking judicial intervention has no application in a context in which the administrative agency has no lawful power to act at all. (*Dobler v. Kaplan*, 27 Misc. 2d 15). . . .

Our courts and administrative agencies have no power to act when the remedy sought calls into question the sovereign power of a foreign government. (*Frazier v. Foreign Bondholders Protective Council*, 288 A. D. 44, lv. den. 283 A. D. 655; see *French v. Banco Nacional de Cuba*, 23 N. Y. 2d 54). *Matter of American Jewish Congress v. Carter* (19 Misc. 2d 205, mod. 10 A. D. 2d 833, aff'd. 9 N. Y. 2d 223), is not in point. There the oil company in New York allegedly discriminated against prospective employees on the basis of religion. The actions of the oil company were in question, not those of a foreign sovereign. However abhorrent the discriminatory policies of the Republic of South Africa and its Consulate in New York, no administrative or judicial remedy is here available against them. No facts are alleged showing that petitioner is engaged in implementing such policies.

Respondent is without jurisdiction to conduct a hearing on the visa policy of the Republic of South Africa, as it affects petitioner in carrying passengers.<sup>6</sup>

*Jurisdiction—nationals abroad—foreign mail—treaties—binding effect  
—necessity of assent of state—Universal Postal Union Convention*

*WILLIAMS v. BLOUNT*. 314 F. Supp. 1356.

U.S. Dist. Ct., Dist. of Columbia, June 17, 1970.

In a class action, plaintiffs, American nationals who included the publisher of and several subscribers to *The Crusader*, a publication emanating from Peking, China, sought to enjoin the Postmaster General from impounding the May, 1967, issue. The Postmaster General's order was based primarily upon 18 U.S.C. §1461 which forbids the mailing or delivery by mail of ". . . matter of a character tending to incite arson, murder or assassination."<sup>1</sup> The issue of *The Crusader* in question was said to advocate mutiny and sabotage by Negroes serving in the American forces in Viet-Nam. The complaint was particularly directed to the Postmaster General's summary seizure of this foreign publication without providing an opportunity for sender or recipients to be heard, whereas such an opportunity would be available if the non-mailability of a domestic publication were under consideration. The Postmaster General responded that a foreign sender's rights regarding carriage of mail are governed either by the Universal Postal Union Convention<sup>2</sup> or by domestic law. Article 28 of the convention recognizes the right of a state to establish and enforce prohibitions on receipt of mail. Neither the convention nor United States law provided for hearings in regard to the determination of the non-mailability of foreign mail. Granting the injunction, the three-judge District Court

<sup>6</sup> 315 N. Y. S. 2d 651, at 654-655.

<sup>1</sup> Quoted by court, at p. 1358. The order was also based upon §§957, 1717(a), and 2387.

<sup>2</sup> 16 U.S. Treaties 1291, T.I.A.S., No. 5881.

held that the Postmaster General had violated plaintiffs' Fifth Amendment rights by following a summary procedure in this matter.

In a memorandum opinion, Judge Robinson pointed out that the terms of the Postmaster General's supervisory power over the mails were expressly stated in law. Moreover, with respect to 18 U.S.C. §1461, the Supreme Court had said that

that section does not authorize "... the Postmaster General to employ any process of his own to close the mails to matter which in his view falls within the ban of that section." *Manual Enterprises v. Day*, 370 U.S. 478, 519, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962).<sup>3</sup>

It followed that the Postmaster General could not impound foreign mail in the absence of specific statutory authorization. Furthermore, the Postmaster General could not rely upon the Universal Postal Union Convention as his source of authority because the Republic of China is not a party thereto. The court noted: "Generally, for international agreements to be binding, an indication of assent by participating nations is required."<sup>4</sup> Judge Robinson observed that, even if the convention were applicable, Article 28 does not authorize the use of a summary procedure. The court said:

A Postal Convention is neither a law nor a treaty since it has neither been passed by Congress nor ratified by the Senate. *Four Packages of Cut Diamonds v. United States*, 256 F. 305, 306 (2d Cir. 1919). A Convention has only the effect of an administrative regulation issued by the Postmaster General under authority of law. *Standard Fruit and Steamship Co. v. United States*, 103 Ct.Cl 659, 682 (1946).

Article 28, Section 1(d), contains no standards of its own; it merely points to the domestic laws of member nations for standards of mailability. Since the Supreme Court has emphasized that the Postmaster General is not free to employ whatever procedures he chooses in dealing with prohibited matter, the interpretation of Article 28, Section 1(d), which would be most consistent with the Court's constitutional mandate would be that it directs him to domestic substantive and procedural law for standards of mailability. (314 F. Supp. at 1362.)

Citing *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); Judge Robinson concluded:

An American citizen does not forfeit his rights to freely use the mails or to be insulated from arbitrary or unfair actions by his Government simply because he finds himself outside of the country. . . .

*Reid v. Covert* dispels any doubts as to the Fifth Amendment's application to the actions of our government as they affect American citizens abroad. The principle announced there compels the conclusion that the Postmaster General violated Williams' [the publisher's] Fifth Amendment rights when he impounded the May 1967 *Crusader* in a manner inconsistent with procedural due process. (*Ibid.* at 1363-1364.)

<sup>3</sup> 314 F. Supp. 1356 at 1362.

<sup>4</sup> *Ibid.*, citing Restatement (Second), Foreign Relations Law of the United States, §122, Comment (a) (1965).

## UNITED KINGDOM CASE NOTE

*Treaties—state succession—evidence of accession to treaty—Convention Relating to the Status of Refugees, 1951—expulsion of aliens—the law of Lesotho*

MOLEFI v. PRINCIPAL LEGAL ADVISER. [1970] 3 Weekly Law Reports 338.

United Kingdom, Judicial Committee of the Privy Council, June 17, 1970.

Appellant, a South African national, was arrested in 1961 on charges of violating the South African Suppression of Communism Act (No. 44 of 1950). Following his release on bail, he went to Basutoland. In October, 1966, Basutoland became the independent Kingdom of Lesotho. Two years later, appellant was ordered to leave Lesotho pursuant to the provisions of the Aliens Control Act (No. 16 of 1966). This law was approved on September 30, 1966, and went into operation on March 1, 1968. Appellant petitioned the High Court of Lesotho for a stay of the expulsion order on the ground that he qualified as a refugee under the terms of §38(1) (2)<sup>1</sup> of the Aliens Control Act. The court granted a temporary stay, which was withdrawn after a hearing. Appellant then appealed to the Court of Appeal, which dismissed his appeal in May, 1969, but granted him leave to appeal to the Judicial Committee of the Privy Council with a stay of expulsion pending the latter's decision. The Judicial Committee dismissed his appeal.

At the outset, the Judicial Committee had to determine whether the 1951 Convention Relating to the Status of Refugees<sup>2</sup> had been acceded to "by or on behalf of the Government of Lesotho" so that its terms could be invoked by appellant in pursuance of §38 of the Aliens Control Act. A letter of March 22, 1967, from the Prime Minister of Lesotho to the Secretary

<sup>1</sup> Sec. 38 provides:

"(1) If any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention shall not be refused entry into or sojourn in Lesotho, and shall not be expelled from Lesotho in pursuance of the provisions of this Act except with his consent or except to the extent that is permitted by that treaty or convention, subject to any reservation that may be in force at the material time.

"(2) If any question arises—

- (a) whether an alien is a refugee;
- (b) whether any provision of an international treaty or convention relating to refugees, applies to that alien; and
- (c) whether the expulsion of that alien from Lesotho is permitted by that treaty or convention,

the High Court may on the application of that alien declare that he is a refugee, that that provision of the international treaty or convention applies to him, and may declare that his expulsion from Lesotho is, or is not, permitted by that treaty or convention, or may decline to make any such declaration." [1970] 3 Weekly Law Reports 338 at 340.

<sup>2</sup> 189 U.N. Treaty Series 150; T.I.A.S. No. 6577; 63 A.J.I.L. 389 (1969).

General of the United Nations, was offered in support of appellant's contention that Lesotho was bound by the convention. Paragraph four of the letter stated:

The Government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties [*i.e.* that they would be applied by Lesotho on a reciprocal basis for twenty-four months from the date of independence unless abrogated or modified earlier by mutual consent] cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument—whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty.<sup>3</sup>

Respondents argued that this paragraph did not constitute a commitment to accede to any multilateral convention but was at the most "... an offer voluntarily and on a reciprocal basis to observe certain terms of some treaties or conventions."<sup>4</sup> On examination of the letter and the meaning of "reciprocity," Lord Morris of Borth-y-Gest said:

The Prime Minister's letter was therefore, as Maisels J.A. held, a declaration that pending individual examination (which would take time) of those multilateral treaties which had resulted in treaty relations between the country formerly known as Basutoland and other states, Lesotho would adhere to those treaties. The Refugee Convention was one of them. When therefore the Aliens Control Act 1966 came into operation the appellant, an "alien," could rely upon s. 38 if he was a "refugee" within the meaning of the Convention.<sup>5</sup>

It remained to be shown whether appellant qualified as a refugee under the terms of the convention, which in Article 1 limited this status to a person who "... as a result of events occurring before 1 January 1951" was "... outside the country of his nationality" and was unable to seek its protection because of "... well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Appellant contended that he had left South Africa because of the election of the National Party to power in 1948 and the adoption of the Suppression of Communism Act in 1950, both of which contributed to the repression of Africans in that country. The Judicial Committee pointed out, however, that appellant had remained in South Africa for more than a decade after these two events. At the most, they formed the background for the actual event which gave rise to the charges against him in 1961, *i.e.*, his participation in an unlawful organization, the Pan Africanist Congress, which had been established in 1959. In consideration of these facts, the Judicial Committee agreed with the Lesotho Court

<sup>3</sup> [1970] 3 Weekly Law Reports 338 at 344.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*



of Appeal that appellant was not a refugee within the meaning of the 1951 Convention.

REPUBLIC OF ISRAEL CASE NOTES \*

*War—definition of prisoner of war—irregular forces—Popular Front for the Liberation of Palestine—Geneva Convention Relative to the Treatment of Prisoners of War, 1949—the law of Israel*

MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM ET AL. File No. 4/69. Military Ct., Ramallah, April 13, 1969.<sup>1</sup>

Defendants were captured by Israeli troops in October, 1968, at Auja near Jericho and were charged with being members of the Organization of the Popular Front for the Liberation of Palestine (Palestine Liberation Front), which engaged in sabotage and other criminal acts directed against the state of Israel. Defendants pleaded that they should be treated as prisoners of war and that this status was a defense to the charges brought against them. Rejecting this plea, the military court held that it was competent to hear the case.

Both Israel and Jordan were parties to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>2</sup> Article 4 of the convention lists various categories of persons who qualify as prisoners of war. The court was satisfied that members of the Palestine Liberation Front could not be classified as members of the armed forces of Jordan (Article 4(1)) nor as members of the armed forces of a government not recognized by Israel (Article 4(3)) because the Front

... is neither a State nor a government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan.<sup>3</sup>

Nor could they be classified as members of a *levée en masse* (Article 4(6)) in view of the fact that the area in which they were captured had been occupied by Israel for more than a year prior to this incident. It remained to be shown whether defendants could be classified as members of irregular forces including militia, volunteers, or an organized resistance movement (Article 4(2)). To be so categorized, defendants had to meet four criteria: they had to be under military command; they had to wear a fixed distinctive symbol recognizable at a distance; they had to carry arms openly; and they had to act in accordance with the laws and customs of war.

Defendants qualified under the second criterion, in that when they were captured they were wearing dress which differed from that worn by civil-

\* Translations of the following decisions have recently become available to this JOURNAL, and are included here because the subject matter is of current interest.

<sup>1</sup> Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University of Jerusalem, Law and Courts in the Israel-Held Areas, Jerusalem, Ahva Press, 1970, p. 17.

<sup>2</sup> 6 U.S. Treaties 3316; T.I.A.S., No. 3364; 75 U.N. Treaty Series 135; 47 A.J.I.L. Supp. 119 (1953).

<sup>3</sup> *Loc. cit.* note 1 above, at 24.

ians in the area and one of them (and presumably all) carried a pass listing his name, serial number, and the letters, "J.T.F." (Palestine Liberation Front). They did not meet the other three criteria. It was not shown that they acted under responsible military command. The fact that they were carrying weapons became evident to witnesses only after they had begun to fire on the Israeli troops. Finally, the numerous acts of violence directed by the Front against civilians precluded the argument that defendants acted in accordance with the laws and customs of war. The court said:

This [last] condition is most essential. Let us note only that its nonfulfilment completely precludes any possible claim to lawful belligerency. Lawful belligerency is incompatible with disregard of the rules and customs of war.<sup>4</sup>

This last point was reinforced by the fact that defendants were carrying civilian clothes which "... is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals."<sup>5</sup>

*War—definition of enemy—giving information of military value to enemy—the law of Israel*

MILITARY PROSECUTOR *v.* ADNAN IBN ADAL IBN BADAWI AL BAHSH. File No. NAB 462/69.

Military Ct., Nablus, Aug. 13, 1969.<sup>1</sup>

The accused, who was authorized to carry agricultural produce from the West Bank to Jordan, was charged with three counts of violating the West Bank law against carrying printed matter to Jordan. Israeli Army authorities had found in the accused's truck newspapers which he admitted were to be delivered to a Jordanian security officer stationed at a check-point on the border. The accused stated that he had agreed to deliver the newspapers following threats by this officer. The accused was familiar with the law and made no effort to conceal the newspapers. The military court acquitted him on all counts.

Although the court agreed that on the face of it the accused had had dealings with an enemy agent, a member of the Jordanian army, in fact the accused's contact had been involuntary, incidental, and open, in that he freely admitted the nature of the contact to Israeli authorities. The prosecution's argument equating attempted delivery of newspapers with delivery of military information to the enemy was rejected by the court as there was no evidence that the newspapers contained any information of military value. Finally, the court could find no improper object in the act undertaken by the accused which would bring it within the terms of the law invoked by the prosecution.

<sup>4</sup> *Ibid.* at 29.

<sup>5</sup> *Ibid.* at 34–35.

<sup>1</sup> Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University of Jerusalem, Law and Courts in the Israel-Held Areas, Jerusalem, Ahva Press, 1970, p. 36.

## BOOK REVIEWS AND NOTES

LEO GROSS

*Book Review Editor*

*Social Justice in the Law of Nations: The ILO Impact after Fifty Years.*

By C. Wilfred Jenks. London, Oxford and New York: Oxford University Press, 1970. pp. ix, 94. Index. 12 s.; \$2.50.

This book, consisting of three chapters, is an expansion of the Hersch Lauterpacht Lectures delivered before the Faculty of Law of the University of Cambridge in February, 1969, on the occasion of the Fiftieth Anniversary of the International Labor Organization (ILO). Their theme is the crucial problem of contemporary international law, a problem that involves the citizen as well as the lawyer. Noting the rapidly changing nature of the world, the author poses the question whether the law can keep pace with life, or whether its failure to keep pace with life, and the loss of respect for the rule of law resulting from such failure, will be a tragically decisive element in the disintegration of the whole social order.

Initially, reference is made to the functioning of international law in the continuing effort over the past decades to create an organized world community and the issue thus posed as to the adequacy of existing concepts of the law for contemporary social functions. The author takes the view that the law is in constant motion and he formulates the targets set by the international community for the contemporary progress of law in these words: "The law must protect the common peace, must promote the common welfare, and must provide an orderly discipline for the relentlessness of change." An analysis of the three postulates contained in this quotation demonstrates that they encompass every facet of life in our modern society. If the law of nations is to be responsive to the wide-ranging needs of our changing society, a whole series of new major branches of the law must be developed within the next generation. The half-century of pioneering experience of the ILO in furthering social justice within the realm of law through unique diplomatic and legal techniques, in providing a constitutional framework for social justice, and in giving a specific content to the general concept of social justice, is examined within this context to explore whether such experience is relevant in bringing other fields of policy within the rule of law in order to achieve the desired responsiveness.

Chapter 2 treats the constitutional framework of social justice provided by the structure and procedure of the ILO. After briefly noting important areas of progress achieved by the ILO during the last 50 years, five essential elements are examined which have enabled the ILO to achieve this progress and to bring a new field of human activity within the ambit of the

law of nations. These are: the clear and specific mandate in the Charter of the ILO, the ILO's constitutional structure, its international legislature procedure, the effectiveness of international supervision of treaty obligations, and judicial and fact-finding procedures. All of these are directly related to the fundamental structural weakness of contemporary world organization, and a major portion of the book is devoted to examination of these elements in a most interesting and highly informative fashion. The ILO experience does not solve the basic problem of making the law responsive to the pressures of human development, but it does exhibit a determination to evolve the elements of a solution pragmatically by experiment and experience.

The final chapter deals with the content of social justice as reflected in the International Labor Code—which is essentially a codification of internationally approved standards—consisting of 130 Conventions with over 3,500 ratifications and 134 Recommendations. The Code is one of the main formative influences on the development of social legislation in many countries throughout the world. Its significance here is discussed in relation to four matters of general interest: human rights; the development and utilization of labor legislation; the place of law in labor-management relations and of labor-management relations in the structure of the state; and conflicts of law in labor matters. While these matters may be considered marginal to the traditional preoccupation of international lawyers, their subsequent treatment shows them to be illustrative of the current evolution of the law.

The book as a whole carries the message that the urgent task today is “to evolve, within the discipline of the law but by its dynamic development, a law in the service of mankind which will enable mankind to live”; that the fulfillment of this goal is within the grasp of mankind; and that the experience of the ILO is relevant to this undertaking. This is a provocative book for the serious student of international affairs.

GEORGE L. P. WEAVER

*Problèmes de Confins en Droit International Public.* By Charles De Visscher. Paris: Éditions A. Pedone, 1969. pp. 200.

The observations of Judge De Visscher in his recent book on *Les Effectivités du Droit International Public* (1967) were characterized by Professor Leo Gross as “variations on the theme of effectiveness.”<sup>1</sup> In his study of *Problèmes de Confins en Droit International Public*, the theme englobed by Judge De Visscher relates to “confins”—literally, confines, borders or limits. The concept, writes the author, embraces notions of borders, limits, proximity, contiguity, and spatial continuity, whether on land or sea.

This global concept of *confins* is so all-encompassing that, once set up, it must immediately be broken down into its diverse elements in order to permit precise observation. Thus, for example, “as opposed to delimitations on land whose firmness leaves little place for problems of *confins*, the

<sup>1</sup> 63 A.J.I.L. 844 (1969).

concepts of geographical proximity play a capital role in maritime *confins*" (p. 8). Even the rigidity of land frontiers yields at times to the establishment of a *régime de confins* applicable in a particular border zone because of the necessities of neighborhood or communication. And on the seas, the delimitation and use of areas bordering the coast, bays, straits, archipelagos, and the continental shelf relate not to a global concept of borders or limits but to specific legal regimes developed to serve recognized needs.

The method employed has nevertheless the advantage of permitting the world's most experienced and distinguished international lawyer to set forth his considered reflections on a variety of territorial problems in international law. In addition to traditional matters of attribution of territorial title, delimitation, demarcation, jurisdiction in border areas, the utilization of international rivers and the regime of international straits, Judge De Visscher has observations on current problems such as pollution of air and water, the resources of the seabed, and the distinction between hot pursuit at sea and its false analogy to pursuit across land frontiers.

The student of international law will find most valuable the author's consistent efforts to relate current problems to a jurisprudential base in international adjudications and arbitrations. Territorial questions decided by the Permanent Court and the International Court of Justice are professionally appraised for their real significance. The principles underlying the recent *North Sea Continental Shelf* case are carefully analyzed. In addition, Judge De Visscher has enlightening comments on international arbitrations or incidents like the *Palmas Island*, *Trail Smelter*, *Lac Lanoux*, *Rann of Kutch*, the Argentine-Chilean Award of Lord McNair (1966), the *Shatt-al-Arab*, and the *Torrey Canyon* cases.

Following his *Théories et Réalités en Droit International Public* (first published in 1953),<sup>2</sup> Judge De Visscher has given us *Problèmes d'Interprétation Judiciaire en Droit International Public* (1963),<sup>3</sup> *Aspects Récents du Droit Procédural de la Cour Internationale de Justice* (1966),<sup>4</sup> *Les Effectivités du Droit International Public* (1967)<sup>5</sup>—and now the volume under review. It is not ingratitude for the riches thus bestowed which makes the international lawyer hope for more.

HERBERT W. BRIGGS

*Koordination und Integration als Rechtsprinzipien.* By Claudius Alder. Bruges: De Tempel, 1969. pp. xxxiv, 344. Index. B. Fr. 400; \$8.00.

The study under review attempts to find a legal basis for a supremacy of the law of the European Communities. The author critically examines this problem in the light of two diametrically opposed schools of thought,

<sup>2</sup> See review in 49 A.J.I.L. 106 (1955), by Josef L. Kunz; and review of revised English translation in 64 A.J.I.L. 463 (1970), by Stanley Hoffmann.

<sup>3</sup> See review in 58 A.J.I.L. 198 (1964), by Herbert W. Briggs.

<sup>4</sup> See review in 62 A.J.I.L. 206 (1968), by Leo Gross.

<sup>5</sup> See review in 63 *ibid.* 844 (1969), by Leo Gross.

*i.e.*, of the "federalists" and of the "dualists." The federalists' view seeks to establish the supremacy of Community law over national law by an analogy with a federal system in which, within a specific field, the federation has an exclusive legislative competence and federal law prevails, leaving no place for state law. The "federalists" seek to justify their view by stressing the federal elements inherent in the Community legal structure.

However much sympathy the author shows for this approach—as to the result he agrees with the "federalists"—he rightly warns against superficial comparisons and against overestimating the ultimate objective of a federation, merely hinted at by the treaties, which could justify the supremacy of Community law (p. 75). The author does recognize some structural similarities of the Communities with a federal system, particularly their direct legislative powers. Yet he doubts, and with good reason, that an absolute surrender of the power of the Member States, which would establish the supremacy of Community law, could be deduced from these similarities.

The author's stand on this point is sound and realistic. At present, the Communities display, at best, some pre-federal features, but not more. The treaties have been drafted in a very pragmatic spirit, without any preconceived dogmatic notions. As the author correctly observes, the drafters of the treaties availed themselves of some federal features, not in order to develop a federal structure but rather to establish an institutional structure considered particularly apt for pursuing the Community objectives (p. 153). This is another aspect which weakens the value and force of the federalist approach.

In sharp contrast to the federalist approach stands the dualist school of thought according to which the treaties, as any other international treaty, are binding on states only. To become applicable by national authorities, the treaties, as any other international treaty, must be transformed into the national legal system. Thus the legal status of the treaties in the national legal system is determined by the respective constitutional provisions of the Member States. And as these provisions differ, the legal status of the Community Treaties in the national legal order differs as well. The author categorically rejects this approach, reproaching the dualists for completely disregarding the special nature of the treaties and the material content of their provisions. Neither the federalists nor dualists may, in his view, offer a conclusive argument for a feasible relation of the Community law to national law because they base it on traditional concepts of public international law, which fail to take into consideration the original features of the Community Treaties (p. 301).

Instead the author seeks to deduce the supremacy of Community law from the treaties themselves, from the content of their material provisions. He rightly points out that, unlike traditional international organizations, the E.E.C. binds not only Member States but individuals as well. The material treaty provisions imply, in the author's view, an acceptance of the principle of integration by the Member States without which the establishment of the Common Market would be inconceivable. In his opin-

ion, the fusion of the national markets and the integration as reflected by the treaties were as much intended by the Member States as was the supremacy of Community law which is the only way of assuring the pursuance of these objectives. "Accordingly it must be assumed," asserts the author, "that by accepting the Community Treaties the Member States subordinated themselves, even though not formally, at least materially to the Community law, and in fact surrendered, although not explicitly, their sovereignty" (p. 312). According to the author, this is merely a logical consequence of the principle of integration underlying the E.E.C. Treaty.

The author's views are well presented and quite defensible. His approach is sufficiently pragmatic to avoid unnecessary and futile dogmatic discussions which, in view of the novelty of the problem, would be largely misplaced anyhow. The unquestionable merit of this study, of course, does not exclude some critical remarks. The study is predominantly formal in the sense that it disregards, to a large extent, the actual practice and the case law of the Court of Justice and of the national courts dealing with this problem. A more extensive and systematic consideration of the case law would have enhanced the value of this study and made the author's argument even more persuasive.

It appears somewhat difficult to accept the author's view that in 1968, the time the study had been completed, it would have been premature to appraise the impact of the ENEL case of the Court on national case law. A certain trend is already discernible. Several decisions of national courts, some of them of particular importance, have been rendered since then, which would have deserved brief examination (for example, the decisions of the Italian Constitutional Court of Dec. 16, 1965; the German Constitutional Court of Oct. 18, 1967; Finanzgericht of the Saar, Nov. 15, 1966). The insufficient and critical examination of the case law of the Court is particularly evident in the author's discussion of treaty provisions directly applicable. Had the author carefully examined it, he might not have so quickly concluded that there is a direct application of some treaty provisions (e.g., Articles 7, 48, par. 1, 52, 119) (p. 324). There are more problems involved than the author's presentation would suggest.

His observation that the Court declared Article 4 of the European Coal and Steel Community Treaty directly applicable seems to originate in a misunderstanding of the true meaning of the case of *Groupement des Industries Sidérurgiques Luxembourgeoises* (Nos. 7/54 and 9/54) (p. 321). In this instance, the Court did not deal with a direct application of a treaty provision in the national legal system in the sense that individuals may invoke it before national courts, as the author assumes. This case concerned the question whether or not a treaty provision is so clear and complete in its wording as to permit its immediate application by the competent Community institution. But this is something entirely different than a direct application, in the sense given above, which the author envisages in his study.

The author also examines the direct application of the various binding Community acts in national legal systems. Some of his statements appear

rather doubtful. Thus the author maintains that the Court recognized in the *Toepfer* case a direct application of a decision of the Commission addressed to a Member State (p. 329)—a view shared unfortunately by other authors as well. This is not correct. Admittedly, the formulation of the Court on this point may be misleading; but if placed within its context, it leaves no doubt that the Court examined in this instance the admissibility of an appeal according to Article 173(2) of the E.E.C. Treaty, which requires, *inter alia*, that the appellant be *directly affected* in his interests by the allegedly illegal decision. But again this is an entirely different matter as compared with a direct application of a treaty provision in the national legal system.

Several decisions of national courts ruled on the legal nature of Article III of GATT, a provision which in its purpose and wording is very similar to that of Article 95 of the E.E.C. Treaty. Some decisions even contrasted these two provisions. While recognizing the direct application of Article 95 of the E.E.C. Treaty, they refused such a legal nature to Article III of GATT. The reasons which prompted national courts to differentiate between these two provisions might have been conveniently used by the author for reinforcing his arguments.

This criticism, of course, in no way detracts from the merits of this stimulating and revealing study, which makes a significant contribution to the understanding of this vital problem. It will, therefore, assume an important place among the ever increasing literature dealing with it.

G. BEBR

*Teoriia mezhdunarodnogo prava.* By G. I. Tunkin. Moscow: izd-vo "Mezhdunarodnaia otnosheniia," 1970. pp. 507. R. 2 k. 62.

The theoretical views of Tunkin on international law are comparatively well known to Western jurists through his lectures at the Hague Academy in 1958 and 1966 and the French and German translations of his *Voprosy teorii mezhdunarodnogo prava* (1962).<sup>1</sup> Tunkin has been closely associated in Western eyes with articulating the juridical underpinnings of the post-Stalin policy of peaceful co-existence, although the work of some of his lesser-known colleagues (Bobrov, Kozhevnikov, Levin, Minasian, to mention but a few) is also of great interest in this connection.

The present volume, a revised and considerably enlarged version of his 1962 treatise, is without doubt the most important work by a Soviet jurist on international legal theory.<sup>2</sup>

Many changes in the new edition are the result of events of the past eight years. The copious references in the first edition to Khrushchev have been replaced by equally suitable statements or documents written by his successors. The attention devoted in 1967 to the fiftieth anniversary of the October Revolution is reflected in a new introductory chapter extolling the influence of that Revolution upon the development of international

<sup>1</sup> Reviewed by John N. Hazard in 57 A.J.I.L. 673 (1963).

<sup>2</sup> See editorial by Hazard in 65 A.J.I.L. 142 (1971).



law. Criticisms of Kelsen, Morgenthau, McDougal, Hazard, and others have been updated with extensive citations to their own publications and to those of their Western critics. The principal revisions, however, lie in the areas of norm-formation, international organizations, and Socialist internationalism.

The chapters on norm-formation have been augmented by a lengthy consideration of the rôle that general and specialized international organizations play in this process. Soviet jurists are far from agreed as to what this rôle is or should be. Tunkin quite emphatically insists that treaties of international organizations are more than merely treaties among large numbers of states. He concludes that such treaties "may create and in fact do create norms binding upon the parties to such treaties, which enter into the system of contemporary international law." (P. 129.)

The enactment of binding resolutions by international organizations is regarded as another new means of creating international legal norms: "In this case international legal norms are created by their adoption by a majority of members of the international organization . . . such resolutions are binding on all member-states of the organization, including states that voted against their adoption," assuming, of course, that the resolutions conform to the charter of the organization. Tunkin notes, however, that a "member-state of an international organization may legally escape the application of any such resolution by withdrawing from the organization." (P. 230.)

The very inadequate discussion of the legal nature of international organizations in the first edition has been remedied by the addition of four new chapters incorporating and expanding upon Tunkin's 1966 lectures at The Hague.

Developments in Czechoslovakia, China, Rumania, and elsewhere in the Socialist bloc are responsible for a substantial reworking of the final chapter on Socialist principles of international law. In contrast to the 1962 edition, which emphasized that the principles of proletarian internationalism had originated in the international workers' movement prior to the Russian Revolution, the present volume rather sharply asserts that the successes of the Soviet state are the greatest example of the validity of the principles of proletarian internationalism and that Soviet foreign policy is responsive to the interests of the proletariat of all countries. There is, correspondingly, less attention given to the principles of equality, respect for sovereignty, and non-intervention in internal affairs in the relations of Socialist states:

The principles of non-intervention and equality include, for example, not only the mutual obligation not to violate each other's respective rights but also the duty to render assistance in the enjoyment of such rights, as well as their joint defense from the infringements of imperialists, in conformity with the principles of socialist internationalism. (P. 499.)

Remarkable as it may seem in this age of intense interest in Soviet affairs, no work of a major Soviet international legal theorist has ever been

translated into English. As an original and authoritative treatment of contemporary international legal theory from a Marxist-Leninist point of view, Tunkin's work ought to be available to the English-speaking legal community in a scholarly translation.

WILLIAM E. BUTLER

*Zachodnia Granica Polski [Poland's Western Frontier]*. By Krzysztof Skubiszewski. Gdańsk: Maritime Publishers, 1969. pp. 631. Index. Zł. 100.

The title page shows an intriguing and rare remark: "Printed as a manuscript." In a country with preventive censorship these words mean that the opinions expressed in the volume do not coincide with party and government policy but have sufficient merit to be published on the sole responsibility of the author and for purpose of discussion. Apparently party censors were reluctant to endorse some views of the author.

A great amount of printer's ink has been spilled about the new Oder-Neisse borderline on both sides of it, mostly polemics and propaganda for and against. The legal problems involved have also been passionately discussed by German and Polish jurists. Now after both the Soviet-West German treaty of August 12, 1970, and the Polish-West German treaty of December 7, 1970, have explicitly declared the Oder-Neisse border as "inviolable" and West Germany has renounced any territorial claims, the time has come for a dispassionate and detached appraisal. K. Skubiszewski's remarkably well-written scholarly volume (though naturally fully supporting the Polish point of view) is sufficiently well balanced to help initiate such a new approach. The author is an able international lawyer known to Western jurists through several papers published in English concerning the law of the United Nations.

The book, well researched and meticulously documented, consists of two parts. The first presents a detailed picture of the diplomatic history and international politics of the Polish-German border from Versailles to Potsdam, including the intricate history of the Free City of Danzig and its relations with Poland and Germany. It covers also the transfer of the German population after Potsdam. For reasons of space this review leaves the first part aside, mentioning only that it contains many highly interesting diplomatic episodes unknown even to the generally well-informed public and reads in places like a fascinating novel. The second part discusses legal problems relating to the present Oder-Neisse frontier. Skubiszewski's argument runs roughly as follows: The big Powers assumed supreme authority in and over Germany (an aggressor state) after her unconditional surrender. They were thus legally authorized, under international law in force at that time, to change Germany's frontiers and were acting in place and on behalf of a non-existent German Government with legal effect binding any future German Government. Therefore the Potsdam agreements of August 2, 1945, assigning the "former German territories" east of the

Oder-Neisse to Poland and transferring the German population do not represent for Germany a *res inter alios acta*. Both the Atlantic Charter and the Charter of the United Nations were explicitly excluded by the Allies from being applied to the peace terms between Germany and the Allies. The principle of self-determination was only a political directive and not an institution of public international law in 1945. (Since then it has become a part of the law of the international community and would make a similar transaction illegal today.) The disposition of enemy territory by the victorious great Powers and its assignment to Poland does not represent a case of regular cession but could be roughly compared to the disposition of German colonies and Arab provinces of the Ottoman Empire by the Allies before the post-World-War I peace treaties were concluded. It goes further than the transfer of "administration" of Cyprus to Great Britain, and of Bosnia and Herzegovina to Austria-Hungary by the Berlin Congress in 1878. The author points out the similarities and the differences. The Polish "administration" was not subject to any international supervision nor was it otherwise restricted in any way and was explicitly considered as not representing a belligerent occupation régime of foreign territory. The expression "former German territories," the removal of the German population and finally the failure of the expected German peace conference to materialize stamped the Oder-Neisse border with the mark of permanence. These traits made the Polish "administration" in practice tantamount to an extension of Polish sovereignty over the Western provinces. The forced transfer of population would now, according to the author, certainly be legally inadmissible but was not contrary to any prohibition of international law (*ius cogens*) in 1945 (the Greek-Turkish precedent of 1923). The so-called *Recht auf die Heimat* (right to the homeland) claimed by German expellees does not exist even in present-day international law.

Each of the above theses is carefully supported by legal arguments and on the whole in a persuasive manner. The only point which needs some qualification concerns the handling by the author of legal sovereignty over the Western territories. That the great Powers were legally capable of transferring sovereignty over German territory does not imply that they actually did so. The clear intention was to do it later at the peace conference. At Potsdam the part of Germany east of the Oder-Neisse was severed from Germany and handed over to Poland to be governed as part of her territory together with a vague promissory note that formal title would be granted at the peace conference. The Cold War and the creation of two separate German states prevented the conclusion of a peace treaty. Thus recognition of the new Polish-German frontier by each of the Big Four and by both German states became necessary for Poland to acquire formal title. After the recent West German-Soviet treaty Polish sovereignty has ceased to be politically controversial. Action by a peace conference is superfluous. Simple unilateral recognition by this country and Great Britain is sufficient to close this chapter of World War II history.

ALEKSANDER WITOLD RUDZINSKI

*International Group Protection. Aims and Methods in Human Rights.*

By J. J. Lador-Lederer. Leiden: A. W. Sijthoff, 1968. pp. 481. Index.

Those of us who were impressed by the author's far-ranging book on *International Non-Governmental Organizations and Economic Entities* (1963), have had great hopes for his new volume. Unfortunately, it is necessary to admit that the new book meets only a few of these expectations. The author rambles through many fields, some of which are only loosely connected with the main theme of the book. The language is opaque, the style atrocious, the proofreading inadequate, and the footnoting haphazard.

The author does not resolve satisfactorily the dilemma which is already apparent in the title of his book: Should he deal primarily with special rules and procedures designed to protect groups (such as minorities), or should he concentrate on the procedures developed to enable groups (such as the non-governmental organizations) to protect their members? The book shifts continuously between these two approaches—the group as the beneficiary, and the group as the agent of protection—though his conclusions, to the extent that they are related to the previous sections of the book, seem to be related primarily to the failure of the NGO's to fulfill adequately the "tribunical" rôle. (This special term was coined by the author in his 1963 book (p. 33 and p. 37, footnote 4), and refers to the function of the *tribuni plebis* in ancient Rome who defended the rights of the common people against the patricians and even the Senate.) As the author points out in the current book (p. 458), the NGO's not only do not take sufficient advantage of the opportunities provided by the existing international machinery but also insist on maintaining "their attitude of sovereign arbitrary judgment in the selection of causes they are ready to espouse."

Similarly the author heaps scorn on classic international law and on positive law, especially treaty law, and shows great preference for a natural law approach, especially where he finds existing rules to be unsatisfactory. The author is very selective in his treatment of various subjects, sometimes dealing interminably with peripheral questions, at other times dismissing important issues with a short paragraph. For instance, his treatment of the protection of minorities by the League of Nations (pp. 309–313) and of the rôle of NGO's at the San Francisco Conference (pp. 396–397) is completely inadequate.

The book is more critical than constructive. It pinpoints the faults of other approaches, but does not offer much by way of alternatives. His principal constructive suggestion (p. 459) is that various NGO's need to develop a system of collaboration and mutual support in place of the existing chaos in which each organization tries to achieve its own goals and to protect its vested interests. Whether this can be expected in the near future is certainly arguable, however desirable it may be.

It is quite obvious that many sections of the book are just collections of notes for a much larger work, and, reading this book, one frequently wishes

that the author had waited until he had completed a well-rounded treatise instead of rushing into print with his preliminary notes. Nevertheless, if we cannot have something more polished, we must be satisfied with what he was able to complete. There are some brilliant insights into complex problems, and the author has shown in a new light the many facets of the evolving system for the protection of human rights. A patient reader, willing to spend extra time on unraveling intricate paragraphs, is likely to be rewarded with many ingenious epigrams and surprising turns of thought.

LOUIS B. SOHN

*Judicial Protection against the Executive.* 3 vols. Vols. 1 and 2: *National Reports—Australia–Yugoslavia.* Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag KG; Dobbs Ferry, N. Y.: Oceana Publications, 1969, 1970. Vol. 1: pp. xlv, 634; Vol. II: pp. xii, 635–1258. \$20.00 each; \$50.00 a set.

As Professor Hermann Mosler, Director of the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, explains in his introductory remarks, the subject was selected in order to make a contribution in the field of legal science to the International Year for Human Rights (1968). It should be stated at the outset that the Institute and the contributors from 31 countries have succeeded in producing what probably is the most important item among the numerous publications which appeared in and around 1968 to commemorate the twentieth anniversary of the proclamation of the Universal Declaration of Human Rights.<sup>1</sup>

The two volumes contain, in addition to Professor Mosler's introduction (The Heidelberg Colloquium on Judicial Protection against the Executive—Subject and Method), a message from René Cassin and the Systematic Questionnaire prepared by Hanfried Walter, which had formed the basis of national reports, *i.e.*, country monographs, covering 31 states. Two papers are devoted to the protection of the individual against the executive power in the European Communities and in international organizations in general. Volume 3, which was not yet available when the present review was being prepared, will contain an analysis of the material presented in the national reports from the point of view of comparative law and studies of the information thus collected in regard to its impact on public international law under the heading of the general principles of law recognized by civilized nations and otherwise.

The "national reports" are written in German, English and French, respectively. They cover 18 countries of non-Communist Europe, the United States, Australia and New Zealand, Japan and Israel. Eastern Europe is represented by monographs on Czechoslovakia, Hungary, Rumania, and

<sup>1</sup> For a survey of this literature see Schwelb in 24 *International Organization* 74–92 (1970).

Yugoslavia. No study on the Soviet Union is included. Only two Latin American jurisdictions (Colombia and Mexico), one Asian (India) and one African (Kenya) have been reported upon. The under-representation of Africa is explained in the Introduction by the fact that only an expert on Kenya (incidentally, a professor of the Law Faculty of Dar es Salaam in Tanzania) could be persuaded to participate. The absence of material on French-speaking Africa and on the Arab world is a serious lacuna in the work. The report on Kenya, although it deals with the legal system of a country which is based on English law, proves that a better coverage of the Third World would have been very useful indeed. "Resort to courts for redress against the Government in a former colonial, largely illiterate and rural country is unusual," it says. "A system which relies primarily on the courts to correct administrative abuse or defects is not likely to be successful and efficient in a country like Kenya" (pp. 631-632).

The title of the work speaks of judicial protection. However, the organizers of the publication did not overlook the fact that in a number of countries there are other means of protection for the individual by public institutions and procedures, and they therefore invited the authors of the national reports to describe such institutions and procedures. Otherwise a considerable number of countries would not have been able to participate in the study. This applies, in particular, to Eastern Europe. The reports on Rumania (p. 901) and Hungary (p. 1097) point out that their respective systems reject the principle of the separation of powers and are based on the concept of the unity of the power of the state, and consequently reject the idea of the judiciary supervising the executive. As a consequence, institutions such as the *procurator* of Eastern Europe and the *ombudsman* in the Nordic countries, New Zealand and elsewhere ("the Parliamentary Commissioner for Administration, the British answer to the Ombudsman movement," p. 368), are also dealt with.

While there are differences in the length of the individual contributions and in their attention to details, they all are of a very high level of scholarship and give a very good picture of the situation in the countries covered. Even in regard to legal systems, information on which is, in general, easily accessible, the usefulness of this up-to-date and handy collection is outstanding. The Max Planck Institute and the many contributors to the two volumes deserve the gratitude of the legal profession.

In conclusion, this reviewer wishes to add that the topic of the work under review has also been the subject of various regional meetings, so-called seminars, organized in 1959, 1961 and 1962 under the American-sponsored United Nations program of Advisory Services in the Field of Human Rights,<sup>2</sup> and that a volume containing some of the leading studies was published by the United Nations Secretariat in 1964.<sup>3</sup>

EGON SCHWELB

<sup>2</sup> Seminar on judicial and other remedies against the illegal exercise or abuse of administrative authority, Peradeniya (Kandy), Ceylon, 1959, U.N. Doc. ST/TAO/HR/4; Seminar on judicial and other remedies against the illegal exercise or abuse of administrative authority, Buenos Aires, Argentina, 1959, U.N. Doc. ST/TAO/HR/6; Seminar

*Justiz und NS-Verbrechen. Sammlung Deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945-1966.* Vol. I: *Die vom 08.05.1945 bis zum 12.11.1947 ergangenen Strafurteile.* Bearbeitet von Adelheid L. Rüter-Ehlermann und C. F. Rüter. Amsterdam: University Press Amsterdam, 1968. pp. xxiii, 788. \$64.00; \$1,260 for 21 vols.

This is the first volume of a major project of the Amsterdam University's Van Harvel Criminological Seminar, under a distinguished Dutch-German editorial board, designed to reproduce largely inaccessible texts of German judicial decisions rendered from 1945 to the end of 1965 on Nazi criminality. Since even during the early postwar years German courts have tried over 12,000 persons for such crimes, the series is limited to Nazi crimes that resulted in human deaths, committed after September 1, 1939.

The project resulted from a 1966 resolution of the West German Jurists' Association (*Juristentag*) demanding "thorough (*gründliche*) investigation into problems connected with the punishment of Nazi criminality." As the editors point out (p. vii), the problems of "governmentally organized criminal violence . . . still worry mankind more than ever" but have so far received scant professional attention within or outside the Federal Republic. In the meantime, the statute of limitations had in principle made all Nazi crimes other than murder unprosecutable in West Germany "since 1960 at the latest" (p. v). International concern lest mass murder and extermination cases (which remained mostly undetected until the 1960's) might also become immune from prosecution, led to two U.N. General Assembly resolutions (2338 (XXII) and 2391 (XXIII)) and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

The 35 judgments, plus pertinent appellate decisions, reproduced in this volume were handed down by German courts in the American, British and French occupation zones, up to mid-November, 1947. They deal (excepting Case No. 25) exclusively with Nazi crimes against German nationals, largely individual deserters and defeatists, or relatively (by Nazi standards) small groups of victims. Many occurred during the very last phase of the war in German towns with American troops at their gates.

These decisions are of lively interest not only to the criminologist and political scientist, but also to the student of international law. The German courts often applied the basic Allied Control Council Law No. 10 (CCLaw 10) of 1946, which essentially copied the Nürnberg Charter and which also governed the U. S. war crimes tribunals in the 12 great "sub-

---

on amparo, habeas corpus and other similar remedies, Mexico City, Mexico, 1961, U.N. Doc. ST/TAO/HR/12; Seminar on judicial and other remedies against the abuse of administrative authority with special emphasis on the rôle of parliamentary institutions, Stockholm, Sweden, 1962, U.N. Doc. ST/TAO/HR/15. The participants of these seminars submitted monographs describing the situation in their respective countries, which were reproduced as working documents.

<sup>3</sup> Remedies against the Abuse of Administrative Authority. Selected Studies, 1964, U.N. Doc. ST/TAO/HR/19. This volume contains studies by C. J. Hamson, Rafael Bielsa, T. A. Yampolskaya, Björn Kjellin, Stephan Hurwitz and Alfred Bexelius.

sequent" Nürnberg proceedings. For example, the German reasoning regarding the concept of crimes against humanity can be seen in two denunciation cases: (a) A truck driver who, to get even with a crippled colleague, denounced him for anti-Hitler jokes and subversive remarks (the victim was hanged) was found guilty of a crime against humanity. As the Siegen District Court judgment of 9/9/1947 (confirmed by Appellate Court of Hamm, 2/2/1948) says, the very institutions of the GESTAPO and the People's Court implied forced confessions, torture, concentration camps, perhaps execution—"in short, inhumanity." Hence, it rejected the plea that such denunciations were then considered "permissible, and even patriotic duty" (pp. 668-669). (b) The typist who, after the abortive attempt on Hitler's life of July 20, 1944, recognized in an East Prussian canteen the fugitive head of the conspirators, Leipzig Lord Mayor Dr. Goerdeler, caused his arrest and accepted for this a 1-million RM check from Hitler, was sentenced to 6 years' imprisonment for a crime against humanity: by "coldly delivering Goerdeler to the hangman," she "identified herself with the regime of violence and its methods" (pp. 712-713) (Berlin Court of Assizes, 11/1/1947, confirmed by Berlin Court of Appeals, 6/30/1948).

On the whole, the German courts had no difficulty in applying the "superior order" doctrine of the Nürnberg Charter and CCLaw 10. Indeed, a German appellate court in Nürnberg ruled (May 20, 1947) that CCLaw 10 did not eliminate the "*larger (weitergehende)* responsibility" imposed by pre-existing municipal law (Art. 47 of the Nazi Military Penal Code) on persons carrying out illegal orders (p. 658). These German decisions should, therefore, lay to rest the erroneous view that the more restricted rejection of the plea of superior orders by the Four-Power and U. S. tribunals was a Nürnberg "invention."

The question of retroactivity came up relatively seldom, because the defendants' actions were found in violation even of Nazi law (e.g., death "sentences" imposed by sham courts-martial) or because a Fuehrer order demanding, e.g., "sharpest measures," was found so loosely worded as not actually to command the specific atrocity. Where application of post-Hitler law was considered retroactive, this was, in the words of one court, "not objectionable" in cases "so grave as absolutely requiring punishment in the interest of material justice . . . on ethical grounds." (See instructional (*richtungsweisende*) appellate decision of 6/21/1947, *Gazette of North Rhine-Westphalia Ministry of Justice*, 1947, 19/20, quoted on p. 668.)

The project deserves sincere appreciation. The full collection will be required especially for libraries and research institutions. Subsequent volumes should inform the reader of the eventual definite outcome, for example, after an appellate court ordered retrial by the lower court. If possible, he should also learn of the concrete developments following final judgment. How many of the death sentences imposed on physicians participating in the notorious mass killings dubbed "euthanasia" were carried



out? How many of those otherwise convicted were pardoned, or had their sentences reduced?

JOHN H. E. FRIED

*Voting in the Security Council.* By Sydney D. Bailey. Bloomington and London: Indiana University Press, 1970. pp. xii, 275. Index. \$10.00.

This is a valuable and comprehensive survey of the practice of the Security Council in the field of voting in all its aspects. Its author has written already well-known works on the General Assembly and the Secretariat of the United Nations; he promises two other volumes on other aspects of the procedure and practice of the Council and the rôle of the Council in its primary responsibility for maintaining international peace and security. Many articles have been written on specific aspects or incidents in the practice of the Security Council, and there was an early general account in "Voting and the Handling of Disputes in the Security Council" by Professor Jiménez de Aréchaga in 1950; the Repertories of the United Nations give only piecemeal material. It is therefore very useful to have a work which draws together the practice of the Security Council and presents it in so complete a manner. The main text, which necessarily devotes much attention to the veto, is well complemented by very full Appendices containing tables of decisions and extracts from texts.

The conclusions reached are firmly based on a detailed study of the actions of the Security Council, but it might have been even more interesting if the author had given us also the benefit of his further thinking on the implications of some of the newer or more unexpected aspects of Security Council practice. For example, in his discussion of consensus on pages 75 to 83 he does not suggest why a consensus may be more acceptable to the Members of the Security Council in particular instances than a vote. To take an instance which he cites, was the consensus of December 8, 1967, adopted in this form because this enabled the Members of the Council to identify themselves less closely with the action of the Security Council and thus avoid prejudicing their positions on the underlying point of principle on peacekeeping procedures, and in particular on whether the authority to increase observers lies with the Secretary General or only with the Security Council? Such a motive would be different from that which leads governments to favor the procedure by consensus in the work by the General Assembly on questions of international law, such as the Principles concerning Friendly Relations and Co-operation among States, which is referred to in Appendix 7. In the same way one would welcome some further comments on the increasing tendency of the Security Council to be blocked by the number of abstentions rather than the application of the veto, which is dealt with only very briefly at pages 73 to 74.

When the fare at the banquet is so good, it is churlish to ask for further courses. It is by way of compliment to what has fallen from the author's pen that the present reviewer asks for more. It may be that some of these matters will be dealt with in the two further volumes which are

promised, which will together constitute an invaluable account of the work of this most important organ of the United Nations.

H. G. DARWIN

*Dag Hammarskjöld's United Nations.* By Mark W. Zacher. New York and London: Columbia University Press, 1970. pp. xiv, 295. Bibliography. Index. \$7.00.

Dag Hammarskjöld was both theoretician and prime mover in developing the political function of the United Nations and, more particularly, elaborating a rôle for the Secretary General in preventive diplomacy and peacekeeping. During his eight and one-half-year tenure (1953-1961) diplomatic action on major international crises—Chinese Communist imprisonment of American fliers, nationalization of the Suez Canal, the 1956 Suez war, the Middle East crisis of 1958, United Nations involvement in the Congo—tended to center at the United Nations and more often than not because of his initiative. He was the first to see United Nations involvement as a means to insulating local conflict from big Power confrontation. He designed the machinery for consent-type peacekeeping which helped contain local conflicts in Kashmir, the Middle East, the Congo and Cyprus.

The creative period of experimentation with U.N. diplomacy went into a decline with his tragic death nine years ago. Just in the past year or so has interest revived in the Secretary General's diplomatic and peace-making rôle. Professor Zacher's superb monograph on Hammarskjöld's political doctrine is thus very timely. His book is a lucid and full-bodied codification and analysis of Hammarskjöld's central concepts on the United Nations as an organization for political action and his strategies with respect to U.N. activities to promote peaceful settlement, control the use of force (peacekeeping), spur arms control and build the peace through economic and social activities. Naturally, the stress is on preventive diplomacy and peacekeeping. Zacher gives a highly stylized presentation, setting forth and explaining the basic propositions of Hammarskjöld's doctrine, interpreting and documenting them from statements and unrecorded utterances, and citing cases in profuse detail to illustrate how doctrine fared in practice. Some may consider the treatment overly scholastic and exegetical, but it has the great merit of orderliness and clarity and it brings to bear a wealth of case material on key questions in the study of political action by international organizations. I would hazard the guess that this book will be one of the most heavily used of the year, saving scholars many hours of primary research. It is extremely good value for the money.

What is the lesson? We will never return to Hammarskjöld's day, partly because his style was unique to the man, but mainly because the new political configuration at the United Nations can no longer accommodate such wide discretion for the Secretary General. This is to be regretted, but it is a fact. Still there remains much room for maneuver. Hammarskjöld casts a giant shadow of precedent and both his doctrine and

experience remain most relevant. The essence, as Zacher brings out so well, is that U.N. diplomacy and peacekeeping depend on a constant fine tuning of diplomatic action to the political tolerances, but that the Secretary General can use his not inconsiderable influence to stretch the possibilities of action. Hammarskjöld's philosophy and tactics were to probe for the outer limits of the United Nations' capacity—when in doubt to test what the traffic would bear. He was successful more often than not, partly because of his skill in shifting the basis of his political support and partly because (despite his messianic streak) he was credited with acting on behalf of a stronger United Nations and not for self-serving ends. His approach was to construe as broadly as possible the generalized mandates he received from the Security Council and the General Assembly and the powers implicit in his office. When he considered the ends legitimate, he used political power where he could find it. When the Soviets and their allies turned against him in the Congo he redressed the balance by appealing to the deep interest of the Asians and Africans in the survival of the Congo and of the United Nations itself. In Lebanon he used his discretion to expand the observer force without an explicit authorization from the Security Council, because he correctly judged that this action was within the realm of political tolerance and was needed to carry out the United Nations' purpose.

In an echo of Hammarskjöld, U Thant recently explained to the Royal Commonwealth Society that in sending a personal representative to settle the Bahrain issue he had acted at the request of the parties and that private diplomacy in this case was to be preferred to discussion in the Security Council. It is to be hoped that Zacher's monograph will help keep alive renewed interest in reactivating the latent peacemaking powers of the Secretary General. We are indebted to the author and the editors for another fine work in the series of Columbia University Studies in International Organization.

N. A. PELCOVITS

*The Majority of One: Towards a Theory of Regional Compatibility.* By Minerva M. Etzioni. Beverly Hills, Calif.: Sage Publications, 1970. pp. 238. \$7.50.

The "one" in the title of this book is the United States. The place where the majority prevails is in the Organization of American States. American domination in the O.A.S. and preference for a regional rather than a universal forum in Hemispheric matters have combined to make the O.A.S. "incompatible" with the United Nations. Mrs. Etzioni traces the legislative history of the peacekeeping and regionalism sections of the U.N. Charter (Articles 34, 35, 51, 52, 53, 54 and 103), and concludes that from "the push and pull of regionalist and universalist forces" an ambiguous formula emerged which could be construed to reconcile the two viewpoints "into a degree of compatible regionalism that preserved the ultimate responsibility of the Security Council." Following the theme developed by

Inis L. Claude, Jr., in his 1964 booklet on *The O.A.S., the U.N., and the United States*, Mrs. Etzioni shows how potential compatibility, in which regional peacekeeping would be "effectively subordinate" to universal peacekeeping, developed into incompatibility, in which the "regional security system . . . effectively circumvented the veto of the United Nations Security Council."

Both authors attribute this development to the Cold War. Claude focuses on "the particular aspects of international political rivalry which affect the evolution of regional-global organizational patterns" and presents "a study of international organization and United States foreign policy." Etzioni focuses on the impact which this evolution has had on the relative importance of the United Nations and the Organization of American States.

The two studies complement one another. Claude's is one of international politics, while Etzioni's is one of constitutional law. Consequently, the latter emphasizes juridical rather than political analysis and characterizes the Cuban missile crisis as one in which

the need to bring about a politically workable solution as soon as possible . . . meant that very little attention was given to the jurisdictional aspects of the question, the issues of universalism and regionalism, the nature of regional compatibility. The onrush of events obscured the underlying issues.

Mrs. Etzioni makes a worthwhile contribution to the law of international organizations by developing a continuum based upon the threefold categorization of universalism ("world peace is indivisible"), compatible regionalism ("the divisions of function and jurisdiction . . . are harmonious"), and incompatible regionalism ("giving priority to the resort to regional organization"). Her contribution to the study of politics is more modest. The term "downward transfer" which the author uses to designate the emergence of incompatibility is a pejorative rather than an explanation, and the bald label "pragmatic process" conveys little more than the passage of time.

Conceding that "the record of O.A.S. performance has provided incompatible regionalists with a strong arguing point," Mrs. Etzioni concludes that instances of O.A.S. success which she describes are offset by the weakening of the United Nations and by "the damage done to [United States] relations with Latin America." Moreover, the O.A.S. has become a

political censor [which seeks] to oversee the internal political order of a country. This, together with a United States-inspired preference for rightist governments, has made the O.A.S. more ready to deal with threats to democracy from the left than from the right.

The predilection in *The Majority of One* for less political, or at least more even-handed, intervention in Latin America and the preference for "the primacy of the United Nations" may seem somewhat wistful. But the author *cares*. In the long run, if there is a long run, her views will probably prevail.

The book is well documented, but lacks an index. It contains its own review, in a thoughtful preface by Richard A. Falk.

STANLEY V. ANDERSON

*The British Year Book of International Law, 1967.* Vol. 42. Edited by Sir Humphrey Waldock and R. Y. Jennings. London, New York, Toronto: Oxford University Press, 1969. pp. viii, 378. Index. \$14.00.

In "The 1967 Protocol relating to the Status of Refugees and Some Questions of the Law of Treaties," Dr. P. Weis, Special Adviser, Office of the United Nations High Commissioner for Refugees, relates the formulation and adoption of the Protocol to several interesting questions of the law of treaties and the practice of the United Nations in "noting" or "approving" multilateral conventions. By Article I of the 1967 Protocol its parties "undertake to apply articles 2 to 34" of the 1951 Convention relating to the Status of Refugees not only to persons who had become refugees prior to 1951 but to persons becoming refugees as a result of subsequent events. The text of the 1967 Protocol was not drafted at an international diplomatic conference or formulated by the United Nations General Assembly or Economic and Social Council but had apparently been prepared in the Office of the High Commissioner for Refugees after consultation with a representative selection of individual experts and after considering the observations of certain governments, including parties to the 1951 Convention. The Economic and Social Council in 1966 "took note with approval" of the document containing the text thus formulated; and in 1967 a General Assembly resolution "takes note of the Protocol relating to the Status of Refugees" annexed to the Report of the High Commissioner and requests the Secretary General to transmit the text of the Protocol to states "with a view to enabling them to accede to the Protocol." Although some question as to this procedure had been raised, the General Assembly adopted the resolution by a vote of 91-0-15. Weis correctly observes (p. 64): "What is, in fact adopted by the General Assembly is not the treaty but the text of the proposed treaty." One should also note his comment (p. 63) that the 1967 Protocol "is of a dual nature: as between States parties to the 1951 Convention it is an *inter se* agreement; for States not parties to the Convention it is an independent multilateral treaty." A noteworthy feature of the study is the elaborate care taken by Dr. Weis to relate issues arising in connection with the Protocol to the 1966 draft of the International Law Commission on the Law of Treaties which survives in the Vienna Convention on the Law of Treaties.

The law of the Charter is discussed by Dr. Theodor Meron in "Budget Approval by the General Assembly of the United Nations: Duty or Discretion?", where he concludes that, although the General Assembly has the "power" not to approve necessary appropriations, it has no legal right to prevent the United Nations from meeting obligations incurred by the principal organs acting within the limits of their authority.

Dr. F. A. Mann contributes two articles characterized by his profound legal knowledge and his trenchant style: "State Contracts and International Arbitration" and "International Corporations and National Law." Dr. Ian Brownlie writes of "The Justiciability of Disputes and Issues in International Relations"; J. E. S. Fawcett on "The Judicial Committee of the Privy Council and International Law"; Dr. Mitchell Akehurst a noteworthy contemporary study of "Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States." Professor D. P. O'Connell contributes an historical study of the refusal to ratify the Treaty of Regensburg in 1630. Notes by K. Lipstein on "Proof of Foreign Law," by A. Samuels on "Crimes Committed on Board Aircraft," and by H. G. Darwin on "The Outer Space Treaty" add to the value of the volume. Decisions of British courts on questions of international law in 1967 and decisions of the Court of Justice of the European Communities during the same year are reviewed. The *British Year Book* has always taken seriously its Reviews of Books and the current volume contains reviews of superior quality.

HERBERT W. BRIGGS

## BRIEFER NOTICES

*Drei sowjetische Beiträge zur Völkerrechtslehre.* University of Kiel, Institute for International Law, Vol. 59. G. I. Tunkin: *Grundlagen des Modernen Völkerrechts; Der Ideologische Kampf und das Völkerrecht*; D. B. Lewin: *Grundprobleme des Modernen Völkerrechts*. Introduction by Dr. Eberhard Menzel. (Hamburg: Hansischer Gildenverlag, Joachim Heitmann & Co., 1969. pp. xl, 479. Index. DM. 68, cloth; DM. 47.60, paper.) The publication under review is one of a Series published by the University of Kiel. Its purpose is to provide the German student and reader with a full picture of contemporary tendencies in the Soviet theory of international law. Both Professors Tunkin and Lewin are in their sixties and belong to that generation of Soviet jurists which is the product of Soviet education, while their active life has spanned the most important periods in Soviet history. Both of them have had distinguished careers and have written a good deal, and both in their own manner have contributed to the formulation of key legal concepts intimately connected with Soviet foreign policy. Professor Tunkin combined teaching and writing with his work in the Ministry of Foreign Affairs of the U.S.S.R. He was President of the Soviet International Law Association, represented the Soviet Union at international conferences, and was a member of the International Law Commission, where he became known as an imaginative and skillful spokesman for the Socialist science of international law. His main achievement was the legal formulation of the doctrine of peaceful co-existence, a key concept in Soviet diplomatic practice, and his two contributions to the volume (opening and concluding) demonstrate the distance this concept (originated under Khrushchev) has traveled in the course of the decade (1957-1967).

Professor Lewin's background is less spectacular, although his achievements as a teacher and writer are no less important. He has written prolifically, and after a long and successful academic career became professor of international law at Moscow University, where he is the colleague of Professor Tunkin. His treatise, included in the book under review, is

less an essay (which Tunkin's works are) and more in the nature of a treatment of modern international law understood as a system of doctrines for contemporary use. Although written by a teacher and a member of the academe in the full sense, it reflects great attention to the needs of Soviet diplomacy and is therefore of great interest to all those who would seek a key to the understanding of Soviet foreign policy.

The translators, Dr. Peter Roszbacher, Dr. Dietrich Frenzke and Dr. Hubert Rodinger, have done an excellent job, and all those who know German and are not conversant with Russian may use this book with confidence as conveying not only the literal sense of the writings of two Soviet authors, but also the flavor of Soviet legal reasoning.

KAZIMIERZ GRZYBOWSKI

*Rechtsprobleme der Beseitigung radioaktiver Abfälle in das Meer [Legal Problems Connected with the Disposal of Radioactive Wastes into the Seas].* By Norbert Pelzer. (Göttingen: Institut für Völkerrecht, 1970. pp. xlv, 216. Index. DM. 33.) This work, Volume 41 in the Göttingen Studies in International Economic and Atomic Energy Law, is a scholarly, extremely valuable and fully documented contribution toward a solution of a growing global problem. The author initially analyzes the nature and extent of the problem of radioactive pollution and then proceeds to study that pollution in the light both of international law (customary as well as conventional) and of the domestic law of the countries involved in such pollution, citing the specific legislation of eight states and covering others through a general discussion. The regulations issued by the U. S. Atomic Energy Commission are singled out for special commendation, even though the author concedes that they do not cover all likely contingencies. Careful analysis is given of the special problems encountered in territorial waters and the continental shelf.

The final portion of the volume deals with the knotty problem of future regulation. Pelzer rejects, with well-founded reasoning, the authority of a new global international agency whose recommendations would be incorporated on a voluntary basis into domestic legislation, as well as the idea that an already existing universal international organization (U.N.P) should issue obligatory regulations concerning the disposal of radioactive wastes into the seas. Consequentially he favors a world-wide international convention, analogous to the recent treaties on the seas and diplomatic relations, following a conference of states. He believes, however, that a regulatory convention would require the inclusion of workable enforcement procedures; otherwise, the treaty would represent merely an exercise leading to global frustration. The convention would also have to be preceded, according to Pelzer's reasoned view, by substantial research in the natural sciences in order to determine, more precisely than is the case today, the impact of radioactive pollution on the current and future ecology of the world's oceans.

Pelzer's volume is based on a most comprehensive documentation, drawn from relevant private and official sources published in all the countries most directly concerned with the problem, with special emphasis on the well-known Rousseau Report ("Legal Implications of Disposal of Radioactive Wastes into the Seas," IAEA, 1963). The book is strongly recommended both as a sourcebook on the pollution of the seas and as a stimulating base from which future legal studies may originate.

GERHARD VON GLAHN

*The Inter-American Commission on Human Rights.* By Anna P. Schreiber. (New York: Humanities Press, Inc.; Leiden: A. W. Sijthoff, 1970. pp. 187. Index. \$6.00; Fl. 19.) This study presents an extremely well-written account and thoughtful evaluation of the little-known work of the Inter-American Commission on Human Rights. Mrs. Schreiber traces both the legislative history of the statute creating the Commission and the gradual development of its powers. Although the American states were quick to approve in 1948 a high-sounding "American Declaration of the Rights and Duties of Man," they were extremely reluctant to accept a binding convention or any formal machinery for the protection and implementation of such rights and duties. The principle of non-intervention in domestic affairs was too highly regarded by most American states to permit anything like the European Convention for the Protection of Human Rights and Fundamental Freedoms or the international machinery provided for its enforcement. Instead, the original statute establishing the Commission, as first adopted by the Council of the O.A.S., gave it only the most general and apparently innocuous authority to make studies with regard to the status of human rights in the American states and to "make recommendations to the governments of the member states in general . . . for the adoption of progressive measures in favor of human rights . . . and appropriate measures to further the faithful observance of those rights." Apparently the framers of the original enactment deliberately withheld authority to entertain and investigate particular complaints of violations of human rights. Nevertheless, the Commission early in its career began to entertain and circumspectly to investigate individual complaints, asking governments to respond to them and even holding hearings on their merits when the circumstances seemed propitious. By a judicious mixture of threats of public exposure and promises of confidential treatment, the Commission induced several of the governments involved to respond to the merits of the complaints. This practice gradually became sufficiently accepted, even though it was apparently not originally contemplated by the drafters of the statute, so that there was no opposition to revision of the statute in 1966 to authorize explicitly investigation of individual complaints and representations regarding them to the governments concerned.

This does not mean that Mrs. Schreiber paints an optimistic or exhilarating picture of the effectiveness of the Commission's representations. Detailed studies of several different situations indicate that the results varied considerably, depending upon a variety of internal and external forces quite independent of the Commission itself. In the Dominican Republic, for example, the Commission was notably effective in mitigating the wholesale invasion of personal rights which threatened to engulf the country in 1965-1966; this effectiveness was undoubtedly, Mrs. Schreiber speculates, partially attributable to the presence and support of substantial military forces of the United States. At the opposite extreme, in the case of alleged violations of human rights by the Castro régime in Cuba, the Commission received hardly the respect of an answer, except for an occasional blunt denial of its jurisdiction or authority to inquire at all. From Haiti and Guatemala, on the other hand, the Commission received "a thin facade of response" to its requests for information but no substantial degree of co-operation. Nevertheless, Mrs. Schreiber speculates that the reports of the Commission, presenting both the individual complaints and the inadequate responses, "may have helped to persuade other American governments to cooperate with the Commission to avoid similar exposure." (P. 117.)

In conclusion Mrs. Schreiber wisely points out that the experience of the Inter-American Commission helps to illustrate the variety of approaches



that may be necessary in order to make any significant headway in the advancement of human rights. More tentative and less ambitious than the European Community system for the protection of human rights, yet more concrete and demanding than any United Nations effort thus far, the inter-American system may be the best adapted to its own peculiar situation. Hopefully it may eventually develop into something more like the European system, while at the same time suggesting to other regions one way of getting started on the long hard road toward some realistic international protection of human rights.

NATHANIEL L. NATHANSON

*Regimen Constitucional de los Tratados.* By Jorge Reinaldo A. Vanossi. (Buenos Aires: Editorial El Coloquio, 1969. pp. 301.) It is to be expected that scholars in other countries with more or less rigid constitutions should be beset with the same controversial issues that arise under our own document of 1789. In this slender volume a brilliant young Argentine scholar tackles the problems that confront his own country and gives us an exposition, section by section, of the supremacy of the Constitution; of the place of treaties in the Federal system; of the relation between President and Congress; of the Constitutional status of executive agreements; of the principles of *pacta sunt servanda* and *rebus sic stantibus*; and a special item on a concordat with the Holy See.

The numerous comparisons made with the situation of treaties in the United States would be well worth translating, for the author has interesting comments to make. His analysis of *Missouri v. Holland* is particularly interesting, presenting the conflict between the local jurisdiction of the State and the Federal control over foreign affairs. The study, it happens, was finished before the publication of the Vienna Convention on the Law of Treaties, which now raises a number of points for discussion.

The author is to be congratulated on a scholarly piece of research, presented in stimulating form, well worthy of the praise bestowed upon it in the Preface by one of Argentina's leading jurists, Dr. Segundo V. Linares Quintana.

C. G. FENWICK

*International Organization and Integration.* Edited by H. F. Van Panhuys and others. Foreword by Philip C. Jessup. (Deventer: Æ. E. Kluwer; Leiden: A. W. Sijthoff, 1968. pp. xxviii, 1142. Index. Fl. 70.) If the late Judge Manley O. Hudson hailed the publication of the *United Nations Textbook*, the predecessor of the book under review, "with great joy," considering it "essential for our day," how much more would he have greeted the present publication which is incomparably vaster in scope and coverage, more developed in detail and systematically and skillfully executed. This is not only a revision of a very useful collection of texts but a *reformatio capitis et membrorum*, and by no means a *reformatio in peius*. On the contrary, as Judge Philip C. Jessup points out in his Foreword, there is "no other comparable collection of the fundamental texts which participants in and students of international organization need to have at their desks for convenient and immediate consultation."

The subtitle of the book, "A collection of the texts of documents relating to the United Nations, its related agencies and regional international organizations, *with annotations*," adequately describes its contents in broad terms but does not convey an idea of the richness of the material covered. Book One on the United Nations contains selected documents preceding the latter, the Charter and the Statute, the Rules of Procedure of the U.N.,

organs, staff regulations, the headquarters and privileges agreements, texts concerning the various functions of the U.N., including the International Law Commission and its work, as well as the vast economic development program. Book Two on regional organizations documents the European Community, other Western European and Atlantic organizations, Eastern Europe, the Middle East, Africa, the Western Hemisphere and the Far East. The annotations, in the words of Judge Jessup, "provide a guide to further research or themselves furnish adequate explanatory background."

The editors are to be congratulated upon the production of this standard reference work. What is needed now is a companion volume containing an equally useful and needed collection of texts in the field of international law in general.

SALO ENCEL

*The United Nations in a Changing World.* By J. A. C. Gutteridge. (Manchester, England: Manchester University Press, 1969; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. vii, 111. Index. \$5.00.) This is a series of lectures given by Miss Gutteridge at the University of Manchester. The author served from 1961 to 1964 as legal adviser to the United Kingdom Permanent Delegation to the United Nations. The purpose of the lectures—and of the book—is "to consider in general how far the United Nations' charter, which was drawn up to meet the needs of the international community as they were foreseen in 1945, is able without amendment to meet the needs of the greatly expanded international community at the present day." (P. 1.) The author accepts the "dynamic" view of the United Nations. Her test of the legal validity of any new development or any action by the Organization or one of its organs is that "the action or development must not be precluded by any express provisions of the charter, and it must be action which is necessary to carry out the Purposes of the Organisation as these are set out in article 1 of the charter." (P. 8.) She thus aligns herself with the majority opinion of the Court in the *Certain Expenses* case, and against the view expressed by Judge Winiarski in his dissenting opinion. Dealing specifically with certain developments relating to the maintenance of international peace and security, non-self-governing territories and economic co-operation, she explains how the Charter has been interpreted, by the great majority at least, to permit activity which the written Charter does not expressly permit. That these developments have the same legal validity as Charter amendments specifically authorizing them is a proposition that all Members of the United Nations obviously are not equally ready to accept.

LELAND M. GOODRICH

*Charter of the United Nations: Commentary and Documents.* Third and Revised Edition. By Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons. (New York and London: Columbia University Press, 1969. pp. xxiv, 732. Index. \$22.00.) Most readers of this JOURNAL are probably familiar with the second (1949) edition of this important work which interprets each article of the United Nations Charter in the light of subsequent practice.<sup>1</sup> This third and revised edition contains an additional 100 pages of commentary not in the second edition. The bibliography provided in the second edition has been dropped, but the footnotes of the third edition provide a source of bibliographical references. The cut-off date of the revision is January 1, 1966, though footnotes in some cases refer to important changes of practice after that date. In one sense, a book

<sup>1</sup> See review in 44 A.J.I.L. 430 (1950).

such as this is bound to be dated as soon as it is published. The mark of its value is that it remains very useful.

J. S. NYE

*Rechtsprechungssammlung zum Europarecht. II. Ergänzungslieferung 1961/62.* Edited by Hans Dölle and Konrad Zweigert. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1970. Loose-leaf.) This loose-leaf publication is the first Supplement to the first volume of the *Rechtsprechungssammlung zum Europarecht*, published in 1966 and reviewed in Volume 62, p. 536, of this JOURNAL (1968). That volume covered the years up to the end of 1960. The present Supplement comprises the case law from 1960 to 1962. The editors have consistently followed their dual purpose: to furnish as complete as possible a survey of the decisions on the law of the European Communities, and to make this material easily accessible through a sophisticated systematization. This aid to research is especially valuable because it includes the decisions of the national courts of the Member States, which are widely scattered in international and national law reports.

All that has been said in praise of the first volume by this reviewer applies to the Supplement as well. The only thing that remains to be desired is a key to the numerous abbreviations occurring in the headlines and the texts. The Index to all the cases reported in both parts, which is arranged chronologically and according to countries and European Community courts, is highly welcome, just as is the enlarged subject index. The Editors are striving to bring the collection up to date in the near future. They deserve to be cheered on in the pursuit of their laborious project.

M. MAGDALENA SCHOCH

*Yugoslavia and the Nonaligned World.* By Alvin Z. Rubinstein. (Princeton, N. J.: Princeton University Press, 1970. pp. xvi, 354. Bibliography. Index. \$11.00.) This is another addition to the long shelf of books on Yugoslavia. Its novelty consists in the survey of Yugoslav foreign policy (1948-1969) from the point of view of Yugoslav relations with the uncommitted countries of the Third World. The author is fully cognizant of the fact that the Yugoslav or any other non-alignment presupposes the existence of mutually competitive great Powers. He has interwoven his story of Yugoslavia as an uncommitted state within the canvas of Yugoslav relations with the Soviet Union, the United States, China and their respective friends and allies.

He views the Yugoslav policy with an undisguised, though not uncritical, sympathy. His main thesis is that the close and friendly relations with the uncommitted non-European countries helped Yugoslavia, excommunicated by Stalin but unwilling to become an ally of the West, to find its place in the world. One could add that the normalization of relations with the post-Stalinist Russia also contributed to the success of Yugoslav efforts to remain uncommitted. The author admits that the Yugoslav earlier expectation of the emergence of a more or less united international front of unaligned countries and hence of their growing weight in international politics has not been vindicated by actual events. What remains today is Yugoslav friendly relations with the Third World and, more important, Yugoslav ability to counter-balance Soviet pressure with Western support and vice versa. Yugoslavia has remained independent.

The skillful Yugoslav diplomacy of non-commitment has won new laurels in the period of time that has followed the date of the publication of the book. Belgrade succeeded in improving its relations with Moscow after the chill caused by the Soviet intervention in Czechoslovakia, in being

visited by the President of the United States, and, perhaps not surprisingly, in improving for the first time its relations with Peking and Tirana.

This book, though made unnecessarily long by a number of repetitions, is undoubtedly a very useful contribution to a better understanding not only of Yugoslav foreign policy but also of the contemporary patterns of general international politics.

W. W. KULSKI

*Völkerrechtliche Aspekte des Heiligen Römischen Reiches nach 1648.* By Albrecht Randelzhofer. (Berlin and Munich: Duncker & Humblot, 1967. pp. 324. Index. DM. 44.60.) The author of the present most valuable monograph pursues two purposes. In the first place he tries to show that the traditional approach to the study of the constitutional structure of the Holy Roman Empire, insofar as it was based on the assumption that the Empire was a state, has been wrong. He convincingly proves that the Empire, particularly in the form which it was given by the Westphalian Peace of 1648, cannot be classified as a state but must rather be looked upon as an example of what in modern terminology is called a regional international organization. True, there are hints of such a conception in James Bryce's classical treatise on *The Holy Roman Empire*, as well as in other writings. But in none of them has the international character of the Empire been so fully elaborated as in the present book. In the second place, the author establishes the relevance of the study of the principles and institutions of the Holy Roman Empire to an understanding of the problems of modern international organization. Randelzhofer's monograph therefore has much more than a purely antiquarian interest. In linking the older form of international organization with the modern forms, the author never loses sight of the dissimilarities. He rightly traces them chiefly to the fact that the Holy Roman Empire after 1648 was the result of a process of political disintegration, while the modern international institutions are inspired by the intention of attaining a closer political integration of the modern community of sovereign states. He also clearly realizes, and successfully avoids, the dangers inherent in the application of the same legal and political notions to structures of different historical ages. The author is greatly helped in his undertaking by his familiarity with a wide range of the pertinent material, old and modern, as is attested both by the text and the bibliography.

ERICH HULA

*Annales d'Etudes Internationales*, 1970. Alumni Association of the Graduate Institute of International Studies. (Geneva: 1970. pp. 245. Fr. 250; \$5.00.) There is no lack of yearbooks and no dearth of quarterlies for the publication of essays in international affairs. So why this new publication? According to its Preface, it is designed to permit the "international community" comprising the students, the alumni, the professors and temporary lecturers of the Geneva Graduate Institute of International Studies to continue the exchange of views which they have started at the Institute.

To judge from this first issue of the *Annales*, the views expressed therein deserve to be expressed not only for the members of this community but for the public in general. The quality of the contributions, in French and in English, is very high throughout. This "*Ancien*" has been particularly impressed by the essays in international organization, including: C. Wilfred Jenks, "Universality and Ideology in the ILO" (this essay by the present Director General of the ILO is especially timely in view of the lamentable decision of Congress to withhold from the Organization part of the Ameri-

can assessment); G. A. Coddington, "The Relationship of the League and the U.N. with the Independent Agencies: A Comparison"; P. Guggenheim, "L'organisation de l'opinion publique dans la communauté internationale"; J. Freymond, "La crise du système international"; and R. T. White, "Regionalism vs. Universalism in the League of Nations." However, in singling out these papers the reviewer does not mean to minimize the value of the others in the field of international organization or those in diplomatic history and international economics.

To present a real *exchange* of views the reviewer would like to suggest that future issues deal with the different aspects of *one* particular topic. In view of the quality and number of potential contributors it should not be difficult to organize such symposia.

SALO ENGEL

### BOOKS RECEIVED \*

- Académie de Droit International. *Recueil des Cours*, 1968: Tome III (Vol. 125 of the Collection). pp. viii, 625. Index; *Recueil des Cours*, 1969: Tome I (Vol. 126 of the Collection). pp. viii, 588. Index; Tome II (Vol. 127 of the Collection). pp. xiii, 505. Index; Tome III (Vol. 128 of the Collection). pp. viii, 750. Index. Leiden: A. W. Sijthoff. 1970.
- Alisky, Marvin. *Guide to the Government of the Mexican State of Sonora*. Tempe, Ariz.: Center for Latin American Studies, Arizona State University, 1971. pp. 47. \$1.00.
- Altug, Yilmaz. *Çin, Vietnam, Çekoslovakya ve Orta-Dogu Sorunlari* [Problems of China, Vietnam, Czechoslovakia and the Middle East]. Istanbul: Sermet Matbaasi, 1970. pp. xi, 351. T 235.45.
- Annuario di Diritto Internazionale* 1967-68. Rome: Giorgio Donnenici de Luca, Editore, 1970. pp. xi, 760. Index.
- Asian-African Consultative Committee. *Report of the Tenth Session. Held in Karachi (Pakistan) from 21st to 31st January 1969*. New Delhi: The Secretariat of the Asian-African Legal Consultative Committee, 1970. pp. iv, 412.
- Barry, Donald D. (ed.) *Governmental Tort Liability in the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland, Roumania and Yugoslavia*. Leiden: A. W. Sijthoff, 1970. pp. 327. Index. Fl. 54.
- Colliard, C. A., and A. Manin. *Droit International et Histoire Diplomatique. Documents Choisis. Tome II: Europe*. Paris: Editions Montchrestien, 1970. pp. x, 1098. Index. Fr. 150.
- Dembiński, Ludwik. *Samostanowienie w Prawie i Praktyce ONZ* [Self-Determination in the Law and Practice of the United Nations]. Warsaw: Państwowe Wydawnictwo Naukowe, 1969. pp. 275.
- Dunscombe, Carroll. *Riparian and Littoral Rights. A Survey of Some of the Legal Problems Involved in Residential and Commercial Uses along the Water's Edge in Relation to the Substantive Aspects of Public Policy*. New York: The William-Frederick Press, 1970. pp. x, 82. \$3.00.
- Fiedler, Wilfried. *Staatskontinuität und Verfassungsrechtsprechung. Zum begriff der Kontinuität des Deutschen Staatswesens, unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts*. Freiburg and Munich: Verlag Karl Alber, 1970. pp. iv, 207.
- Friedmann, Wolfgang. *De l'Efficacité des Institutions Internationales*. Translated from the English by Simone Dreyfus. Paris: Librairie Armand Colin, 1970. pp. 199. Index.
- Friedmann, W. G., and J. F. Garner (eds.). *Government Enterprise. A Comparative Study*. New York: Columbia University Press, 1970. pp. xii, 351. Index. \$10.00.

\* Mention here neither assures nor precludes later review.

- Geiger, Rudolf. *Die Kaschmirfrage im Lichte des Völkerrechts*. Berlin: Duncker & Humblot, 1970. pp. 288. Index.
- Giuntari, Theodore R. *The American Law of Sovereign Immunity. An Analysis of Legal Interpretation*. New York, Washington, and London: Praeger Publishers, 1970. pp. xvii, 438. Index. \$20.00.
- Greig, D. W. (ed.) *The Australian Year Book of International Law 1967*. Sydney, Melbourne, Brisbane: Butterworths, 1970. pp. 315. Index.
- Institut de Droit International. *Annuaire 1969. Session d'Edinbourg. Septembre 1969*. Vol. 53 (Tomes I and II). Tome I: pp. iv, 721. Tome II: pp. xcii, 517. Basle: Verlag für Recht und Gesellschaft, 1970. Sw. Fr. 300, cloth; 290, paper.
- Interuniversitair Instituut voor Internationaal Recht. *Les Nouvelles Conventions de La Haye: Leur Application par les Juges Nationaux. Recueil des Décisions et Bibliographie*. Edited by M. Sumampouw. The Hague: T. M. C. Asser Instituut, 1970. pp. xx, 116. \$4.00.
- Karaosmanoğlu, Ali L. *Les Actions Militaires Coercitives et Non Coercitives des Nations Unies*. Paris and Geneva: Librairie Droz, 1970. pp. 320.
- Kelsen, Hans. *The Pure Theory of Law* (translated by Max Knight). Berkeley, Los Angeles, London: University of California Press, 1970. pp. x, 356. \$3.75.
- Kojanec, Giovanni. *Investimenti all'estero. Regime Giuridico e Garanzie Internazionali*. Padua: Casa Editrice Dott. Antonio Milani, 1970. pp. vii, 194. Index. L. 2,500.
- Kosyk, Wolodymr. *Violation des Droits de l'Homme en Ukraine et en U. R. S. S.* Paris: Editions de l'Est Européen, 1969. pp. vii, 160. Index.
- Lecourt, Robert. *Le Juge devant le Marché Commun*. Geneva: Institut Universitaire de Hautes Etudes Internationales, 1970. pp. 69.
- Lefever, Ernest W. *Spear and Scepter. Army, Police, and Politics in Tropical Africa*. Washington, D. C.: The Brookings Institution, 1970. pp. xiii, 251. Index. \$6.50.
- Lerner, Natan. *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*. Leiden: A. W. Sijthoff, 1970. pp. 132.
- Louvain, Université Catholique de. Centre d'Études Européennes. *Les Droits de l'Homme et les Personnes Morales. Premier Colloque du Département des Droits de l'Homme, 24 Octobre 1969*. Brussels: Établissements Émile Bruylant, 1970. pp. 166. Fr. 500.
- Luanda, Tribunal da Relação de. *Acórdãos do Ano de 1968. (Colectanea das Decisões de Maior Interesse doutrinal proferidas durante o ano.)* Angola: Imprensa Nacional. pp. 767.
- Ludz, Peter Christian. *The German Democratic Republic from the Sixties to the Seventies. A Socio-Political Analysis*. Cambridge, Mass.: Harvard University Center for International Affairs, 1970. pp. xii, 97.
- Mapelli, Enrique, and Roberto Comes. *Convenios Multilaterales sobre Trafico Aereo*. Madrid: Iberia Lineas Aereas de España, S. A., 1970. pp. 503. Indexes.
- Merle, Marcel. *La Vie Internationale*. 3rd revised ed. Paris: Librairie Armand Colin, 1970. pp. 381. Index.
- Oakes, Augustus, and R. B. Mowat (eds.). *The Great European Treaties of the Nineteenth Century*. New York and London: Oxford University Press, 1970. pp. xii, 403. Index. \$9.75.
- Patel, Satyavrata R. *World Constitutional Law and Practice. Major Constitutions and Governments*. Delhi, Bombay, Bangalore: Vikas Publications, 1970. pp. xi, 495. Index. Rs. 37.50.
- Perlmutter, Amos. *Anatomy of Political Institutionalism: The Case of Israel and Some Comparative Analyses*. Cambridge, Mass.: Harvard University Center for International Affairs, 1970. pp. vii, 56.
- Rainaud, J. M. *L'Agence Internationale de l'Énergie Atomique*. Paris: Librairie Armand Colin, 1970. pp. 237.
- Reisman, Michael. *The Art of the Possible. Diplomatic Alternatives in the Middle East*. Princeton, N. J.: Princeton University Press, 1970. pp. 161. Index. \$6.00, cloth; \$1.95, paper.

- Reisman, W. Michael. *Nullity and Revision. The Review and Enforcement of International Judgments and Awards*. New Haven and London: Yale University Press, 1971. pp. xvi, 890. Index. \$25.00.
- Rosenberg, J. Mitchell. *Jerome Frank: Jurist and Philosopher*. New York: Philosophical Library, 1970. pp. xviii, 274. Index. \$8.75.
- Rousseau, Charles. *Droit International Public*. Tome I: *Introduction et Sources*. 2nd ed. Paris: Editions Sirey, 1970. pp. iv, 464. Index. Fr. 70; postpaid, Fr. 75.
- Rovine, Arthur W. *The First Fifty Years. The Secretary-General in World Politics 1920-1970*. Leiden: A. W. Sijthoff, 1970. pp. 498. Index. Fl. 59.
- Sharp, Gene. *Exploring Nonviolent Alternatives*. Boston: Porter Sargent Publisher, 1970. pp. xiv, 161. \$3.95, cloth; \$2.25, paper.
- SIPRI (Stockholm International Peace Research Institute). *Yearbook of World Armaments and Disarmament 1969/70*. Stockholm: Almqvist & Wiksell; London: Gerald Duckworth & Co., Ltd; New York: Humanities Press; New Delhi: Oxford & IBH Publishing Co., 1970. pp. xxiv, 540. Index. \$16.50, cloth; \$8.75, paper.
- Tung, William L. *China and the Foreign Powers: The Impact of and Reaction to Unequal Treaties*. Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xv, 526. Index. \$15.00.
- United States Arms Control and Disarmament Agency. *Documents on Disarmament, 1969*. (Publication 55.) Washington, D. C.: U. S. Government Printing Office, 1970. pp. 821. List of Documents. Index. Bibliography. \$3.50.
- United States Department of State. *Foreign Relations of the United States. The Conferences at Washington and Quebec 1943*. (Dept. of State Pub. 8552.) Washington, D. C.: U. S. Government Printing Office, 1970. pp. xcvi, 1382. Indexes. \$7.00.
- Veiter, Theodor. *Das Recht der Volksgruppen und Sprachminderheiten in Österreich. Mit einer ethnosozologischen Grundlegung und einem Anhang (Materialien)*. Vienna and Stuttgart: Wilhelm Braumüller Universitäts-Verlagsbuchhandlung G.m.b.H., 1970. pp. xxvii, 890. Index. \$27.00.
- Vignes, D. *L'Association des États Africains et Malgache à la C. E. E.* Paris: Librairie Armand Colin, 1970. pp. 224.
- Weston, Burns H. *International Claims: Postwar French Practice*. Syracuse, N. Y.: Syracuse University Press, 1971. pp. xvii, 237. Index. \$10.75.
- Wiswall, F. L., Jr. *The Development of Admiralty Jurisdiction and Practice Since 1800*. (An English Study with American Comparisons.) New York: Cambridge University Press, 1970. pp. xxvii, 223. Index. Bibliography. \$13.00.
- Woronoff, Jon. *Organizing African Unity*. Metuchen, N. J.: The Scarecrow Press, 1970. pp. x, 693. Index. \$15.00.
- Wright, Harry K. *Foreign Enterprise in Mexico. Laws and Policies*. Chapel Hill, N. C.: University of North Carolina Press, 1971. pp. xv, 425. Index. \$15.00.
- Zellentin, Gerda. *Intersystemare Beziehungen in Europa. Bedingungen der Friedenssicherung*. Leiden: A. W. Sijthoff, 1970. pp. xvi, 307. Index.

## OFFICIAL DOCUMENTS

### AERIAL HIJACKING

#### CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT

*Signed at The Hague, December 16, 1970 \**

##### PREAMBLE

##### THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED AS FOLLOWS:

##### ARTICLE 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence (hereinafter referred to as "the offence").

##### ARTICLE 2

Each Contracting State undertakes to make the offence punishable by severe penalties.

##### ARTICLE 3

1. For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

2. This Convention shall not apply to aircraft used in military, customs or police services.

\* 64 Dept. of State Bulletin 53 (1971); 10 Int. Legal Materials 133 (1971). Opened for additional signatures in London, Moscow and Washington, Jan. 1, 1971.



3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the state of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

4. In the cases mentioned in Article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same state where that state is one of those referred to in that article.

5. Notwithstanding paragraphs 3 and 4 of this article, Articles 6, 7, 8 and 10 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a state other than the state of registration of that aircraft.

#### ARTICLE 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

(a) when the offence is committed on board an aircraft registered in that state;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

#### ARTICLE 5

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the state among them which shall exercise the jurisdiction and have the attributes of the state of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

#### ARTICLE 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender

is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such state shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national.

4. When a state, pursuant to this article, has taken a person into custody, it shall immediately notify the state of registration of the aircraft, the state mentioned in Article 4, paragraph 1(c), the state of nationality of the detained person and, if it considers it advisable, any other interested states of the fact that such person is in custody and of the circumstances which warrant his detention. The state which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said states and shall indicate whether it intends to exercise jurisdiction.

#### ARTICLE 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.

#### ARTICLE 8

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested state.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested state.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, paragraph 1.

## ARTICLE 9

1. When any of the acts mentioned in Article 1(a) has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

## ARTICLE 10

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the state requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

## ARTICLE 11

Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to Article 9;
- (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

## ARTICLE 12

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each state may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the depositary governments.

## ARTICLE 13

1. This Convention shall be open for signature at The Hague on 16 December 1970, by states participating in the International Conference on Air Law held at The Hague from 1 to 16 December 1970 (hereinafter referred to as The Hague Conference). After 31 December 1970, the Convention shall be open to all states for signature in Moscow, London and Washington. Any state which does not sign this Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by the signatory states. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the depositary governments.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten states signatory to this Convention which participated in The Hague Conference.

4. For other states, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.

5. The depositary governments shall promptly inform all signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.

6. As soon as this Convention comes into force, it shall be registered by the depositary governments pursuant to Article 102 of the Charter of the United Nations and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

## ARTICLE 14

1. Any Contracting State may denounce this Convention by written notification to the depositary governments.

2. Denunciation shall take effect six months following the date on which notification is received by the depositary governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorised thereto by their Governments, have signed this Convention.

DONE at The Hague, this sixteenth day of December, one thousand nine hundred and seventy, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

[Signed at The Hague Dec. 16, 1970, on behalf of: Afghanistan, Argentina, Barbados, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, China, Colombia, Costa Rica, Czechoslovakia, Denmark, El Salvador, Ethiopia, France, Gabon, Germany, Ghana, Greece, Guatemala, Hungary, Indonesia, Iran, Israel, Italy, Jamaica, Japan, Luxembourg, Malaysia, Mexico, Netherlands, Panama, Philippines, Poland, Por-

tugal, Rwanda, South Africa, Sweden, Switzerland, Thailand, Trinidad, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Venezuela, Yugoslavia; signed at Washington on behalf of: Finland (Jan. 8, 1971), Laos (Feb. 16, 1971), Niger (Feb. 19, 1971).]

## UNITED NATIONS SECURITY COUNCIL

RESOLUTION 286 (1970)\*

*Adopted September 9, 1970*

THE SECURITY COUNCIL,

*Gravely concerned* at the threat to innocent civilian lives from the hijacking of aircraft and any other interference in international travel,

*Appeals* to all parties concerned for the immediate release of all passengers and crews without exception, held as a result of hijackings and other interference in international travel,

*Calls* on states to take all possible legal steps to prevent further hijackings or any other interference with international civil air travel.

## UNITED NATIONS GENERAL ASSEMBLY

RESOLUTION 2645 (XXV)\*\*

*Adopted November 25, 1970*

### AERIAL HIJACKING OR INTERFERENCE WITH CIVIL AIR TRAVEL

*The General Assembly,*

*Recognizing* that international civil aviation is a vital link in the promotion and preservation of friendly relations among states and that its safe and orderly functioning is in the interest of all peoples,

*Gravely concerned* over acts of aerial hijacking or other wrongful interference with civil air travel,

*Recognizing* that such acts jeopardize the lives and safety of the passengers and crew and constitute a violation of their human rights,

*Aware* that international civil aviation can only function properly in conditions guaranteeing the safety of its operations and the due exercise of the freedom of air travel,

*Endorsing* the solemn declaration<sup>1</sup> of the extraordinary session of the Assembly of the International Civil Aviation Organization held at Montreal from 16 to 30 June 1970,

\* 63 Dept. of State Bulletin 341, at 342 (1970); 9 Int. Legal Materials 1291 (1970).

\*\* Doc. A/RES/2645 (XXV); U. N. Press Release GA/4355 (Dec. 17, 1970), Pt. VIII, p. 20; 64 Dept. of State Bulletin 32 (1971); 9 Int. Legal Materials 1288 (1970).

<sup>1</sup> International Civil Aviation Organization, Resolutions adopted by the Assembly, Seventeenth Session (Extraordinary) (Montreal, 1970), Res. A17-1; reprinted below, p. 452.

*Bearing in mind* General Assembly Resolution 2551 (XXIV) of 12 December 1969, and Security Council Resolution 286 (1970) of 9 September 1970<sup>2</sup> adopted by consensus at the 1552nd meeting of the Council,

1. *Condemns*, without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat or use of force, and all acts of violence which may be directed against passengers, crew and aircraft engaged in, and air navigation facilities and aeronautical communications used by, civil air transport;

2. *Calls upon* states to take all appropriate measures to deter, prevent or suppress such acts within their jurisdiction, at every stage of the execution of those acts, and to provide for the prosecution and punishment of persons who perpetrate such acts, in a manner commensurate with the gravity of those crimes, or, without prejudice to the rights and obligations of states under existing international instruments relating to the matter, for the extradition of such persons for the purpose of their prosecution and punishment;

3. *Declares* that the exploitation of unlawful seizure of aircraft for the purpose of taking hostages is to be condemned;

4. *Declares further* that the unlawful detention of passengers and crew in transit or otherwise engaged in civil air travel is to be condemned as another form of wrongful interference with free and uninterrupted air travel;

5. *Urges* states to the territory of which a hijacked aircraft is diverted to provide for the care and safety of its passengers and crew and to enable them to continue their journey as soon as practicable and to return the aircraft and its cargo to the persons lawfully entitled to possession;

6. *Invites states* to ratify or accede to the Convention on Offences and Certain Other Acts committed on Board Aircraft signed at Tokyo on 14 September 1963,<sup>3</sup> in conformity with the Convention;

7. *Requests* concerted action on the part of states, in accordance with the Charter of the United Nations, towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport;

8. *Calls upon* states to take joint and separate action, in accordance with the Charter, in co-operation with the United Nations and the International Civil Aviation Organization to ensure that passengers, crew and aircraft engaged in civil aviation are not used as a means of extorting advantage of any kind ;

9. *Urges* full support for the current efforts of the International Civil Aviation Organization towards the development and co-ordination, in accordance with its competence, of effective measures in respect of interference with civil air travel;

10. *Calls upon* states to make every possible effort to achieve a successful result at the diplomatic conference to convene at The Hague in December

<sup>2</sup> Reprinted above.

<sup>3</sup> 704 U. N. Treaty Series, No. 10106 (1969); 58 A.J.I.L. 566 (1964).

1970 for the purpose of the adoption of a convention on the unlawful seizure of aircraft, so that an effective convention may be brought into force at an early date.<sup>4</sup>

The General Assembly, without a vote, took note of the following statement contained in the report of the Sixth Committee:

"It was agreed in the Committee that the adoption of the draft resolution cannot prejudice any international legal rights or duties of states under instruments relating to the status of refugees and stateless persons."

## UNITED NATIONS SECRETARY GENERAL

### STATEMENT AT DINNER INAUGURATING TWENTY-FIFTH ANNIVERSARY OF UNITED NATIONS DAY PROGRAMME <sup>1</sup>

*New York Hilton, September 14, 1970*

It is a great pleasure for me to address a group of very distinguished American men and women from government, industry, labour, finance and the information media, whose lives, professions and interests are representative of some of the most dynamic forces of the United States. The imaginative programmes for the United States celebration of the 1970 United Nations Day are due to a conjunction of public concern, of individual initiatives by many prominent personalities present here tonight, of the deep involvement of the industrial and cultural forces of your country in world affairs and, last but not least, of the unswerving support of the United Nations by the United Nations Association-USA and its dedicated leaders.

Tomorrow, one of the most important sessions of the world Organization will open in this city. The feeling harboured by so many people throughout the world that the United Nations is the best hope for humanity is vividly reflected in the fact that scores of Heads of State or Government will attend this session. Never in history has there been such a gathering of statesmen from all continents of the world, representing the diverse races, communities, beliefs, cultures, preoccupations and aspirations of mankind. We should pray that these leaders may be inspired by the vision, determination and love for our planet to open a new chapter of international co-operation commensurate with the needs of our times. From being the best hope for humanity, the United Nations must now be made the best instrument for humanity.

It is too early to say if the realization of the smallness and frailty of our planet has penetrated deeply enough into the minds of national leaders to induce them to think in global terms, to come forward with far-reaching and forward-looking proposals and with a new will for world action at this session. Political thinking and action in this century have lagged con-

<sup>4</sup> See above, p. 440.

<sup>1</sup> U.N. Press Release SG/SM/1333, ANV/87, Sept. 14, 1970.

siderably behind the dramatic advances of mankind in the field of science and technology. And we are moving ahead at ever greater speeds on the road of scientific and technical progress without questioning the adequacy of political beliefs, structures and instruments inherited from the past. Of course, most businessmen in this country realize that with the pace of present change, a company that has not adapted itself to that change is no longer in the picture. The world has changed fundamentally in many respects during the last 25 years, but political and social thinking and structures have basically remained the same.

The celebration of the twenty-fifth anniversary of the United Nations has induced many people of good will and responsibility to reflect about the state of world affairs and to present policies and programmes for a conscientious reappraisal. This process is taking place within the United Nations itself where, as part of it, a World Youth Assembly was convened in order to allow the younger generations to speak up in all frankness and to express their views on our present problems and the solutions they had in mind. Several governments have also taken steps to submit their policies and programmes to the United Nations for review. In the United States, such initiatives have been taken by Congress, by universities, non-governmental organizations and by the President himself, who has recently appointed a commission on the twenty-fifth anniversary of the United Nations, whose chairman, Ambassador Henry Cabot Lodge, honours us tonight with his presence.

Some of these reviews and reappraisals will take time to be completed. From the various reports I have seen so far, one can conclude that recommendations can be broadly categorized along two scales of attitudes: there are those who believe that the United Nations can be improved by changing its procedures, its instruments or its Charter, and those who believe that it is the behaviour of Member States that has to change fundamentally. Secondly, there are those who advocate slow, patient and non-disruptive adaptation and change and those who believe that only a radical transformation of the United Nations can be the remedy.

To tell you frankly, I am often wavering myself between these various attitudes. The Secretary General of the United Nations is an amphibious being with feet deeply entrenched in problems between nations and a heart constantly on the side of a peaceful and united world. His effectiveness depends to a very large degree on the confidence, support and co-operation of Member Governments. But, in the eyes of the common man, the Secretary General and the United Nations are expected to speak for mankind as a whole and for everything that is good on earth, from world-wide peace, justice, prosperity and the environment to the individual rights and liberties of man. The latter belief is increasing year after year with the inexorable growth of the number of people throughout the world who, through education and a better knowledge of their fellow earth-citizens, are getting impatient with the present fratricidal and short-sighted course of national policies.



There are times when I believe that, under existing circumstances which are a legacy of past conflicts and human divisions, the United Nations has not been faring so badly; that we have had an uneasy peace during the last 25 years and that we have at least avoided an atomic conflagration; that nearly a billion people have gained their independence, without the bloodshed and struggles which other nations had to endure for centuries to arrive at their present configuration; that a better understanding has been gained of the physical and economic miseries which prevail side by side with abundance and waste on the same planet; that various United Nations agencies and institutions have been created to survey and diagnose the state of the world in most aspects of human life and to recommend and facilitate appropriate action by governments; that several important treaties have been concluded limiting the spread of nuclear weapons and prohibiting atomic tests and weapons in certain zones and media; that human rights have been solemnly defined and widely publicized; that the Security Council is on call, day and night, to consider serious international incidents; and so forth.

But there are other times—and I must confess that they are more frequent than the former—when I believe that, with the will, support and enlightened vision of governments, especially the major ones, the United Nations could have fared infinitely better and done more during this period; that we have failed to become a universal organization; that centrifugal power games and claims are splitting and dividing the world in armed camps; that colonialism and racism are still rampant in many parts of the world; that behind the United Nations there is no real unity among nations; that ideologies and systems adapt themselves but slowly to modern change and continue to harbour dreams of exclusivity and world-wide domination; that much lip-service is being paid to the poverty of the Third World, but that not enough is being done—especially through trade policies—to help put their populations on their feet; that \$200 billion are being wasted each year (a total of \$1 trillion in the last six years!) on an unproductive and reciprocally nullifying armaments race; that innumerable sound international recommendations and decisions have remained unimplemented; that human rights have been well proclaimed, but are being all too frequently violated in many countries without recourse for the individual to any international action; and that we have failed to pacify two persisting and bloody conflicts, the repercussions of which are being felt throughout the world.

I cannot help feeling that we are falling dangerously behind the times and that insufficient attention is being paid to the new planetary conditions which are unfolding under our very eyes and which would require new thinking, new remedies and strong international instruments. The changes which have occurred in the world during the last 25 years are immense and probably greater than anything else the human race has ever seen before. United Nations projections of the future indicate further accelerated changes in many directions. The population of the world in the foreseeable future will continue to double every 30 or 40 years; we were 2.4

billion people on earth in 1945 and we will be six billion people before this century is over. The amounts of pollutants and waste introduced in the atmosphere and in the oceans are increasing every year and may some day destroy the oxygen-producing capacity of our waters. The industrial revolution will stop nowhere and the time will come, sooner or later, when the billions of people of the developing countries will attain consumption standards equal to those of the present-day advanced societies. This will mean immense transformations of the physical endowment of our planet. At that time, the main preoccupation of man will no longer be how to become rich, but how to survive or live in the clean and natural conditions known to his ancestors.

Alas, on the threshold of these formidable events, too few resources and too few talents are devoted to the task of thinking and worrying about the global problems and ills of our planet. The world as a whole seems to be forgotten in the maze of national preoccupations and priorities. United Nations affairs are all too frequently considered as foreign or external affairs of government. The spaceship earth is left without central guidance and stewardship. Action, power, responsibilities and resources are distributed unevenly and are being jealously kept in various insulated segments of the spaceship, with only a few nations ready to accept the truth that their actions may have repercussions throughout the spaceship.

I could give numerous examples of the state of legislative, executive and judicial unreadiness of the world to face the problems of international lawlessness with which we will be increasingly confronted. May I refer to a burning example of what I mean when I speak of the state of lawlessness in which the world finds itself under present-day technological circumstances. The word is on the lips of everyone: hijacking. This is a very revealing new trend of the times in which we live. Many hijackers have not been brought before any court of justice, although the overwhelming majority of peoples and governments have rightly condemned them. Countries which are ready to bring hijackers before a court of justice see their own airplanes hijacked. Any small group of extremists, however justifiable some of their grievances may be, can thus, through hijacking of aircraft or kidnapping of foreign diplomats, receive international attention, remain unpunished, involve innocent people and sow the seeds of international anarchy.

It is high time that we go to the root of this phenomenon and treat its causes with novel remedies and not with old-time recipes to which it is largely immune. Within a civilized and orderly society, a criminal act is judged for its criminal character and not for its political significance. In your country, a Democrat does not applaud a robber because he has robbed a Republican and *vice versa*. But internationally, this is exactly what all too frequently happens. One must start from the premise that international air transportation is an international activity which must be placed under an international rule of law. Airplanes are constructed in one country, owned by another and may be insured in a third country. They travel from one country to another, use facilities all over the world, carry pas-

sengers of all nationalities and are often piloted by men of many nationalities. I feel that all such passengers should be allowed to go about their business free of any interference, and transit passengers should not be detained under any pretext. Hijacking is of course in a totally different category; it is a crime against an international service affecting a diversity of nations, men, women and interests. This crime must be brought before an international tribunal defending the interests of all peoples and nations and not of any particular people or nation.

It may be of help if all governments pledge themselves to extradite hijackers, irrespective of their nationality or political affiliation, and bring them before an agreed international tribunal. Hijackers should be prosecuted in the name of the peoples of the world, for the benefit of all travelers and all pilots, irrespective of their nationality, and of all nations, irrespective of their political system. Some will tell me: "This will be a dangerous breach of national sovereignty." My answer will be: "The world has no other choice, because this is only the beginning of an inexorable trend. Nations and people must have the courage to resort to adequate new methods of international law and order. They must face with courage and imagination the new challenges of our times." Others will say: "Not all nations will agree to submit their nation[al]s to international jurisdiction and not all nations will be able to enforce such a new law." My answer will be: "National or federal justice took the same path and was confronted with the same difficulties at the beginning. These problems will be solved as more and more nations recognize the merit of the system and are ready to implement it. The situation is likely to change if hijackers are served notice by all nations that there will be no immunity or amnesty."

There are other preoccupying examples of new problems that lie in store for humanity. For example, we cannot tamper indefinitely with the non-renewable natural resources of the globe. The day will come when nations must be made accountable for the damage they are doing to the earth's common environment. Fortunately, considerable progress has been made recently in adopting collective arrangements for outer space, and similar progress is in sight for the seas and the oceans. This is a great opportunity and I hope that these examples will serve as stepping-stones for a wise and sound management of the spaceship earth as a whole.

How can the present gulf between science, technology and world-wide mass phenomena, on the one hand, and the selfish behaviour of nations, on the other hand, be bridged? Is it not more realistic to believe that human nature will never change and that there is little hope for a peaceful and orderly world ever being established? In my view, there is one way to reverse the present trend. It would be for the leaders of the great nations of our time to read the omens, to shoulder honestly their share of responsibility towards mankind as a whole, as provided for in the Charter, and to turn their sterile divisions and wasteful armaments into much needed endeavours for the people.

The small nations will no doubt go along. They are still ready to submit to the rules and regulations of international solidarity if the big Powers

set a good example and demonstrate concern for our planet as a whole and join in responsible international co-operation.

It is for that deeply felt reason that I have advocated, during this year of the twenty-fifth anniversary of the Organization, that the heads of state of the great Powers, including the People's Republic of China, or their Foreign Ministers, meet from time to time at an agreed venue to initiate a change from confrontation and division to the building of a safe and peaceful world. It is in the same spirit that I said at the commemorative ceremonies in San Francisco, that it was high time the People's Republic of China be involved in international affairs and that the idea of the universality of the United Nations be given priority in this year's agenda for world affairs.

May we hope and pray that the leaders of the nations in whose hands rests the fate of the world will turn their backs on the past and open a new chapter of history, commensurate with the world's new scientific and technical conditions: a chapter of world-wide peace, prosperity and justice and of joint planetary management.

## INTERNATIONAL CIVIL AVIATION ORGANIZATION

### ASSEMBLY DECLARATION \*

*Adopted June 30, 1970*

WHEREAS international civil air transport helps to create and preserve friendship and understanding among the peoples of the world and promotes commerce between nations;

WHEREAS acts of violence directed against international civil air transport and airports and other facilities used by such air transport jeopardize the safety thereof, seriously affect the operation of international air services and undermine the confidence of the peoples of the world in the safety of international civil air transport; and

WHEREAS Contracting States, noting the increasing number of acts of violence against international air transport, are gravely concerned with the safety and security of such air transport;

#### THE ASSEMBLY:

CONDEMNNS all acts of violence which may be directed against aircraft, aircraft crews and passengers engaged in international civil air transport;

CONDEMNNS all acts of violence which may be directed against civil aviation personnel, civil airports and other facilities used by international civil air transport;

#### URGENTLY

CALLS UPON states not to have recourse, under any circumstances, to acts of violence directed against international civil air transport and airports and other facilities serving such transport;

\* Res. A17-1, ICAO Assembly, 17th Sess. (Extraordinary), June 16-30, 1970; 63 Dept. of State Bulletin 302, at 303 (1970); 9 Int. Legal Materials 1275 (1970).

## URGENTLY

CALLS UPON states, pending the coming into force of appropriate international conventions, to take effective measures to deter and prevent such acts and to ensure, in accordance with their national laws, the prosecution of those who commit such acts;

## ADOPTS THE FOLLOWING DECLARATION:

The Assembly of the International Civil Aviation Organization,  
Meeting in Extraordinary Session to deal with the alarming increase in acts of unlawful seizure and of violence against international civil air transport aircraft, civil airport installations and related facilities,

Mindful of the principles enunciated in the Convention on International Civil Aviation,

Recognizing the urgent need to use all of the Organization's resources to prevent and deter such acts,

## SOLEMNLY

- (1) Deplores acts which undermine the confidence placed in air transport by the peoples of the world.
- (2) Expresses regret for the loss of life and injury and damage to important economic resources caused by such acts.
- (3) Condemns all acts of violence which may be directed against aircraft, crews and passengers engaged in, and against civil aviation personnel, civil airports and other facilities used by, international civil air transport.
- (4) Recognizes the urgent need for a consensus among states in order to secure widespread international co-operation in the interests of the safety of international civil air transport.
- (5) Requests concerted action on the part of states towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport.
- (6) Requests application, as soon as possible, of the decisions and recommendations of this Assembly so as to prevent and deter such acts.

## COUNCIL RESOLUTION

*Adopted October 1, 1970 \**

## THE COUNCIL,

Finding that a heightened threat to the safety and security of international civil air transport exists as a result of acts of unlawful seizure of aircraft involving the detention of passengers, crew and aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, and the destruction of such aircraft;

Recognizing that Contracting States to the Convention on International Civil Aviation have obligated themselves to ensure the safe and orderly growth of international civil aviation throughout the world;

\* 63 Dept of State Bulletin 449, at 453 (1970); 9 Int. Legal Materials 1286 (1970).

Calls upon Contracting States, in order to ensure the safety and security of international civil air transport, upon request of a Contracting State to consult together immediately with a view to deciding what joint action should be undertaken, in accordance with international law, without excluding measures such as the suspension of international civil air transport services to and from any state which after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, or any state which, contrary to the principles of Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes;

Directs the Legal Committee to consider during its Eighteenth Session, if necessary by extension of the session, an international convention or other international instruments:

- i) to give effect to the purposes set out in the preceding paragraph;
- ii) to provide for joint action by states to take such measures as may be appropriate in other cases of unlawful seizure; and
- iii) to provide for amendment of bilateral air transport agreements of contracting parties to remove all doubt concerning the authority to join in taking such action against any state.

### INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume 10, Nos. 1 (January) and 2 (March), 1971, of *International Legal Materials: Current Documents*.<sup>1</sup>

#### VOLUME X, NUMBER 1 (January, 1971)

##### JUDICIAL AND SIMILAR PROCEEDINGS

	PAGE
Chile: Supreme Court Opinion Restraining Lower Court from Hearing Request of Gulf Oil for Judicial Sanctions against the <i>Transit of Machinery en Route to Bolivia</i> .....	1
European Commission of Human Rights: Decision Concerning the Admissibility of <i>Applications by East African Asians against the United Kingdom</i> .....	6
United States: Supreme Court Review of the Petition for Writ of Certiorari in <i>First National City Bank v. Banco Nacional de Cuba (Cuban Nationalizations; Act of State Doctrine; Sovereign Immunity)</i>	

<sup>1</sup> The annual subscription for six numbers of *International Legal Materials* is \$35.00; there is a concessionary rate of \$15.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

	PAGE
Petition for Writ of Certiorari .....	56
Brief in Opposition to Petition .....	69
Reply Brief of Petitioner .....	83
U. S. Department of State Letter .....	89

## TREATIES AND AGREEMENTS

Argentina-Bolivia: Agreement for the <i>Sale of Natural Gas</i>	
Gas Sales Agreement .....	94
Bolivian Supreme Decree Authorizing State Entity to Enter into Gas Sales Agreement .....	115
Government Notes Authorizing Operations of Exportation and Importation .....	119
Modifications of Gas Sales Agreement .....	121
Federal Republic of Germany-Poland: Treaty Concerning the <i>Basis for Normalizing Relations</i> .....	127
International Atomic Energy Agency: Statute <i>Amendment to En- large the Board of Governors</i> .....	130
International Civil Aviation Organization: Convention for the <i>Sup- pression of Unlawful Seizure of Aircraft</i> .....	133
Oil Companies: Contract Regarding an Interim Supplement to <i>Tanker Liability for Oil Pollution</i> .....	137
United Nations: Treaty on <i>Prohibiting the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor</i> .....	145

## LEGISLATION AND REGULATIONS

Andean Commission: Decision Concerning the <i>Treatment of Foreign Capital</i> .....	152
Bolivia: Legislation Concerning the <i>Nationalization of Bolivian Gulf Oil Properties</i> .....	173
Mandate of the Armed Forces to Nationalize Bolivian Gulf Oil Company .....	174
Supreme Decree Nationalizing Bolivian Gulf Oil Company ....	175
Supreme Decree Transferring Bolivian Gulf Oil Company Shares in YABOG to Bolivian State .....	179
Supreme Decree Setting Forth Terms for Indemnity .....	182
Switzerland: Federal Law on <i>Investment Guaranties</i> .....	188

## OTHER DOCUMENTS

European Communities: Commission Memorandum on the <i>Con- tinental Shelf</i> .....	202
Latin American Meeting on Aspects of the Law of the Sea: Lima Declaration and Resolutions on the <i>Law of the Sea</i> .....	207
Non-Aligned Countries Third Conference:	
<i>Lusaka Declaration</i> .....	215
<i>Statement on the Seabed</i> .....	219

	PAGE
United Nations: General Assembly Resolutions Concerning the <i>Sea-bed and Ocean Floor</i> .....	220

## VOLUME X, NUMBER 2 (MARCH, 1971)

## TREATIES AND AGREEMENTS

France-United States: Agreement Concerning Action Against the <i>Illicit Narcotic and Dangerous Drug Traffic</i> .....	235
Gulf States-Oil Companies: Settlement of <i>Financial Obligations of Companies Operating in Gulf States</i>	
O.P.E.C. Resolution XXI.120 Calling for Negotiations and Forming Three-Member Negotiating Committee .....	240
Statement of Three-Member Negotiating Committee of O.P.E.C.	242
Proposal of Oil Companies with Regard to the Negotiations .....	243
O.P.E.C. Resolution XXII.131 Calling for Legislative Measures in the Event No Agreement is Reached with Oil Companies .....	246
Tehran Agreement Between Six Gulf States and Oil Companies Operating in Their Territories .....	247
Organization of American States:	
Convention to Prevent and Punish <i>Acts of Terrorism</i> .....	255
General Assembly Resolution Concerning the <i>Study of Matters Pertaining to Terrorism</i> .....	259
United Nations:	
Convention on <i>Psychotropic Substances</i> .....	261
UNESCO Convention on the <i>Illicit Movement of Art Treasures</i>	289
United States-Haiti: Exchange of Notes Concerning <i>Additional Coverage for Investors under U.S. Guaranty Program</i> .....	294

## JUDICIAL AND SIMILAR PROCEEDINGS

International Court of Justice: <i>U.N. Security Council Request for an Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)</i>	
Excerpts from the Written Statements Submitted to the Court ...	295
South African Letter to the Court Concerning a Plebiscite Proposal	417
United States Tariff Commission: Determination under the Anti-dumping Act of <i>Injury from the Importation of Television Receiving Sets from Japan</i> .....	423

## LEGISLATION AND REGULATIONS

Chile: Proposed Amendment to the Constitution Concerning <i>Natural Resources and Their Nationalization</i> .....	430
France: Law on <i>Hijacking</i> .....	436



## OTHER DOCUMENTS

## PAGE

Canada-United States: Statements on the Establishment of <i>Canadian Fishing Zones</i> .....	437
Council of Europe: Resolution and Communication from the Com- mittee of Ministers on the <i>Legal and Financial Consequences</i> <i>of the Withdrawal of Greece from the Council</i> .....	442
Special Latin American Coordinating Commission (CECLA): Action Seeking <i>Closer Cooperation with the European Com- munities</i>	
Resolution Setting Forth Items for Joint Examination .....	446
Declaration of Buenos Aires .....	448

**BACK NUMBERS**  
*of the*  
**AMERICAN JOURNAL OF  
INTERNATIONAL LAW**  
*and*  
**PROCEEDINGS OF THE AMERICAN  
SOCIETY OF INTERNATIONAL LAW**

**T**HE Society has in stock a limited supply of back numbers of the *Journal* in the original paper bindings for sale at \$7.50 an issue, as follows:

Complete volumes of the *Journal* are available for the years 1964, 1966, 1968, 1969 and 1970. Numbers available for other years are: 1919: *January, April, July*; 1931, 1967: *January, April, October*; 1927, 1930, 1951, 1963, 1965: *April, July, October*; 1925, 1943: *April, July*; 1921, 1928, 1936, 1938, 1949, 1959, 1960, 1961: *July, October*; 1922, 1953: *January*; 1926, 1934, 1952, 1957: *July*; 1918, 1929, 1937, 1947, 1955, 1962: *October*.

**Supplement, 1935, Part I: Harvard Research Draft Convention and Comment on Extradition.**

**Special Supplements (paper or cloth): 1917, 1926, 1928.**

Single issues of the current volume (1971) may be obtained at \$6.00 a copy.

**Proceedings** are available for the years 1956-1958, 1961-1963, 1965-1969 at \$7.50 a volume.

**Analytical Index to the Journal and Supplements, Vols. 35-54 (1941-1960) and Proceedings of the Society, 1941-1960.** Cloth, \$20.00.

**Orders should be sent to the  
American Journal of International Law  
2223 Massachusetts Avenue, N. W., Washington, D. C. 20008**

# ***The Procedural Aspects of International Law Series***

*Richard B. Lillich, Editor*

**"The whole series represents a most valuable contribution."  
—*International and Comparative Law Quarterly***

- 1. International Claims:  
Their Adjudication by National Commissions**  
*Richard B. Lillich* \$5.00
- 2. International Claims:  
Their Preparation and Presentation**  
*Richard B. Lillich and Gordon A. Christenson* \$6.50
- 3. The Role of Domestic Courts in the  
International Legal Order**  
*Richard A. Falk* \$6.50
- 4. The Use of Experts by International Tribunals**  
*Gillian White* \$8.95
- 5. The Protection of Foreign Investment:  
Six Procedural Studies**  
*Richard B. Lillich* \$7.50
- 6. International Claims: Postwar British Practice**  
*Richard B. Lillich* \$6.50
- 7. Law-Making in the  
International Civil Aviation Organization**  
*Thomas Buergenthal* \$10.50
- 8. UN Protection of Civil and Political Rights**  
*John Carey* \$7.50
- 9. International Claims: Postwar French Practice**  
*Burns H. Weston* \$10.75

**In July . . .**

- 10. International Law, National Tribunals,  
and the Rights of Aliens**  
*Frank G. Dawson and Ivan L. Head* \$11.75

**SYRACUSE UNIVERSITY PRESS**

Syracuse, New York 13210

## REBELLION, RACISM, AND REPRESENTATION

*The Adam Clayton Powell Case and Its Antecedents*

P. Allan Dionisopoulos

What Constitutional limits—if any—are imposed upon Congress when it refuses to seat elected representatives? In the past, such issues as polygamy (John M. Bernhisel and Brigham Roberts), loyalty and patriotism (former Confederates), citizenship after slavery (Hiram Revels), socialism-pacifism (Victor Berger), and misconduct before election (John C. Conner, B. F. Whittemore, Arthur R. Gould) became—for both chambers—the excuse to exercise broad, political interpretations of vague Constitutional powers. In this book, Professor Dionisopoulos makes the plea that Congress set up definite, self-imposed guidelines to be used impartially in judging the qualifications of members of the House and Senate, and he warns us that failure to abide by Constitutional principles in seating members-elect seriously jeopardizes the entire democratic process.

x/175 pages

LC 76-125335

ISBN 0-87580-018-1 (cloth) \$6.50

ISBN 0-87580-504-3 (paper) \$2.50

NORTHERN ILLINOIS UNIVERSITY PRESS

DeKalb, Illinois 60115



## International Summer Course on Legal Aspects of European Integration

‘Europa Instituut’, University of Amsterdam

August 16–28, 1971

Participation is open to lawyers, legal advisers in enterprises, and civil servants confronted with problems raised by the EEC Treaty. Tuition fee: Dfl. 600.— (approx. \$167.00)

**Full Information:** Netherlands Universities Foundation for International Co-operation (NUFFIC), 27 Molenstraat, The Hague, Netherlands

**NEW FROM YALE**

## **NULLITY AND REVISION**

*The Review and Enforcement of International Judgments and Awards*

by **W. Michael Reisman**

The process of resolving international disputes by authoritative decisions and bringing such decisions and future conduct into harmony with each other is a problem of the utmost importance. Adapting the policy-oriented framework of Myres McDougal and Harold Lasswell, the author takes up comprehensively the entire subject of international arbitration and decision.

Mr. Reisman develops a set of sequential heuristic models, which enable the international decision-maker to orient himself in the flow of pre-decision, decision, and post-decision events, and permit him to formulate the most effective decision. He then treats in depth a selective but wide range of claims lodged against the validity of a decision, at different sequences, and considers in detail the policies and the contextual investigations to which they should be subjected. Finally, Mr. Reisman presents a model of enforcement for international awards and judgments based on the availability of effective power in diverse contexts and the intricate network of authority expectations that decision-makers may activate and integrate in the enforcement process.



**Yale University Press**—New Haven and London  
in Canada: McGill-Queen's University Press

## ***The Soviet Union and the Law of the Sea***

**WILLIAM BUTLER**

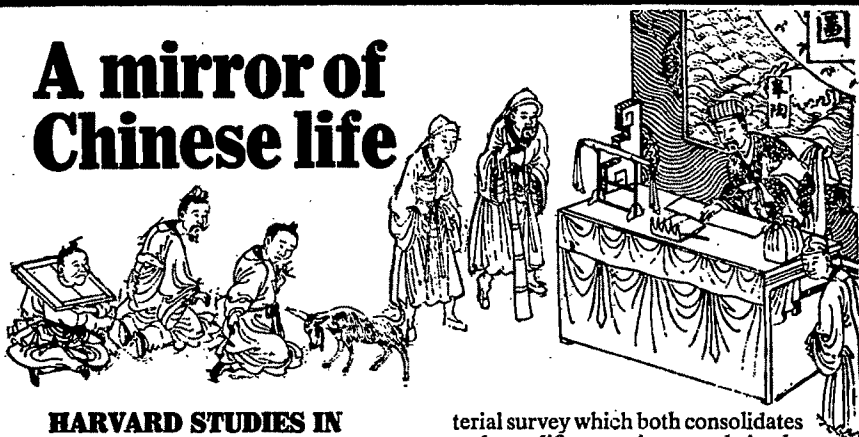
This book is the most thorough study published in any language of the Soviet approach to maritime law. Russian legislation, treaties, judicial decisions, diplomatic practice, and legal writings are thoroughly analyzed and placed in the context of political and technological developments and historical precedent. Political scientists, jurists, and diplomats will find this comprehensive and systematic discussion invaluable.

**\$12.00**



**THE JOHNS HOPKINS PRESS**  
Baltimore, Maryland 21218

# A mirror of Chinese life



## HARVARD STUDIES IN EAST ASIAN LAW

*Jerome Alan Cohen, Chairman of the Editorial Committee*

Only in the last decade have American scholars become aware of the value that the study of law can have to an understanding of the evolution of Chinese social, economic, and political life. This important new series provides new insights into the traditions, theoretical bases, and workings of East Asian law.

## CONTEMPORARY CHINESE LAW:

**Research Problems and Perspectives.** *Edited by Jerome Alan Cohen.* Thirteen essays that explore the methodology for studying Chinese law and investigate research materials, analyze terminology problems, and discuss the comparisons between the Chinese legal system and our own and that of the U.S.S.R.

"...It will be praised by men concerned with seeking the universal insistence of social order. The authors have proved that China is not chaotic, although it presents less familiar features of social order than any other of the great families of law."—*Harvard Law Review* \$10.00

## LAW IN IMPERIAL CHINA:

**Exemplified by 190 Ch'ing Dynasty Cases** (translated from the Hsing-an hui-lan) with Historical, Social, and Judicial Commentaries. *By Derk Bodde and Clarence Morris.* "A landmark for the subject — a magis-

terial survey which both consolidates and amplifies previous work in the field."—*Public Affairs.* \$17.50

## THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963:

**An Introduction.** *By Jerome Alan Cohen.* "... one of the most revealing books yet published concerning the sociopolitical life of the ordinary Chinese on the Mainland." — *The Annals of the American Academy of Political and Social Sciences.* \$15.00

## AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1967:

**A Calendar.** *By Douglas Millar Johnston and Hungdah Chiu.* "Serious students of China and international law will be deeply indebted to the prodigious labor and impressive scholarship which this seminal reference work represents." — *Harvard International Law Journal.* \$12.50

*A new brochure describing all our books on Asia is available upon request.*

# HARVARD UNIVERSITY PRESS

Cambridge, Mass. 02138

# STANDING ORDER SERVICE

To be sure of receiving the latest titles in International Law—or any of a number of other categories—use our Standing Order Service. You will then automatically get such new titles as:



**International Review of Criminal Policy**  
No. 28, 1970 \$2.00

**Multilateral Treaties in Respect of which the Secretary-General performs Depositary Functions** \$5.75

**International Court of Justice Yearbook**

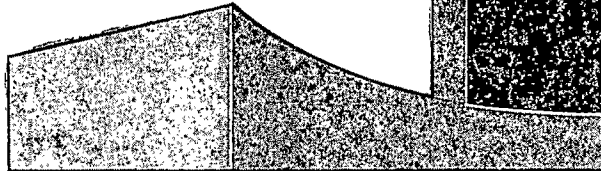
1966-67 No. 314—\$1.50

1967-68 No. 324—\$1.50

1968-69 No. 334—\$2.00

**SEND FOR OUR STANDING ORDER BROCHURE**

**United Nations  
Publications  
Room LX-2300  
New York, N.Y. 10017**



**REPRINT**

**PROCEEDINGS OF THE AMERICAN  
SOCIETY OF INTERNATIONAL LAW**

**Volumes 1-49 (1907-1955)**

**Complete Set Clothbound \$489.00**

**Paperbound \$432.00**

**Per Volume Paperbound \$ 9.00**

**Volumes 12 and 13 (1918-1919) combined and priced as one volume.**

**Reprinted by Special Arrangement with  
The American Society of International Law**

*Address all orders and inquiries to:*

**KRAUS REPRINT CO.**

**A U.S. Division of  
Kraus-Thomson Organization Limited**

**16 East 46th Street  
New York, N.Y. 10017**



# Expanding International Law in a Shrinking World

---

OCEANA PUBLICATIONS, INC. • DOBBS FERRY, NEW YORK

Under the guidance of Francis Deak, Consultant in International Affairs, Oceana has in recent years taken the leadership in the publication of significant titles in the field. The objectives of its extensive publication program are summarized below, and its fruits are reflected in the pages which follow.

## I.

Objective: To combine the best scholarship and editorial skill with the most advanced reproduction techniques to produce source and documentary materials consolidated for student reference and professional research.

Oceana publishes the *Consolidated Treaty Series* and acts as distributor of the *League of Nations Treaty Series*, so that the total range of treaties of the past 300 years is made readily available at one source.

To facilitate the examination of national statements and interpretations of international law, Oceana has begun publication of *American International Law Cases* and *Italian International Law Practice*, and it has co-published *British International Law Cases* with Stevens & Sons of London.

And with the re-issue of the *International Law Quarterly* and the *Grotius Society Transactions* for the British Institute of International and Comparative Law and *International Legislation* and *World Court Reports* for the Carnegie Endowment for International Peace, Oceana has begun a program of reprinting some of the long out-of-print classics in the field.

## II.

Objective: To provide a publishing medium to specialists and opinion moulders for the analysis of contemporary international issues in the context of domestic and international implications.

Oceana has published the *Hammar skjöld Forum Series* for the Association of the Bar of the City of New York; and it has selectively published and co-published monographs which, in its view, represent important contributions to the current literature of international affairs.

It also publishes for and with major institutions and organizations in the field—the American Society of International Law, the Inter-American Institute of International Legal Studies, the International Institute for the Unification of Private Law (Unidroit), and the Parker School of Foreign and Comparative Law, as well as those mentioned above.

The mention of specific works is not intended to exclude other important publications in a growing list that encompasses International Law through Treaties, Public and Private International Law, and international commercial and investment law. Oceana seeks a balanced publication program. Its efforts are designed to expand the availability of both scholarly reference works and practical material of importance to the international law practitioner, e.g., *the Digest of Commercial Laws of the World*.

- Treaty Series
- International Law Practice
- American Society of International Law Publications
- The Hammar skjöld Forums and The Parker School Publications
- Monographs in International Law and Relations
- International Law Catalogs and Reprints
- Document Collections and Encyclopedia
- Foreign Commercial and Investment Law

---

## THE CONSOLIDATED TREATY SERIES, 1648-1918

Edited and annotated by Clive Parry, LL.D., Cambridge University

*The Consolidated Treaty Series* begins with the year 1648, the year of the Treaties of Muenster and Osnabrueck which established the European system of states. It terminates in 1918, with the advent of the *League of Nations Treaty Series*.

The Series reproduces treaties concluded between 1648 and 1918 from numerous earlier series and, in some cases, from original documents in government archives. It represents the first attempt to consolidate in a single collection all available treaties over this 270-year period.

An essential feature is the annotations which cover detail as to the parties to a given treaty, its termination or continued effect, and its continuing relevance. Where the original language is neither English nor French, either a contemporary translation or a summary in English of the main treaty provisions is furnished.

The Series is sponsored by Council of Europe, British Institute of International and Comparative Law and the American Society of International Law.

SBN: 379-13000-9

LC #70-76750

100 plus volumes projected

\$40. per volume

25 volumes now published

## LEAGUE OF NATIONS TREATY SERIES

and

### General Indexes to the Treaty Series

A collection of multilateral and bilateral treaties registered with the League of Nations from 1918 to 1945, when the *United Nations Treaty Series* begins. Treaties are printed in both English and French. Where original language was other than these two, text also appears in the original.

SBN: 379-13200-1

\$2,500. the set

205 volumes, 9 index volumes

(Library-bound)

The combination of the *Consolidated Treaty Series*, the *League of Nations Treaty Series* and the *United Nations Treaty Series* (both available from Oceana) offers the totality of treaties entered into by national states from the beginnings of modern times to the present.

## League of Nations Documents

Oceana Publications has acquired the total holdings of the League of Nations Depository in Geneva. We offer the following:

Four partial sets are offered, consisting of 1,400 to 1,500 separate items. An invaluable source of detailed reference in studying world affairs of the crucial 1920's and 1930's. Collection covers a wide range of political, social and economic papers.

\$2,500. the set

## League of Nations Official Journal

Official Journal of the League of Nations, 1920-1940 (mostly English, some in French). Approximately 2,000 pages xeroxed. Paperbound. (Will bind into at least 40 volumes.)

\$3,000

# LEAGUE OF NATIONS AND UNITED NATIONS MONTHLY LIST OF SELECTED ARTICLES Cumulative, 1920-1970

## A Cumulative Index to 3,000 periodicals throughout the World

Covering 50 years of periodical articles in the fields of international, constitutional and administrative law, politics and economics, the *Monthly List of Selected Articles* is being published by Oceana in a multi-volume series, the first two volumes of which are now available. Each volume will consist of approximately 400 pages.

The only *cumulative* form in which this material now exists is a card catalog begun by the League of Nations in 1920 and continued since 1945 by the United Nations at its Geneva Library.

Oceana will publish the reproduction of that card file, containing chronologically listed entries by subject and country, extracted from some 3,000 periodicals from all over the world. This is a total of some quarter-million card entries, covering the areas of (1) Political Questions (2) Legal Questions and (3) Economics and Population.

Upon completion, the work will be the outstanding bibliographical tool in the field of periodical literature in international law and relations.

SBN: 379-14150-7

LC #75-147817

Vols. I, II now available

\$50.00 per volume

8½ × 11 double column format

## Additional Titles on Treaty Series, Materials and Commentary

Rosenne, Shabtai, *Guide to Legislative History of the Vienna Convention on the Law of Treaties*, Co-published with Sijthoff.

SBN: 379-00464-X

\$25. per volume

LC #74-131422

Al-Baharna, Husain M., *The Legal Status of the Arabian Gulf States—A Study of Their Treaty Relations and Their International Problems*

SBN: 379-00379-1

LC #68-57676

355 pages

1969

\$7.50

Bot, B. R., *Non-Recognition and Treaty Relations*

SBN: 379-00372-2

301 pages

1968

\$10.

Bowett, D. W., *The Law of the Sea*

SBN: 379-11907-2

126 pages

1967

\$6.00

LC #66-29654

Fadel, H. A.; Malha, J.; Craidy, I., *Lebanon—Its Treaties and Agreements*

SBN: 379-00334-1

LC #67-18401

4 volumes

1967

\$95.

Holloway, K., *Modern Trends in Treaty Law*

SBN: 379-00345-7

LC #67-22181

760 pages

1967

\$25.

Inter-American Institute of International Legal Studies, *Instruments Relating to the Economic Integration of Latin America*

SBN: 379-00338-4

LC #67-23682

464 pages

1968

\$12.50

Parry, Clive, *Sources and Evidences of International Law*

SBN: 379-11904-8

LC #65-17525

120 pages

1965

\$5.50

University of the Philippines Law Center, editor, *Philippine Treaty Series*

SBN: 379-16050-1

4 volumes

1968-1969

\$120. the set

Snee, J. M. & Pye, K. A., *Status of Forces Agreements and Criminal Jurisdiction*

SBN: 379-11601-4

LC #57-12991

167 pages

1957

\$8.

United States Department of State, *Catalogue of Treaties, 1814-1918*

## **AMERICAN INTERNATIONAL LAW CASES**

**Compiled and edited by Francis Deak, Rutgers—  
The State University**

A collection of American Federal and State Court decisions involving questions of public international law during the period from 1783 through 1968. The task was undertaken by Professor Francis Deak, Professor of International Law at Rutgers Law School, Camden, N. J.

Until now, the thousands of cases interpreting and applying international law (whether customary or treaty law), are scattered among tens of thousands of Federal and State reports and the volumes of the National Reporter System. Now this collection makes available to the community of international legal scholars the significant American international law decisions of the past 185 years. The decisions are annotated where appropriate—especially with precise identification of and citation to treaties which underlie the majority of the cases. Interim indexes will be published, and a cumulative index will appear when the set is complete.

SBN: 379-20075-9

Vol. I available April, 1971

8-10 volumes projected

LC #78-140621

\$40. per volume

## **BRITISH INTERNATIONAL LAW CASES**

**Edited by Clive Parry, Cambridge University**

This monumental collection of British court cases setting forth and interpreting international law was prepared under the auspices of the International Law Fund and the British Institute of International and Comparative Law. Its eight volumes contain more than 7500 pages of cases.

Vols. I-VII available now

Vol. VIII available April, 1971

Vol. I: \$18.75

Vol. II: \$28.00

Vol. III: \$27.00

SBN: 379-14020-9

Vol. IV: \$27.50

Vol. V: \$24.00

Vol. VI: \$30.00

Vol. VII: \$30.00

Vol. VIII: \$35.00

LC #63-22348

## **ITALIAN INTERNATIONAL LAW PRACTICE 1861-1942**

**Compiled by The Italian Society for International Organization, under the general editorship of Professor Roberto Ago.**

Following a model proposal of the Council of Europe, the Italian Society began about five years ago to compile all the Italian diplomatic papers in the Italian Foreign Office, with a view to publishing this Digest. It will furnish a detailed picture of Italian international law practice from the birth of the Italian State till the end of the Second World War. Many of the papers have never been previously published.

Ten volumes are projected for the series. Text is in Italian, although for future volumes, headnotes will be in both Italian and English. Index is in English-French-Italian.

SBN: 379-10000-2

Vols. I, II available April, 1971

LC #79-147818

\$25.00 per volume

## AMERICAN SOCIETY OF INTERNATIONAL LAW Co-Publications

Oceana is pleased and proud to list the following titles which it has published for and in close cooperation with the American Society of International Law. Each of the first four titles listed below is an outgrowth of a conference of official legal advisers convoked by the Society.

Merillat, H. C. L., ed., *Legal Advisers and Foreign Affairs*. SBN: 379-00223-X. \$4.25

Merillat, H. C. L., ed., *Legal Advisers and International Organizations*. SBN: 379-00294-9. \$4.00

Schwebel, S. M., ed., *The Effectiveness of International Decisions*. SBN: 379-00462-3. \$19.50 (\$14.60 to Society members placing orders through the Society offices)

Rubin, S. J., ed., *Foreign Development Lending—Legal aspects*. SBN: 379-00129-2. (Price and publication date to be announced)

Leive, D. M., *International Telecommunications and International Law: The Regulation of the Radio Spectrum*. SBN: 379-00458-5. \$16.50 (\$12.65 to Society members placing orders through the Society offices)

## THE PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY

### Bilateral Studies in Private International Law

These practical guides to the legal relations of individuals in the international sphere are written by outstanding legal scholars.

1. Nussbaum, A. *American-Swiss* 2nd ed. SBN: 379-11401-1 94 pp. 1958
2. Delaume, G. *American-French* 2nd ed. SBN: 379-11402-X 221 pp. 1961
3. Kollewijn, R. D. *American-Dutch* 2nd ed. SBN: 379-11403-8 111 pp. 1962
4. Domke, M. *American-German* (2nd ed. by U. Drobnig due 1971) SBN: 379-11404-6 144 pp. 1953
5. Eder, P. J. *American-Colombian* SBN: 379-11405-4 95 pp. 1956
6. Ehrenzweig, A. A., Fragistas, Yian-nopoulos, *American-Greek* SBN: 379-11406-2 111 pp. 1957
7. Philip, A. *American-Danish* SBN: 379-11407-0 80 pp. 1957
8. Cowen, Z. *American-Australian* SBN: 379-11408-9 108 pp. 1957
9. Garland, P. G. *American-Brazilian* SBN: 379-11409-7 125 pp. 1959
10. Etcheberry, O. *American-Chilean* SBN: 379-11410-0 96 pp. 1960
11. Seidl-Hohenveldern, I. *American-Austrian* SBN: 379-11411-9 220 pp. 1963
12. Ehrenzweig, Ikehara, Jensen *American-Japanese* SBN: 379-11412-7 176 pp. 1964
13. Nial, H. *American-Swedish* SBN: 379-11413-5 111 pp. 1965
14. Lombard, R. S. *American-Venezuelan* SBN: 379-11414-3 128 pp. 1965
15. Goldschmidt, W., Rodriguez-Novas, Jose *American-Argentine* SBN: 379-11415-1 118 pp. 1967
16. Ansay, Tugrul *American-Turkish* SBN: 379-11416-X 115 pp. 1966
17. Van Hecke, G. *American-Belgian* SBN: 379-11417-8 128 pp. 1968

Each volume is \$7.50

## THE HAMMARSKJÖLD FORUMS

Sponsored by the Association of the Bar of the City of New York

1. *The Issues in the Berlin-German Crisis*, working paper by R. R. Bowie, edited by Lyman M. Tondel, Jr.  
SBN: 379-11801-7 96 pp. 1963 \$5.00
2. *The Role of the United Nations in the Congo*, working paper by T. M. Franck and J. Carey, edited by Lyman M. Tondel, Jr.  
SBN: 379-11802-5 160 pp. 1963 \$6.50
3. *The Inter-American Security System and the Cuban Crisis*, working paper by C. Oliver, edited by Lyman M. Tondel, Jr.  
SBN: 379-11803-3 112 pp. 1964 \$6.00
4. *Disarmament*, working paper by L. Henkin, edited by Lyman M. Tondel, Jr.  
SBN: 379-11804-1 112 pp. 1964 \$6.00
5. *The International Position of Communist China*, working paper by O. E. Clubb and E. Seligman, edited by Lyman M. Tondel, Jr.  
SBN: 379-11805-X 128 pp. 1965 \$6.00
6. *The Panama Canal*, working paper by R. R. Baxter and D. Carroll, edited by Lyman M. Tondel, Jr.  
SBN: 379-11806-8 128 pp. 1965 \$6.00
7. *The Aftermath of Sabbatino*, working paper by R. A. Falk, edited by Lyman M. Tondel, Jr.  
SBN: 379-11807-6 240 pp. 1965 \$9.00
8. *The Southeast Asia Crisis*, working paper by K. T. Young, Jr., edited by John Carey  
SBN: 379-11808-4 228 pp. 1965 \$8.00
9. *The Dominican Republic Crisis*, working paper by A. J. Thomas and A. Thomas, edited by John Carey  
SBN: 379-11809-2 192 pp. 1967 \$7.00
10. *Race, Peace, Law and Southern Africa*, working paper by H. J. Taubenfeld and R. F. Taubenfeld, edited by John Carey  
SBN: 379-11810-6 240 pp. 1967 \$9.00
11. *Law and Policymaking for Trade Among "Have" and "Have Not" Nations*, working paper by Stanley D. Metzger, edited by John Carey  
SBN: 379-11811-4 128 pp. 1968 \$6.00
12. *International Protection of Human Rights*, edited and author of working paper—John Carey  
SBN: 379-11812-2 128 pp. 1968 \$6.00
13. *The Middle East: Prospects for Peace*, working paper by Quincy Wright, edited by Isaac Shapiro  
SBN: 379-11813-0 113 pp. 1969 \$6.00
14. *When Battle Rages, How Can Law Protect?*, working paper by Howard S. Levie, edited by John Carey  
SBN: 379-11814-9 128 pp. 1971 \$7.50
15. *The Cambodian Incursion—Legal Issues*, edited by Donald T. Fox  
SBN: 379-11815-7 128 pp. 1971 \$7.50

Just published . . . .

### When Battle Rages, How Can Law Protect? John Carey, editor

A much-needed discussion of the problem of respect for human rights in armed conflict, this book takes on special meaning when we read of the bombings of civilian populations and follow the trials coming from the alleged Vietnam massacres. In the working paper, Howard S. Levie, Professor of Law, St. Louis University, sets the stage by pointing out: "Armed conflict is, by its very nature, unhumanitarian. However, humanitarian rules, properly applied, can do much to mitigate this situation." Other participants include: Marc Schreiber, Director of the Human Rights Division, United Nations; Richard R. Baxter, Professor, Harvard Law School; and Richard D. McCarthy, member of Congress, New York.

### The Cambodian Incursion—Legal Issues, Donald T. Fox, editor

Soon after the President's announcement of the movement of U. S. forces into Cambodia in Spring of 1970, the Association of the Bar of the City of New York agreed to sponsor a discussion of the legal issues raised by this action. The discussion was held in the form of a debate on May 28, 1970. Both the issues concerning the U. S. Constitution and those concerned with International Law were debated.

Participants were: William H. Rehnquist, Assistant Attorney-General, Office of Legal Counsel, U. S. Department of Justice; Robert B. McKay, Dean, New York University School of Law; John R. Stevenson, Legal Adviser, U. S. Department of State; and Abram Chayes, Professor of Law, Harvard University, former Legal Adviser, U. S. Department of State. An introduction has been prepared by Andreas F. Lowenfeld, Professor of Law, New York University, formerly Deputy Legal Adviser, U. S. Department of State.

## MONOGRAPHS IN INTERNATIONAL LAW

### A Partial Listing \*

#### Codification

Dhokalia, R. P., *The Codification of Public International Law*. SBN: 379-00264-7. \$12.50

#### Diplomacy

Hardy, M., *Modern Diplomatic Law*. Melland-Schill Series. SBN: 379-11908-0. \$5.50

Kaufmann, J., *Conference Diplomacy—An Introductory Analysis*. SBN: 379-00374-0. \$7.00

Regala, R., *World Order and Diplomacy*. SBN: 379-00438-0. \$9.00

#### Foreign Policy

Higgins, R., *The Administration of United Kingdom Foreign Policy Through the United Nations*. Maxwell School Series. SBN: 379-12101-8. \$3.50

Fenwick, C., *Foreign Policy and International Law*. SBN: 00366-X. \$6.00

Schleicher, C. P. & Bains, J. S., *The Administration of Indian Foreign Policy Through the United Nations*. Maxwell School Series. SBN: 379-12103-4. \$5.00

Schwarz, U., *Confrontation and Intervention in the Modern World*. SBN: 379-00380-5. \$7.50

#### International Adjudication

Anand, R. P., *Studies in International Adjudication*. SBN: 379-00466-1. \$6.25

Cukwurah, A. O., *The Settlement of Boundary Disputes in International Law*. SBN: 379-00241-8. \$8.00

#### International Communication

Leive, D. M., *International Telecommunications and International Law: The Regulation of the Radio Spectrum*. SBN: 379-00458-5. \$16.50

McWhinney, E., *The International Law of Communications*. SBN: 379-00138-1. \$8.00

#### International Rivers

Garretson, A. H., Olmstead, C. J. & Hayton, R. D., *The Law of International Drainage Basins*. SBN: 379-00320-1. \$31.00

#### Outer Space and International Law

Fawcett, J. E. S., *International Law and the Uses of Outer Space*. Melland-Schill Series. SBN: 379-11909-9. \$4.00

Gal, G., *Space Law*. SBN: 379-00290-6. \$11.00

McWhinney, E., *New Frontiers in Space Law*. SBN: 379-00389-9. \$7.50

#### Recognition

Bot, B. R., *Non-recognition and Treaty Relations*. SBN: 379-00373-2. \$10.00

#### United Nations

Gutteridge, J., *The United Nations in a Changing World*. Melland-Schill Series. SBN: 379-11910-2. \$5.00

Chamberlin, W., Hovet, T. H. & Hovet, E., *Chronology and Fact Book of the United Nations*, 3rd Edition. SBN: 379-00453-4. \$7.50

\* Catalog available on request.

## Harvard Law School Library

### CATALOG OF INTERNATIONAL LAW AND RELATIONS

A comprehensive bibliography of international law and related subjects representing the complete holding of the Library's collection, accumulated through concentrated effort over more than a century. Margaret Moody, Assistant Librarian for Cataloging, Harvard Law School Library, is the Editor of the set.

Distributed exclusively by Oceana.

SBN: 379-20003-1

20 vols.

1965-67

\$1,000 the set

### CAMBRIDGE CATALOG OF INTERNATIONAL LAW

Prepared by Willi Steiner, Institute of Advanced Legal Studies, University of London, for the Squire Library

Cambridge University Law School has prepared one of the first catalogs of international law to be done on computer. Compiled in four volumes, totalling some 2,000 pages, the catalog features author, title and subject matter indexes, with strong emphasis on treaties and documents.

Available June, 1971.

SBN: 379-20030-9

4 volumes, \$200. the set

### INTERNATIONAL LAW REPRINTS

Carnegie Endowment for  
International Peace

#### WORLD COURT REPORTS

A collection of the judgments, orders and opinions of the Permanent Court of International Justice, edited by Manley O. Hudson. Information and instruments relative to the Court are also included. Numerous tables, lists and indices add to the usefulness of these Reports.

The set consists of four volumes: Vol. I, 1922-26; Vol. II, 1927-1932; Vol. III, 1932-35; Vol. IV, 1936-42

SBN: 379-00428-3 4 volumes

\$ 50. per volume

\$140. the set D

#### INTERNATIONAL LEGISLATION

Hudson, Manley, O.

The following annotation is from *A Catalogue of the Law Collection at New York University* (page 589): "... International Legislation; a collection of the texts of multipartite international instruments of general interest beginning with the Covenant of the League of Nations."

volumes 1, 2 available

\$50. per volume.

\$400. the 9-volume set

British Institute of

International and Comparative Law

#### GROTIUS SOCIETY TRANSACTIONS

The Grotius Society was formed in 1915 in London for study, discussion and advancement of public and private international law, and to make proposals for reform. Its Transactions during 1915-1959 include contributions by practically every authority in the field. Co-published by the British Institute of International Law with Wildy & Sons, Ltd., London.

SBN: 379-20500-9 45 volumes

\$ 15. per volume

\$500. the set D

The Index:

SBN: 379-20545-9 128 pp.

1969

\$ 15.

D

#### INTERNATIONAL LAW QUARTERLY

This is a reprint of the four-volume set which was the predecessor of the *International and Comparative Law Quarterly*

\$125. the set

### EGYPTIAN REVIEW OF INTERNATIONAL LAW

The only international law periodical in the Near East, *the Review* is highly regarded in the world of scholarship. Its field of interest is a wide one and includes all the varied problems of international law arising in the Near East. On the documentary side, *the Review* publishes much material not otherwise accessible to the researcher.

SBN: 379-12400-9

25 volumes 1969

\$380. the set. cloth/D



## BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS

Edited by Louis B. Sohn, Bemis Professor of International Law, Harvard University, and Counselor on International Law, United States Department of State.

This 3-4 volume set is a unique collection of annotated documents dealing with the development of regional organization in Africa.

All basic agreements, as well as subsidiary rules of procedure of all African regional organizations are reproduced in English or French. Each chapter contains introductory notes setting forth the historical and political events from which the organization emerged and the various states of development, activities and action of each. An extensive bibliography follows each introductory note, providing references to official sources of basic and supplementary documents, books and treatises, articles and periodicals, and including works in English, French, German and Italian.

The main sub-divisions in the approximately 1800-page manuscript are:

*Organization of African Unity*

*The Maghreb Permanent Consultative Committee*

*The African Development Bank*

*The East African Organizations*

*Regional Groups in French-Speaking Africa*

*The Association of African States with the European Economic Community.*

*Regional Cooperation in West Africa*

Published under the auspices of the Inter-American Institute of International Legal Studies, Washington, D. C.

SBN: 379-00361-9

LC: 72-141326

Volume I now available

\$35. per volume

4 Volumes projected

## CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Permanent Loose-Leaf Edition

Compiled with Chronologies and Bibliographies by ALBERT P. BLAUSTEIN, Rutgers-Camden Law School and GISEBERT FLANZ, New York University

Projected as a ten-volume loose-leaf set, the service will be regularly updated to reflect constitutional changes and to permit the inclusion of new and revised constitutions. The end product will be the only permanent and continuous research and information service on the constitutions of all countries.

Volume I consists of a one-star loose-leaf binder, together with approximately 1,000 pages of material covering the constitutions of: Ecuador, Fiji, Gambia, Ghana, Korea, Malawi, Malta, Paraguay, Turkey, Uruguay, Western Samoa, and Yugoslavia. Now available.

So that payment may be equated with issue of material, the set is priced at \$5.75 per Constitution (only full issues of material may be ordered). This includes not only the constitution itself and the attendant annotative material, but binders as they become necessary and all supplementary and revised material as it is issued until the set is complete. (Such supplementary and revised material will be issued as needed, so that each constitution is kept up-to-date on a continuing basis.)

SBN: 379-00467-4

Vol. 1—\$69.00 including binder

## INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

Conceived under the auspices of UNESCO, sponsored by the International Association of Legal Science, and compiled under the aegis of the Max Planck Institute, Konrad Zweigert, general editor, this monumental 16-volume (17-book) set is expected to emerge as the definitive work in comparative law in our times. A chief editor and advisory group of some five-to-seven experts are charged with the preparation of each volume. In all, 350 experts from all over the world have served as *rapporteurs*. It is anticipated that the project will take approximately seven years to complete.

Accordingly, publication has been arranged in a combination of paperback individual subject matter pamphlets which ultimately will be grouped into the cloth-bound volumes, each of which is broken down into subject fields of law.

Price is \$95.00 per volume, payable on a unique installment plan to coincide with the issue of both paperback and clothbound material. Write to Oceana to request detailed prospectus and terms of subscription.

## **OCEANA PUBLICATIONS / INTERNATIONAL COMMERCIAL LAW**

Oceana also publishes in the area of International Commercial Law and Foreign Trade. We encourage those interested to subscribe to our *Foreign Trade Newsletter* (no charge) and to request our *Catalogue of Books on Foreign Trade*. Requests should be addressed to Oceana on your letterhead.

### **DIGEST OF COMMERCIAL LAWS OF THE WORLD**

Edited since 1966 by the National Association of Credit Management under the direction of Dr. George Kohlik, Director, International Department, this four-binder loose-leaf service now covers sixty-five nations of the world, including the U.S.S.R. and major socialist countries. A new section—Forms of Contracts—is designed to facilitate transactions between nationals of different countries. Digest material is issued in quarterly supplements.

Subscription, beginning to May, 1972  
Renewal subscription, May, 1971 to May, 1972

LC #65-22163  
\$235.  
\$ 75.

### **PATENTS AND TRADEMARKS**

As a separate service, the Editors of the Digest offer a binder on *Patents and Trademarks* with a subscription service that keeps the material up to date on a quarterly basis. Coverage of the laws of more than sixty countries.

Subscription, beginning to May, 1972  
Renewal subscription, May, 1971 to May, 1972

\$75.  
\$35.

### **INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)**

Oceana is exclusive distributor of all the publications of Unidroit, founded to promote on a world-wide scale the unification of law in the fields of private and commercial law.

**Uniform Law Cases**, 2 issues per year, multilingual with preference to English and French, collects selected decisions of various national courts of law in the application of rules and uniform law.

Complete set, 1959-1970  
Yearly subscription:

\$137.50  
\$ 12.50

**Yearbook**, the annual English/French survey of the Institute's activity includes special studies on unification of law, draft conventions, bibliographies, etc.  
18-volume set through 1969  
Standing Order for future.

\$151.50

**Proceedings and Papers** is a microfilm edition covering the activity of the Institute from 1928 to 1965. 1966-1969 is currently in preparation.  
Microfilm edition through 1965 is priced at

\$1,350.

**Digest of Legal Activities of International Organizations and other Institutions** is an English/French loose-leaf publication aimed at covering the different phases of development of all legal activities undertaken by international organizations and institutions on private and public law.

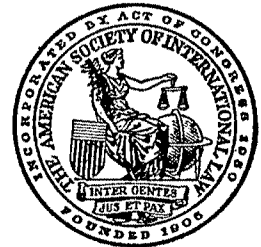
Published in 1970—more than 450 pp.  
Price of supplements to be announced.

\$30. standing order

# *American Journal of International Law*



*July*            *1971*  
*Vol. 65*    *No. 3*



*Published by The*  
*American Society of International Law*

## PATRONS OF THE SOCIETY

HONORABLE ARTHUR H. DEAN

HONORABLE HERMAN PHLEGER

MRS. BENJAMIN J. TILLAR (deceased)

MR. W. ROBERT MORGAN

### *In Memoriam*

DR. JAMES BROWN SCOTT

MR. HENRY C. MORRIS

MR. ARTHUR K. KUHN

MR. ALEXANDER FREEMAN

## PATRONAGE, GIFTS AND BEQUESTS

Upon donation to the Society of \$5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$5,000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

## MANLEY O. HUDSON MEDAL

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visscher (1966), and Paul Guggenheim (1970).

# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 65

July, 1971

NO. 3

## CONTENTS

	PAGE
Self-Determination <span style="float: right;"><i>Rupert Emerson</i></span>	459
The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity <span style="float: right;"><i>Robert H. Miller</i></span>	476
Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations <span style="float: right;"><i>Chris Osakwe</i></span>	502
<b>Editorial Comment:</b>	
<i>Two Perspectives on the Barcelona Traction Case</i>	
The Rigidity of Barcelona <span style="float: right;"><i>Richard B. Lillich</i></span>	522
Nationality of Corporate Investment under Investment Guaranty Schemes—The Relevance of Barcelona Traction <span style="float: right;"><i>Stanley D. Metzger</i></span>	532
The Reports of the Death of Article 2 (4) Are Greatly Exaggerated <span style="float: right;"><i>Louis Henkin</i></span>	544
The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment <span style="float: right;"><i>Stefan A. Riesenfeld</i></span>	548
<b>Notes and Comments:</b>	
Was Biafra at Any Time a State in International Law? <span style="float: right;"><i>David A. Ijalaye</i></span>	551
Resolution of the Bahrain Dispute <span style="float: right;"><i>Edward Gordon</i></span>	560
Transfer or Recognition of Sovereignty—Some Early Problems in Connection with Dependent Territories <span style="float: right;"><i>Jochen A. Frowein</i></span>	568
The United Nations Travel and Identity Document for Namibians <span style="float: right;"><i>J. F. Engers</i></span>	571
A Sometime World of Men: Legal Rights in the Ross Dependency <span style="float: right;"><i>F. M. Auburn</i></span>	578
Seminar on the Rôle of the United Nations in the Development of International Law <span style="float: right;"><i>Subhash C. Jain</i></span>	582
New Student Journals of International Law <span style="float: right;"><i>Eleanor H. Finch</i></span>	584
The Society's Eighth Annual Regional Meeting at Syracuse, 1971 <span style="float: right;"><i>L. F. E. Goldie</i></span>	585
The Society's 65th Annual Meeting <span style="float: right;"><i>Eleanor H. Finch</i></span>	587
<b>Correspondence:</b>	
On the Status of United States Treaty Law <span style="float: right;"><i>Salo Engel</i></span>	593
Teaching International Law <span style="float: right;"><i>Woodfin L. Butte</i></span>	597
U. S. Contemporary Practice Relating to International Law <span style="float: right;"><i>Steven C. Nelson</i></span>	599
Judicial Decisions Involving Questions of International Law <span style="float: right;"><i>Edited by Alona E. Evans</i></span>	608

## CONTENTS (cont'd.)

	PAGE
<b>Book Reviews and Notes. Edited by Leo Gross:</b>	
Académie de Droit International, <i>Recueil des Cours</i> , 1966	632
Schwarzenberger, Georg, <i>International Law as Applied by International Courts and Tribunals</i> . Vol. II: <i>The Law of Armed Conflict</i>	635
Falk, Richard A., <i>The Status of Law in International Society</i>	637
Lay, S. Houston, and Howard J. Taubenfeld, <i>The Law Relating to Activities of Man in Space</i>	639
Taylor, Telford, <i>Nuremberg &amp; Vietnam: An American Tragedy</i>	640
Akehurst, Michael, <i>A Modern Introduction to International Law</i>	643
Campbell, Alan R., <i>Common Market Law</i>	644
Castañeda, Jorge, <i>Legal Effects of United Nations Resolutions</i>	647
Khan, Rahmatullah, <i>Implied Powers of the United Nations</i>	650
Randle, Robert F., <i>Geneva 1954: The Settlement of the Indochinese War</i>	651
Cohen, Jerome A. (ed.), <i>Contemporary Chinese Law: Research Problems and Perspectives</i>	655
Rolfe, Sidney E., and Walter Damm (eds.), <i>The Multinational Corporation in the World Economy</i>	657
Kiel University, Institut für Internationales Recht, <i>Jahrbuch für Internationales Recht</i> , 1969	658
<b>Briefer Notices:</b> Shore, 660; Rabl, 661; Cosgrove and Twitchett, 661; Russotto, 662; Merryman, 663; Bethell, 663; Hudson (ed.), 664	
<b>Books Received</b>	665
<b>Official Documents</b>	
<b>Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. Guatemala City, Guatemala, March 8, 1971</b>	670
<b>American Convention on Human Rights. San José, Costa Rica, November 22, 1969</b>	679
<b>International Legal Materials. Contents, Vol. X, No. 3 (May), 1971</b>	703

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

---

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$30.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$6.00 a copy; other available back numbers at \$7.50 a copy.

Manuscripts may be sent to either the Acting Editor-in-Chief of the JOURNAL, Northwestern University Law School, 357 East Chicago Avenue, Chicago, Illinois 60611, or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

Copyright © 1971 by The American Society of International Law  
Second-class postage paid at Lancaster, Pa.

## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$30 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$35 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$25 for residents of the United States, \$10 for non-residents; professional, \$40; intermediate, \$15; student, \$7.50. Application for membership may be made on the form printed at the back of this issue of the JOURNAL.

### OFFICERS OF THE SOCIETY, 1971-1972

<i>Honorary President</i> .....	PHILIP C. JESSUP
<i>President</i> .....	HAROLD D. LASSWELL
<i>Executive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>Vice Presidents</i> .....	RICHARD A. FALK, JOHN N. HAZARD, WILLIAM D. ROGERS
<i>Honorary Vice Presidents:</i>	DEAN G. ACHESON, WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, LEO GROSS, GREEN H. HACKWORTH, JAMES N. HYDE, HANS Kelsen, CHARLES E. MARTIN, BRUNSON MAC- CHESNEY, MYRES S. McDUGAL, OSCAR SCHACHTER, JOHN R. STEVENSON, ROBERT R. WILSON.
<i>Secretary</i> .....	EDWARD DUMBAULD
<i>Treasurer</i> .....	FRANZ M. OPPENHEIMER
<i>Assistant Treasurer</i> .....	JAMES C. CONNER

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER  
Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. LILlich  
University of Virginia Law School

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. MCDUGAL  
Yale Law School

STANLEY D. METZGER  
Georgetown University Law Center

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS KELSEN  
University of California

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY





## SELF-DETERMINATION

*By Rupert Emerson \**

Any examination of self-determination runs promptly into the difficulty that while the concept lends itself to simple formulation in words which have a ring of universal applicability and perhaps of revolutionary slogans, when the time comes to put it into operation it turns out to be a complex matter hedged in by limitations and caveats. In a different turn of phrase, what is stated in big print—as in the reiterated United Nations injunction: All peoples have the right to self-determination—is drastically modified by what follows in small print. Indeed, once the major original exercise of self-determination has been undertaken, the small print takes over and becomes the big print which establishes the new and far more restrictive guidelines.

In the same fashion, the most obvious questions which must be asked about self-determination are usually familiar and straightforward but they all tend to suffer from the same common defect of lacking unambiguous answers which can be easily adapted to meet the pressures of political demands and counter-demands. Three sets of overlapping and interrelated questions may be suggested as covering most of the ground: (1) What is the status of the principle or the right of self-determination under international law? (2) Who may legitimately claim to exercise the right of self-determination, when, and under what circumstances? (3) What are the rights and obligations of other states and international organizations in relation to self-determination and how might they be strengthened to bring an always potentially explosive procedure under control and render it more fruitful?

To the first of these questions I believe that only a somewhat equivocal answer can be given because of the elusive and contradictory nature of the issues to be dealt with—a matter which is reflected in the disagreement among the experts as to the proper verdict. The matter is complicated by the fact that the inquiry is presumably to be divided into two parts, each of which lends itself to a diversity of opinions. The wider and preliminary question is as to the law-creating powers of the organs of the United Nations, notably the General Assembly, and the second, introducing an array of quite different considerations, is the specific question as to

\* Professor of Government, Harvard University; currently Visiting Professor, University of California at Los Angeles. This article is one of the by-products of the Panel on Self-Determination organized by the American Society of International Law. It is built largely around points and problems that were raised in the course of the Panel's deliberations but it makes no pretense of dealing with all the matters considered by the Panel nor does it represent a consensus of the Panel. In the succeeding pages I have unashamedly, but gratefully, purloined ideas and arguments which were brought forth in the discussion and in papers prepared for the Panel.

what measure of legal validity the principle or right of self-determination has achieved.

There is no occasion to undertake here any extensive consideration of the United Nations as a source of international law, particularly since, with Wolfgang Friedmann, I tend to regard it as a "rather futile controversy."<sup>1</sup> If the orthodox or classic view denies law-creating powers to the General Assembly, while other approaches open up wider horizons which seem to be gaining favor, the actual differences in opinion are not likely to take the form of flat opposition between a negative and an affirmative. No one is likely to deny that principles laid down by the United Nations may under appropriate conditions set in motion forces which ultimately have the effect of bringing law into being, nor, on the other side, does anyone assert that Assembly resolutions laying down general principles automatically create international law. The effective difference of opinion is not to be stated in the confrontation of opposites but in the nature and extent of the evidence required to justify the proposition that a norm has achieved a consensus (the consent?) of the international community. Rosalyn Higgins has established a useful frame of reference in insisting that the key issue is not the non-binding character of Assembly resolutions but the cumulative effect of such resolutions taken as an indication of the emergence of rules of general customary law:

What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general *opinio juris*, have created the norm in question.<sup>2</sup>

More sharply defined differences of opinion appear when the general principles of United Nations lawmaking, or its denial, are applied to the concrete issue of the legal character of self-determination. Applying her own criteria, Dr. Higgins finds inescapable the conclusion that self-determination has developed into an international legal right. To the large array of cases of decolonization in which the United Nations has participated or to which it has given its blessing, she adds the overwhelming acceptance of the 1960 Declaration on colonial independence (Resolution 1514 (XV))<sup>3</sup> and its 1961 successor (Resolution 1654 (XVI))<sup>4</sup> setting up a Special Committee to oversee the application of the Declaration. Given this background she finds it academic

to argue that as Assembly resolutions are not binding nothing has changed, and that "self-determination" remains a mere "principle", and Article 2/7 is an effective defense against its implementation. To

<sup>1</sup> Wolfgang Friedmann, *The Changing Structure of International Law* 139 (Columbia University Press, 1964). His comment bore specifically on declaratory resolutions of the U.N.

<sup>2</sup> Rosalyn Higgins, "The United Nations and Lawmaking: the Political Organs," 64 A.J.I.L. 43 (Sept., 1970).

<sup>3</sup>U. N. General Assembly, 15th Sess., Official Records, Supp. No. 16 (A/4684), p. 66.

<sup>4</sup> *Ibid.*, 16th Sess., Supp. No. 17 (A/5100), p. 65.

insist upon this interpretation is to fail to give any weight either to the doctrine of *bona fides* or to the practice of states as revealed by unanimous and consistent behavior.<sup>5</sup>

Assessing the situation differently, Leo Gross, a hard-liner on the question of the law-creating powers of the Assembly, finds that nowhere in the Charter has the right to self-determination in the legal sense been established, and contends that

subsequent practice as an element of interpretation does not support the proposition that the *principle* of self-determination is to be interpreted as a *right* or that the human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right to self-determination.<sup>6</sup>

Working with substantially the same materials of recent history and United Nations practice, Dr. Higgins and Professor Gross come to opposed conclusions. Where she finds it inescapable that a right has come into being, he holds it to be an equally inescapable conclusion that the right to self-determination "is not or not yet one which can be characterized as based on customary international law." (How large a loophole is opened by the two words "not yet"?) Acknowledging that an impressively large number of peoples have been granted or conceded self-determination, he asserts that it is not possible to supply the missing element, namely, that practice was based on a sense of legal obligation:

On the contrary, the practice of decolonization is a perfect illustration of a usage dictated by political expediency or necessity or sheer convenience. And moreover, it is neither constant nor uniform.<sup>7</sup>

It is certainly the case that since the start of the United Nations a highly significant change has taken place in the expectations of broad and important elements of the international community concerning self-determination, but it is a troublesome matter to attempt to define and delimit the nature and extent of the change. Evidently there is disagreement as to what evidence should be taken into account and how it should be weighted: the practice which one expert holds to be "unanimous and consistent behavior" the other regards as "neither constant nor uniform." On this score it must be a relevant consideration that the colonial Powers and a number of states supporting them have not accepted the basic proposition that all colonialism is illegitimate nor the corollary proposition that the colonial peoples are entitled to as speedy as possible an exercise of their right of self-determination with independence as the strongly favored

<sup>5</sup> Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 101-102 (Oxford University Press, 1963). Muhammad Aziz Shukri, *The Concept of Self-Determination in the United Nations* 338-350 (Damascus, Syria, 1965), also inclines to accept self-determination as a legal right, but he qualifies his acceptance by pointing to the many political considerations, based on national interest, which circumscribe its application.

<sup>6</sup> Leo Gross, "The Right of Self-Determination in International Law," in *New States in the Modern World*, edited by Martin Kilson (a forthcoming publication of the Harvard University Press.)

<sup>7</sup> *Ibid.*

goal. How widespread the hesitation is to accept the verdict of the anti-colonial majority may be seen in that nine states, including the United States, the United Kingdom, France, Portugal, and Australia, abstained even in the vote which, in a surge of emotion, brought unanimous adoption of the centrally important Resolution 1514 (XV) of 1960, the Declaration of colonial independence. In the aftermath of this Declaration what may be seen as the annual catch-all anti-colonial self-determination resolutions roused much more objection. Thus, for example, Resolutions 2105 (XX) of 1965<sup>8</sup> and 2189 (XXI) of 1966<sup>9</sup> were adopted by votes, respectively, of 74-6-27 and 76-7-20, the negative votes and abstentions deriving in part, perhaps, from the fact that these resolutions also added opposition to military bases in colonial territories and a denunciation of colonial rule and *apartheid* as a threat to the peace and a crime against humanity.

Where so substantial a body of doubt and opposition exists, including major Powers and those still possessed of colonies, the existence of a rule of international law cannot lightly be assumed. The general climate of opinion has certainly turned sharply against colonialism, and the administering Powers agree on the need for an orderly end of the colonial relationship,<sup>10</sup> on their own terms; but that all dependent peoples have here and now the right to determine their own destinies is denied by the states which remain in charge of them. If, as proposed by Rosalyn Higgins and others, the expectation of the international community as to what constitutes lawful behavior is a key criterion in determining the existence of new rules of international law, it is obviously essential to know how the international community is composed and what major portions of that community may be excluded without impairing its status as a single and solidary body.

The preceding paragraphs have already, prematurely but unavoidably, introduced another key element into the discussion: the virtually total concentration of attention since World War II, as far as self-determination is concerned, on the colonial peoples. If the right to self-determination is to be made an operative one under international law and an orderly one within the confines of an organized international society, an essential condition is surely that the peoples or territories to which it applies are demarcated with at least reasonable clarity;<sup>11</sup> but all commentators on self-determination have pointed out that neither "people" nor "nation" has any generally accepted meaning which can be applied to the diverse world of political and social reality.

One obvious version which can be disposed of without further ado is

<sup>8</sup> U. N. General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 3.

<sup>9</sup> *Ibid.*, 21st Sess., Supp. No. 16 (A/6316), p. 5.

<sup>10</sup> Save Portugal, which clings to the contention that it has no colonies.

<sup>11</sup> "The more strictly the people to whom it is to be applied are defined, the more possible it is to classify self-determination as a right which can be stated with reasonable precision and given institutional expression." Harold S. Johnson, *Self-Determination within the Community of Nations* 55 (Leiden, 1967).

the notion that when United Nations resolutions or the first articles of the two Covenants on Human Rights assert that "All peoples have the right to self-determination," they mean what they say, *i.e.*, that all peoples have the right. Anyone tempted by so simple an interpretation is invited to consult the Germans, Koreans, and Vietnamese; the Biafrans or Ibos, the south Sudanese, the Baltic peoples; the Formosans, the Somalis, and the Kurds and Armenians.

There have been two major periods when self-determination has come to a substantial measure of international acceptance in the sense of being an operative right or principle, but in each instance only for a relatively closely defined category of peoples or territories. In the first, at the close of World War I, Woodrow Wilson and others proclaimed the right of self-determination in universal terms, but for practical purposes with a concentration on the European territorial settlement following the war. In substance this involved particularly the destiny of the peoples in Eastern Europe, the Balkans, and the Middle East who were directly affected by the defeat or collapse of the German, Russian, Austro-Hungarian, and Turkish land empires. In the second, following World War II, the focus of attention has been the disintegration of the overseas empires, which had remained effectively untouched in the round of Wilsonian self-determination.

A common bond might be found between the two in that each involved, to use contemporary United Nations phraseology, "subjection of peoples to alien subjugation, domination, and exploitation." The ground rules that were actually invoked, however, could be seen as precariously in contradiction of each other, although in each instance it was assumed as a basic principle that once the first act of self-determination had been undertaken, no further recourse to the right was allowable. The point of contradiction lay in the fact that the peoples involved in the Wilsonian period were ethnic communities, nations or nationalities primarily defined by language and culture, whereas, in the present era of decolonization, ethnic identity is essentially irrelevant, the decisive, indeed, ordinarily the sole, consideration being the existence of a political entity in the guise of a colonial territory. Thus two quite different and mutually incompatible definitions of the "people" entitled to exercise the right of self-determination marked the two periods: in the first, politically shapeless ethnic communities were authorized to disrupt the existing states; in the second, the inhabitants, however haphazardly assembled by the colonial Power, take over pre-existing political units as independent states, but with the firm prescription, reiterated in substance under various auspices, as in Resolution 1514 (XV), that

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.<sup>12</sup>

Thus, in the new dispensation, precisely the condition which was held

<sup>12</sup> Cited note 3 above.

to justify self-determination in the earlier period, *i.e.*, that ethnically different peoples were subjected to alien rule, is now wholly unacceptable as a justification once the colonial territory has achieved its independence.<sup>13</sup> It would, however, be exceedingly difficult to establish that, say, the Ibos are ethnically closer to the Hausa-Fulani of Northern Nigeria, the south Sudanese to the northern Sudanese, or the Papuans of West Irian to the Javanese than were the Czechs to the Austrians or the Poles to the Russians. In either instance, once the newly created or newly independent state is in existence, no resort to further self-determination is tolerable.

It will be evident that what is in part at stake here is the vexed issue as to whether the right to self-determination includes a right of secession. Despite the fact that the self-determination of the World War I peace settlement seems clearly to have involved secession, and that it is nonsense to concede the right to "all peoples" if secession is excluded, the customary verdict has been that self-determination does not embrace secession, at least as any continuing right. The reason is too obvious to require elaboration: except in the rarest of circumstances no state will accept the principle that at their own choosing some segment of its own people will be free to secede either to become independent or to join a neighbor. Similarly, no organization of states is in the least likely to lay down the law that its members must yield if they are challenged by an internal demand for self-determination.

This principle was vigorously asserted by Secretary General U Thant when he was asked at a press conference on January 4, 1970, whether there was not a deep contradiction between the people's right to self-determination as recognized by the United Nations and the attitude of the Nigerian Government towards Biafra. The Secretary General's reply, which included a reference to the United Nations' successful effort to prevent Katanga's secession, affirmed that when a state joins the United Nations, there is an implied acceptance by the entire membership of its territorial integrity and sovereignty. He continued to say:

So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.<sup>14</sup>

<sup>13</sup>Rosalyn Higgins, having found self-determination to be an international legal right but one whose extent and scope is still open to some debate, defined it as "the right of the majority within an accepted political unit to exercise power." *The Development of International Law through the Political Organs of the United Nations* 103-105. This serves to embrace the current anti-colonial phase of self-determination and the Hungarian rising against Soviet domination, but it runs counter to the post-World War I version. It also risks being out of tune with what may well be the next incarnation of self-determination when the peoples now subjected to what they regard as alien rule in states composed of heterogeneous elements rise up to demand the right to rule themselves. Her assertion that, in the present political climate, "the right of self-determination is likely to continue to be presented in a racial context" is more plausible than the contention that traditionally the term self-determination referred to the desire of a *race* for independence. *Ibid.* 105-106.

<sup>14</sup>7 U.N. Monthly Chronicle 36 (Feb., 1970). The Special Committee on Prin-

If the right of secession is eliminated and the maintenance of the territorial integrity of states takes priority over the claims of "peoples" to establish their own separate political identity, the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization. It need scarcely be added that the transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the "restoration" of a rightful sovereignty of which the people have been illegitimately deprived by the colonial Power concerned. On the theory that colonialism is permanent aggression, which was put forward by India at the time of taking over Goa from Portugal, the imperialists have and have had no rights, and therefore no issue of secession can be raised. In the Goan instance the people formally returned to the India from which they had never been lawfully separated; in the case of other colonies the latent sovereignty of the people is made manifest as the usurpers are overthrown or withdrawn. The anti-colonialists denounce all colonialism as illegitimate, even though Article 73 of the Charter appears clearly to contemplate the exercise of a measure of control by the administering states.

The end of colonialism is, however, near at hand, the great bulk of the colonial peoples already having achieved independence or otherwise come out from under alien rule, and it has so far proved impossible to determine what category of peoples, if any, will next be designated as the ones entitled to call upon the right of self-determination. Useful as it would be to establish where the lightning may strike next, in order to make some advance planning possible, we have little more than guesswork to rely on. While it appears inevitable that demands for a right to determine their own separate destinies will be made by "peoples" embraced within the heterogeneous polities of the third world, as well as of the first and second, there can be no present assurance that the international community will give them, or some defined portion of them, the kind of blessing which it has given the colonial peoples.

It appears to be the usual interpretation of self-determination that it involves accession to independent statehood, but account must also be taken of the claim which is made to what may be called internal self-determination, as contrasted with the external self-determination associated with international political status. A convenient phrasing of it is to be found in the General Assembly's Declaration on Non-Intervention (Resolution 2131 (XX)):

---

ciples of International Law concerning Friendly Relations and Cooperation among States, in dealing in its Report with the principle of equal rights and self-determination of peoples, which it accepted as a principle of international law, took a firm stand against any action which would dismember or impair the territorial integrity or political unity of independent states. U.N. General Assembly, 25th Sess., Official Records, Supp. No. 18 (A/8018), 1970, p. 69. For self-evident reasons the Organization of African Unity, in its Charter and elsewhere, has been particularly firm in its insistence on the maintenance of sovereignty and territorial integrity and on banning interference in internal affairs.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.<sup>15</sup>

The Declaration, for the moment leaving the realities of international politics behind it, denies the right of any state to intervene, directly or indirectly, in the internal or external affairs of any other state or to use economic, political, or any other type of measures in order to secure advantages of any kind from another state or to subordinate the exercise of the latter's sovereign rights.<sup>16</sup> The temptation to vote with the majority on the side of virtue obscures on occasion the need for precision of language and realism of prescription.

It appears to this writer that self-determination in this phase, as contrasted with the positive action implied by external self-determination, is essentially a negative matter, and as such properly dealt with in a declaration on non-intervention. With one substantial exception, no positive step is required, nor is any particular kind of government or social, economic, or cultural system called for or favored; all that is needed is that there not be external interference which impairs the ability of the state freely to make its own choices. All states and international organizations are asked to contribute political and material support to the winning of independence by colonial peoples; in relation to internal self-determination they are asked only to abstain from action of any kind which influences the domestic decision of other states. Any effort on the part of states or organizations to become involved in the affairs of other sovereignties in order to promote one or another decision would seem to be an evident violation of the ban on intervention. For good or evil, such intervention is, of course, an old-established and continuing feature of international life, whether in soft-spoken and covert fashion or in such open actions as the United States in relation to Cuba and the Dominican Republic, the Soviet Union in Hungary and Czechoslovakia, or Sukarno's Indonesia in its armed "confrontation" with Malaysia.

Wholly comprehensibly in the light of the arrogant imperialist interventions of the not distant past and despite the unlikelihood that it will be lived up to, total non-intervention has been accepted by the United Nations as one of the highest of principles. A still higher principle, however, has been established by the United Nations which overrides the right of internal self-determination and invalidates the obligation to ab-

<sup>15</sup> U.N. General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 11; 60 A.J.I.L. 662 (1966).

<sup>16</sup> "If it becomes common for Assembly resolutions of this nature to be passed by large majorities only to be immediately ignored, then the seriousness with which the Organization deserves to be taken will have been significantly downgraded." David A. Kay, "The Impact of African States on the United Nations," 23 *International Organization* 32 (Winter, 1969).

It deserves also to be noted that in a distinctive burst of honesty Malta declined to participate in the unanimous vote for the Declaration on the ground that it was being openly violated by several states which voted for it, and that they were unlikely to modify their policies. 2 U.N. Monthly Chronicle 23 (Jan., 1966).



stain from interference in what would otherwise be the domestic affairs of other states. This loftiest of principles is covered in the Declaration on Non-Intervention by the injunction that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations." The Special Committee on Friendly Relations has also debated these issues at length and combined in the Declaration unanimously adopted on September 15, 1970, the assertion of equal rights and self-determination of peoples, the inalienable right of every state to choose its political, economic, social, and cultural systems without interference, and the duty of states to eliminate all forms of racial discrimination and religious intolerance.<sup>17</sup>

In addition to the right or obligation to intervene to bring colonialism to an end, the United Nations organs have repeatedly asserted the necessity to intervene to overthrow the open and full-fledged racial discrimination of the *apartheid* regime in South Africa, also applied in Southwest Africa, and the close approximation to it which the white minority has instituted in Rhodesia since the Unilateral Declaration of Independence of 1965. In these instances, and presumably any others which might be found comparable to them, the inalienable right of a state to choose its social-political system vanishes and is replaced by the international mandate to secure a non-discriminatory regime.<sup>18</sup> It has been suggested that the contradiction between the doctrine of non-intervention and the attack upon *apartheid* is greatly mitigated if Resolution 2131 (XX) is read as being subject to the obligations imposed on states by the Charter. Unless intervention, however, is assumed by definition to involve the threat or use of force, bringing pressure of one sort or another to bear on a state does not appear to be outlawed by the Charter. As far as human rights and fundamental freedoms are concerned, even if it be conceded, as it must be, that *apartheid* constitutes an unmistakably flagrant violation of these rights and freedoms, reference to the Charter could not by itself furnish an answer as to whether Article 1, par. 3, or Article 2, par. 7, takes priority.

Racial discrimination is assumed by the contemporary international consensus to be a basic evil wherever it occurs and in whatever guise, but it becomes the paramount evil when the majority of the people are wholly dominated by a minority of another race. Under such circumstances self-determination comes into play only when the majority achieves freedom to express its will and make it effective. Such a stand, with its special reference to white-ruled southern Africa, does not necessarily imply any general endorsement of majority rule, as, for example, in relation to rule by a military junta after a coup, but is limited to situations in which *apartheid* or some approximation thereof is practiced by the dominant racial minority. Nothing but total scorn could greet the well-advertised insistence

<sup>17</sup> For the text of the Declaration see the Report of the Special Committee, cited note 14 above, pp. 62-71; also reprinted in 65 A.J.I.L. 244 (1971).

<sup>18</sup> See Alexander J. Pollock, "The South West Africa Cases and the Jurisprudence of International Law," 23 International Organization 786 (Autumn 1969).

of the South African Government that its doctrine of *apartheid*, under the label of separate development, is in fact intended to promote the self-determination of each of the country's peoples.

In the deliberations of the Special Committee on Friendly Relations on the Declaration to be presented to the Assembly for adoption, the United States proposed the inclusion of the following article in the section dealing with self-determination:

The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.<sup>19</sup>

While this seems a mild and temperate statement to which it is difficult to take exception, it might, if it had been adopted, have turned out to raise some troublesome issues. Would it, for instance, justify recourse to self-determination on the part of peoples who are not, or who claim not to be, effectively represented in and by their government; and, as in all such questions of self-determination, who is entitled to make the relevant judgments and decisions? Is it a matter of international concern that representative governments do not exist in many countries, and what, if anything, should be done about it? As a general proposition it might be suggested that the more criteria are laid down internationally as higher principles conditioning the right of states to full and free internal self-determination, following the precedent of the elevation of the condemnation of *apartheid* to the status of a super-principle, the greater will be the temptation—or even, at a further remove, the obligation—to intervene.

One other problem of self-determination which has come to be of considerable current significance concerns the multiplicity of actual or potential ministates now coming into existence. In the 19th century it was widely assumed as both the desired and the expected outcome that the new principle of nationality would enable the larger nationalities to consolidate and establish strong and stable states, while the lesser peoples, seen as having made no mark upon history, would either be absorbed or fade into the background. The emergence of Germany and Italy was taken as setting the pattern, and the "Balkanization" which lay ahead was not adequately foreseen.<sup>20</sup> The round of self-determination which followed

<sup>19</sup> U.N. Doc. A/AC.125/L.75 (Sept. 15, 1969), p. 4. The U.K. submitted an almost identical text, p. 6. In the Declaration adopted by the Special Committee there survived from these proposals the statement that states which complied with the principle of equal rights and self-determination, as described in the Declaration, were "thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour." Report of the Special Committee 69.

<sup>20</sup> Professor Karl W. Deutsch has suggested that "Scandinavianization" be substituted for "Balkanization," thus producing an immediate change in implication and attitude. The derogatory sound of "Balkanization" obscures the very real possibility that the construction or maintenance of larger heterogeneous political units lumping together peoples without common bonds may produce disastrously costly results, of which Nigeria is the most recent unhappy example. Furthermore it has been cogently argued that the Austro-Hungarian Empire was not necessarily the ideal political solution and that balkanizing the Balkans was a step forward, not a step backward.

World War I represented some further fragmentation but the great eruption of small peoples, laying claim to self-determination and ranging from lesser middle-sized to infinitesimal, broke out around the globe in the later phases of the process of decolonization. The British, indefatigable collectors of bits and pieces of empire,—miscellaneous islands, coaling stations, bases, and enclaves—were the major contributors, but others were also somewhat perplexed proprietors of tiny territories or, on occasion, of relatively large territories with tiny populations and meager known resources.<sup>21</sup>

As with most issues of self-determination, the questions which are likely to be asked are simple, the answers complex or non-existent. The simplest question of all, to which only an arbitrary answer can be given, is: How small is small?

Small peoples are as much entitled to self-determination as large ones, but it is also evident that at some level a point of absurdity is reached as when islands such as Nauru and Anguilla, with a population of a few thousand each, are envisaged as taking a full place in the international society as sovereign states. It may be that, apart from any speculation as to whether it is to their advantage or disadvantage, they could manage to maintain life at some level if left wholly adrift on their own, but their ability to take an active and normal share in the life of the international community would be drastically limited.

An important part of the problem was raised by Secretary General U Thant in the Introduction to his Annual Report in September, 1967, when he remarked that, for all the desirability of universality of membership in the United Nations, "the line has to be drawn somewhere." Accepting the complete legitimacy of even the smallest territories attaining independence through self-determination, he added that

it appears desirable that a distinction be made between the right to independence and the question of full membership in the United Nations. Such membership may, on the one hand, impose obligations which are too onerous for the "micro-states" and, on the other hand, may lead to a weakening of the United Nations itself.<sup>22</sup>

As far as the United Nations is concerned, the precedents, disturbing to many participants and observers, have come to be so generous to ministates as to make future restrictions difficult unless firm decisions are both taken and enforced, laying down rules as to the size of states to be admitted as Members. The present low point is that of the Maldives Islands, admitted in 1965 with a population at that time of some 100,000, its nearest rival among the recent "Third World" Members being Equatorial Guinea, admitted three years later with 272,000 people. The precedents were already well established, however, by the membership in the League of Nations of the Central American and Caribbean Republics and the admission to the

<sup>21</sup> See David W. Wainhouse, *Remnants of Empire* (New York and Evanston, 1964), and the voluminous documentation of the Special Committee of 24, dealing with the implementation of the Declaration on colonial independence.

<sup>22</sup> U.N. General Assembly, 22nd Sess., Official Records, Supp. No. 1A(A/6701/Add. 1), p. 20.

United Nations in 1946 of Iceland with 285,000. A UNITAR publication of 1969 lists a total of 17 U.N. Members with populations of less than one million,<sup>23</sup> and a number of others hover not far about that figure.

There is no occasion to elaborate here on the well-worn theme of the imbalance within the United Nations and other international organizations between states with populations running to hundreds of millions and those with a few hundred thousands or less. It is obviously necessary, however, to carry further and to deepen the exploration both of the acceptable alternatives to independence and of the ways in which the United Nations and other international bodies might be of service to small peoples without the assumption that the latter must acquire sovereign independence and full United Nations membership. On the first score a difficulty that must be taken into account, although it is certainly not insuperable, is that the Committee of 24, looking to speedy decolonization under Resolution 1514 (XV), has strongly tended to equate the proper exercise of the right of self-determination with a decision for independence. Particular exceptions have been approved as legitimate by the Committee and the Assembly itself, as in the case, for example, of the Cook Islands, whose desire for continued ties with New Zealand was accepted with surprised dismay, but the basic assumptions of the Committee and the Assembly are reflected in the standard bracketing together of self-determination and independence.

To the pleasure of the United States and its associates, the 1970 Declaration of the Special Committee on Friendly Relations held in the section dealing with the equal rights and self-determination of peoples that it accounted as a legitimate outcome of self-determination not only independence but also association or integration with an independent state or the emergence into any other political status freely accepted by a people.<sup>24</sup> By now a number of alternative relationships between independent states and small peoples and territories have been worked out which provide self-government and at the same time on a freely agreed basis secure the benefits of association with a larger state and presumably representation by it in the world at large. Despite the advantages which such co-operative arrangements can bring with them, it has been the inclination of a number of members of the Committee of 24 to ask that any act of self-determination which calls for less than independence should be subject to reversal by a later and definitive act of self-determination which would record the people's demand for independence. As they see it, self-determination is an inalienable right to which access must remain available until the ultimate option of independence has been exercised.

<sup>23</sup> Status and Problems of Very Small States and Territories (UNITAR Series, No. 3), pp. 73-74. The population figures cited are taken from the relevant issues of the Yearbook of the United Nations and the UNITAR Status and Problems.

<sup>24</sup> A number of Assembly resolutions make substantially the same point. Res. 1541 (XV) of 1960, for example, states that self-government can be attained through emergence as an independent state, or through free association or integration with an independent state; but the deep-rooted preference for independence generally shines out undisguised.

The ills and shortcomings characteristic of small peoples may be significantly eased by the contributions which international organizations can make to their well-being and even to their survival in an interdependent and often threatening world. If full membership in the United Nations is to be denied to peoples whose numbers and such other attributes as may be internationally specified fall below some agreed standard, there remain a variety of other possibilities. These include some version of associate membership (presumably non-voting) in the United Nations, associate or full membership in specialized agencies and relevant regional organizations, and the creation of some body (an Office of Small States and Territories?) within the United Nations or outside it, to which would be assigned responsibility for seeing to it that small peoples are kept abreast of developments in spheres germane to their interests and particularly of programs which would help them to overcome the deficiencies deriving from their small size.<sup>25</sup> The more such relationships remain in the sphere of technical advice, the less controversial they would be, but they would inevitably also move into spheres with manifest political implications and thus be increasingly likely to stir up trouble.

A political issue of the first order of importance concerns the provision of defense and security for small states and territories. By no stretch of the imagination can they be assumed to have the resources which would enable them to defend themselves against any serious attack. The UNITAR study of very small states realistically remarks that, if all U.N. Members lived up to their Charter obligations, no special guarantees would be necessary, but the possibility of non-observance leads to the need for further forms of safeguards.<sup>26</sup> This issue was most persuasively presented to the United Nations in relation to the three High Commission Territories embraced within South Africa as they approached independence. The danger that one or more of the three might be forcibly swept within the *apartheid* regime led to a solemn warning to the South African Government by the General Assembly in Resolution 1954 (XVIII) of 1963 that "any attempt to annex or encroach upon the territorial integrity of these three Territories shall be considered an act of aggression."<sup>27</sup> It must, however, be recognized that this or any other type of international arrangement safeguarding the independence of states or territories is subject to all the frailties and vagaries of collective security which stand out so clearly on the historical record.

Although there may be a substantial number of common issues, a different set of problems appears when the people or territory under consideration is not independent. Of the many varieties of lack of independence, two main types must be distinguished: a people who occupy and lay claim to a reasonably well defined territory which might be separated from the state of which it forms a part, such as the South at the time of

<sup>25</sup> See UNITAR, Status and Problems, particularly Pt. II, Chap. II: and Patricia Wohlgenuth Blair, *The Ministate Dilemma* (Carnegie Endowment for International Peace, Occasional Paper No. 6, 1967).

<sup>26</sup> UNITAR, *op. cit.* 157.

<sup>27</sup> U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/5515), p. 8.

the American Civil War, Biafra, or Nagaland, and a people intermingled with the dominant majority people, such as the Blacks in the United States, the Chinese in Malaysia or Indonesia, or the Asians in East Africa. Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity and its human rights. In these circumstances, the aim must be to achieve non-discriminatory acceptance into the general citizenry with, perhaps if it is desired and proves negotiable, such an admixture of minority rights as will work to preserve the distinctiveness of the community involved.<sup>28</sup>

Given a geographically distinct territory, secession or some form of territorially based self-government is at least conceivable, whatever the political complications, particularly if the territory is wholly separate from the state concerned, as in the case of an island or overseas dependency. Small colonies and peoples, however, have scant opportunity to arrive at decisions of their own and are likely to be subject to the determinations of the metropolitan Power to which they attach. The singularly pertinent case of minuscule Anguilla, which, exposing Britain to global ridicule, even underwent British military occupation, challenged the conscience of the world to find some better answers and procedures than those immediately available. With no desire for a complete breach with London, Anguilla found in the ordinary course of events no outside authority to which it might turn for aid and advice and no forum in which to plead for a change in the London-imposed formula for decolonization, including the unwelcome merger with St. Kitts and Nevis. Its leaders saw no alternative to an otherwise nonsensical declaration of independence which not only dramatized its case, at some midpoint between farce and tragedy, but promptly also gave it some measure of international standing and removed it from the ranks of the untouchables as far as the United Nations and other international organizations were concerned.

It is to avoid a situation such as this that Roger Fisher and others have proposed an overhaul of the existing machinery and assumptions. The essence of the proposals made by Professor Fisher is a plea for flexibility which would make possible a wide array of fluid arrangements to meet the varying needs of small peoples and territories. Thus he called for recognition that

independence and political freedom are too important to be confined by sharp categories. Self-determination is not a single choice to be made in a single day. It is the right of a group to adapt their political position in a complicated world to reflect changing capabilities and changing opportunities.<sup>29</sup>

<sup>28</sup> For an illuminating discussion of this problem as well as of a number of other points relevant to self-determination, see Chap. 5, "Self-Determination and Minority Rights," in Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York, London, Toronto, 1970).

<sup>29</sup> Roger Fisher, "The Participation of Microstates in International Affairs," 1968 *Proceedings, American Society of International Law* 166 (Washington, D. C., 1968).

Turning away from the traditional rigid alternatives, he urged a deliberate blurring of the distinction between independence and dependence in the hope both of lessening the demand for full sovereignty and of opening to small places access to the advice, facilities, and services which they are unable to furnish for themselves. In explicit contrast to the Committee of 24 with its bias in favor of independence, his proposed Office of Small States and Territories in the United Nations would seek the practical solution of problems on their merits and accept from the outset the assumption that small states will normally want to have a close relationship with some large state, perhaps the former colonial Power, and also have direct access to the United Nations.

For territories which have crossed the threshold to independence it should not be too difficult to work out such programs, but to apply the same technique to those which remain dependent is obviously to risk serious trouble. To be effective the new instrumentalities must constitute a direct challenge to the sovereignty of the state over what it holds to be its own land and people. The more effective they would be in promoting the right to self-determination, the more direct and objectionable the challenge, although by now the process of decolonization is so far advanced that for many small territories the colonial Powers might welcome expert and impartial international advice as to how to bring the colonial relationship to a mutually satisfactory end.<sup>30</sup>

For large territories or small, whether it concerns Anguilla or Angola, Gibraltar or Guam, Brittany or Quebec, Biafra, the south Sudan, or Lithuania, the claim of an international authority to intervene in the determination of political affiliation threatens to bring down on its head the wrath of any country directly affected. A parallel might be drawn with the attempt in the interwar decades to maintain a system for the international protection of minorities, which achieved not very impressive results, was resented by the states to which it applied, and was abandoned in the reconstruction of the world after 1945. That minorities deserve protection when they are denied the human rights supposedly theirs and that some peoples have what seem excellent claims to a separate political identity are propositions which it is impossible to deny. There is ample room, however, for skepticism that the existing system of sovereign states has evolved to the point where its members would be prepared to subject themselves to intervention on behalf of minorities or to advice given directly to peoples within their jurisdiction encouraging these peoples to seek self-government or independence.<sup>31</sup>

<sup>30</sup> Professor Fisher explicitly recognized that in order to have its advice accepted as expert and impartial, without political preconceptions, the "U.N. would have to change quite radically its orientation to small places," departing from the rôle hitherto played by the Committee of 24 "as an international lobby for absolute independence regardless of the consequences." *Ibid.* 168-169. How real is the prospect that the U.N. could divorce itself from politics and political preconceptions for such purposes?

<sup>31</sup> It deserves to be noted that promptly following Professor Fisher's paper at the 1968 A.S.I.L. meeting, Elizabeth Brown of the Office of U.N. Political Affairs, De-

Particularly where it involves the emergence of new states on the world scene or the reshaping of old ones, self-determination is obviously a matter of legitimate international concern. The problem, to which no satisfactory answer has as yet been produced, is how one sets about regularizing and bringing under international control what this writer has elsewhere described as essentially a right of revolution, justified by an appeal to principles of higher law.<sup>32</sup> That the overwhelming U.N. majority has accepted it as substantively a right of revolution appears to be confirmed by the repeated Assembly injunction that all states should provide moral and material assistance to the struggle for independence of the national liberation movements, some of which are carrying on open warfare. Self-determination has from time to time been referred to as the right of the winner in a Darwinian conflict for survival. Up to now the success or failure of an attempt at self-determination represented no special merit or lack of it but, in success, good fortune and effective strength, including external assistance, or, in failure, bad fortune and the lack of the force needed to put it across. The American Revolution won freedom from Britain; the South failed to win the Civil War; Jinnah and the Moslem League made life difficult enough for the British and the Indian National Congress to secure Pakistan's separate existence; the Ibos lacked the power to sustain Biafra's independence; Israel fought its way to statehood; Indonesia and Algeria won independence; but Angola and Mozambique have so far failed to break the Portuguese colonial grip.

It would be a wholly new departure if norms were to be established by which claims to self-determination could be evaluated and the Assembly, the Security Council, or some other newly created international agency were empowered to take authoritative decisions, implemented in part, perhaps, through the elaboration of a collective process of recognition by the international community.<sup>33</sup> Because of the great variety of situations, problems and claims, the decisions would undoubtedly have frequently to

---

partment of State, called attention to "some serious problems" involved if the U.N. were to offer political and constitutional advice to an area under the administration of a sovereign state. On the basis of past experience, it was her conclusion that the metropolises would find very little more than technical assistance in the narrow sense acceptable. *Ibid.* 180.

<sup>32</sup> See the writer's *Self-Determination Revisited in the Era of Decolonization* (Occasional Paper No. 9, Center for International Affairs, Harvard University, 1964). Rosalyn Higgins sees the principle of self-determination as having, "over the last 15 years, led to the widespread view that there may now be a legal right of revolution; that is to say, that under the principle of self-determination the peoples of a territory must be allowed—if absolutely necessary by forceful means—to replace the government by one of their own choice. This principle finds express approval in the resolutions passed on the Hungarian intervention." *The Development of International Law through the Political Organs of the United Nations* 211.

<sup>33</sup> The Secretary General has in at least three recent instances been called upon to play a significant rôle in issues of self-determination: in 1963, certifying the willingness of the people of Sabah and Sarawak to join Malaysia; in 1969, joining in supervising "the act of free choice" of West Irian in remaining a part of Indonesia; and in 1970, undertaking to ascertain "the wishes of the people of Bahrain" at the request of the United Kingdom and Iran.



be of an *ad hoc* "political" nature, but various criteria have been suggested which might be drawn upon to provide norms for judging claims. A frequently mentioned criterion for a favorable decision is the denial of human rights—a peculiarly pertinent criterion in view of the proposition often put forward that all other human rights rest on the right of self-determination—but it is also evident that other means of safeguarding human rights than the drastic remedy of independence should be explored.

On the face of it, it is desirable that the United Nations be empowered to play a larger rôle in relation to the always hazardous issue of self-determination, granted—which is not necessarily self-evident—that to do so would be to ease rather than to intensify international tensions and to promote human well-being. The realistic issue is still not whether a people is qualified for and deserves the right to determine its own destiny but whether it has the political strength, which may well mean the military force, to validate its claim. Have states and peoples evolved sufficiently to be prepared to accept the substitution of international decisions, or at least of international intervention and good offices, for the old-established trial by battle? In the current phase of self-determination the Committee of 24 and the Assembly have insisted on the desirability of United Nations participation in the transition of colonies to independence or some other approved status, but they have met with frequent rebuffs by the colonial Powers who are even more firmly insistent on setting their own timetable and their own style and sequence of events. This does not augur well for the future, and all the less so if the ending of the process of decolonization means that hereafter self-determination headed toward independence can only mean secession from existing states. It might also be asked as possibly a highly relevant consideration: Assuming that the remaining bits and pieces of empire are tidied up to the general satisfaction of the Committee of 24 and the Assembly, leaving still the grave problems of white-dominated southern Africa, will the large array of new countries tend to lose interest in self-determination, or, insofar as they retain interest, seek rather to safeguard their present boundaries and jurisdiction than to risk them by empowering an external authority to busy itself with the dynamite of self-determination? Continued white minority rule in southern Africa, condemned as an evil of paramount importance, will keep the slogans and the cause of self-determination alive, but it must also be recognized that this is a special and distinctive issue. The demand for self-determination there has no necessary implication of support for self-determination elsewhere and certainly not for what seems likely to be its next major incarnation in the clamor of peoples trapped in pluralistic states in which they have no dominant share to take charge of their own destinies.

## THE CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

*By Robert H. Miller \**

A quarter of a century has now elapsed since the end of World War II. During that time concerted efforts have been made to bring to justice those responsible for the appalling atrocities committed in the name of the Nazi forces. While many of the principal authors of war crimes have been punished, some of them are known to be still at large. Either by managing to escape detection or by fleeing to a country of haven, they have successfully avoided prosecution and punishment. In other cases<sup>1</sup> judicial proceedings have not yet been completed against persons suspected of war crimes or crimes against humanity.

With the coming into effect in some states<sup>2</sup> of statutes of limitation<sup>3</sup> which prevent the institution of criminal proceedings and the execution of penalties for crimes committed beyond a prescribed period, a new dimension has been given to the problem of prosecuting and punishing persons suspected of having committed war crimes or crimes against humanity. The question of the applicability of prescription, a municipal law concept, to those international crimes occasioned concern before the United Nations. On November 26, 1968, the General Assembly of the United Nations

\* LL.B. (Melbourne), LL.M. (University of California, Berkeley); Lecturer-in-Law, Monash University, Australia. Formerly Asst. Human Rights Officer, United Nations.

<sup>1</sup> For example, "from 8 May 1945 to 1 January 1968, 77,044 investigations of persons suspected of major Hitler-era crimes were conducted by the West German Authorities. A total of 6,192 were sentenced during this period, 12 of them to the death penalty, 90 to life imprisonment, 5,975 to shorter terms of imprisonment and 114 to pay fines. At present, 19,933 cases of persons suspected of National Socialist crimes are before the West German Courts." Quoted in Press Release, Federal Republic of Germany Information Center, New York, "Statute of Limitations—Controversial Problem of German Policy," Oct. 15, 1968.

<sup>2</sup> For instance in Greece: "... pursuant to Greek national legislation all war crimes are subject to a twenty-year statutory limitation. As a consequence, war criminals of the Second World War can no longer be prosecuted in Greece." U.N. Doc. A/7174, p. 19. In the following states, the ordinary statutory limitations are apparently applicable to war crimes and to persons guilty of crimes against humanity: Cambodia, Cameroon, Japan, Malta, Morocco, Norway, Spain, Sweden, Turkey, Venezuela. U.N. Doc. E/CN.4/906, p. 53.

<sup>3</sup> Statutory limitation, or prescription, in criminal law is not a universal concept and it should be contrasted with the practice of common law countries, where the principle of setting a time limit for the prosecution of crime is generally not recognized. See U.N. Doc. A/7174/Add.1-3 for a description of the limitation periods that apply in several states; e.g., in Italy, "this [statutory] limitation does not apply to serious offences which are subject to the penalty of *ergastolo* [rigorous imprisonment for life]."

adopted the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity.

The convention is a significant contribution to the historical development of international criminal law. Previous international instruments<sup>4</sup> establishing responsibility for war crimes and crimes against humanity as well as the obligation of states to prosecute and punish persons who had committed those crimes, were silent<sup>5</sup> as to the applicability of any statute of limitation to their prosecution and punishment. The 1968 Convention attempts to fill this gap. In essence it defines war crimes and crimes against humanity and provides that states parties to the convention undertake to adopt measures to ensure that statutory limitations shall not apply to the prosecution and punishment of the crimes referred to and that existing limitations shall be abolished. In the absence of an international tribunal which would apply the convention's substantive and adjective law, the convention accords with the realities of international penal law by leaving the mechanics of prosecution and punishment of persons charged with those crimes to national legal systems.

#### UNITED NATIONS CONCERN WITH INTERNATIONAL CRIMES

During the deliberations of the various United Nations bodies concerned with drafting the 1968 Convention, the views expressed by states are particularly revealing on a number of significant legal and political issues. While universal recognition and acceptance were given by states to the principle that the criminals responsible for war crimes and crimes against humanity should be traced, apprehended, and equitably punished, vast differences of opinion were expressed on other fundamental matters. Delegates, in defining the crimes concerned, or in delimiting the scope of the convention, or in articulating the doctrine that the convention should apply to past as well as to future crimes, were often irreconcilably opposed.

A clear indication of the conflicting views that emerged during those debates is seen in the distribution of votes that were cast for the adoption of the convention before the General Assembly, when less than one half of the 126 United Nations Member States actually voted for it. The convention was approved by 58 votes in favor and 7 against, with 36 abstentions.<sup>6</sup> More opposing votes were cast against the adoption of this

<sup>4</sup> *E.g.*, the Declaration of St. James of 1942, the Moscow Declaration of 1943, the Potsdam Agreement of 1945, the Charters of the International Military Tribunals of Nürnberg and the Far East, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the Geneva Conventions of 1949 all called for the punishment of such criminals.

<sup>5</sup> The representative of France noted "that silence might be interpreted as encouraging States to apply their domestic legislation to war crimes and crimes against humanity, thus creating a situation unsatisfactory to the international community." U.N. Doc. E/CN.4/SR/921, p. 4.

<sup>6</sup> For: Algeria, Bulgaria, Burma, Byelorussian S.S.R., Central African Republic, Ceylon, Chad, Chile, China, Cuba, Cyprus, Czechoslovakia, Dahomey, Ethiopia, Gabon, Ghana, Guinea, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Kenya, Kuwait, Lebanon, Liberia, Libya, Malaysia, Maldive Islands, Mauritania, Mexico, Mon-

convention than were voted in opposition to any prior international human rights instrument.<sup>7</sup> Yet it is of even greater significance that well over thirty states abstained from voting. Those included Belgium, Denmark, France, Greece, Luxembourg, The Netherlands and Norway, all of which had been occupied by German forces.

An examination of the history of the most important provisions of the convention, particularly during final drafting, will assist in understanding the principal differences that divided the delegates so sharply.

### *The Origins of the Convention*

The preparation and eventual adoption of the 1968 Convention was largely precipitated by a decision of the Bundestag of the Federal Republic of Germany. Pursuant to legislation adopted on April 13, 1965,<sup>8</sup> the period of limitation<sup>9</sup> for prosecution of offenses of the most serious kind (which included war crimes or crimes against humanity) was extended from May 8, 1945, until December 31, 1969.

Under the terms of the German Penal Code of 1871,<sup>10</sup> war crimes and crimes against humanity are punishable under the provisions relating to such offenses as murder, manslaughter, bodily injury, unlawful deprivation of liberty and duress. As in many countries,<sup>11</sup> the law of the Federal

golia, Morocco, Nepal, Niger, Nigeria, Pakistan, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Senegal, Singapore, Southern Yemen, Sudan, Syria, Togo, Tunisia, Ukrainian S.S.R., U.S.S.R., United Arab Republic, United Republic of Tanzania, Upper Volta, Yugoslavia and Zambia.

Against: Australia, El Salvador, Honduras, Portugal, South Africa, United Kingdom, United States.

Abstentions: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Greece, Guatemala, Guyana, Haiti, Iceland, Ireland, Italy, Jamaica, Japan, Laos, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Spain, Sweden, Thailand, Turkey, Uruguay and Venezuela.

<sup>7</sup> Prior to this convention, sixteen international instruments had been adopted in the field of human rights by the United Nations, and only in the following three cases were dissenting votes cast against the adoption of such instruments: The Convention on the Traffic in Persons, the Convention on the Right of Correction, and the Optional Protocol to the International Covenants on Human Rights. For details of votes cast, see U.N. Doc. A/CONF.32/15.

<sup>8</sup> Bundesgesetzblatt, Part I, p. 315. See U.N. Doc. E/CN.4/906, pp. 71-77, for information provided to the Secretary General by the Federal Republic of Germany concerning its legislation relating to the applicability of statutory limitations to war crimes and crimes against peace and humanity.

<sup>9</sup> "The Law concerning the Calculation of Periods for Criminal Prosecution (*Federal Law Gazette*, Part I, p. 315), passed on 13 April 1965, provides that the period from 8 May 1945 to 31 Dec. 1949, shall not be taken into consideration when calculating the periods of limitation for crimes which would carry a penalty of life imprisonment with hard labour. This means that the period for the prosecution of any crimes which may not be known to the German authorities can on no account expire before 1 January 1970." U.N. Doc. E/CN.4/927, p. 35.

<sup>10</sup> As amended on Aug. 25, 1953.

<sup>11</sup> Much has been written on the application of statutory limitation to domestic laws in Europe. See, e.g., J. Graven, "Les crimes contre l'humanité peuvent-ils bénéficier de la prescription?" 81 *Revue pénale suisse* 113 (1965); J.-B. Herzog, "Etude

Republic of Germany<sup>12</sup> provides for a period of prescription beyond which persons may not be prosecuted or punished. "German law distinguishes between the barring of prosecution owing to time limitation (*Verfolgungsverjährung*) and the barring of the execution of final sentences owing to time limitation (*Vollstreckungsverjährung*)."<sup>13</sup> Article 66 of the German Criminal Code establishes the broad policy consideration by providing that the "prosecution of an offense and the execution of a sentence shall be barred by time limitation." Article 67, paragraph 1, provides:

1. Prosecution shall be barred by time limitation after twenty years in the case of serious offenses (*Verbrechen*) punishable by confinement in a penitentiary for life; after fifteen years in the case of serious offenses for which the maximum penalty is deprivation of liberty for a term of more than ten years; and after ten years in the case of serious offenses punishable by deprivation of liberty for a shorter term.

Pursuant to Article 68, "the period of limitation for prosecution is interrupted by every action taken by a German judge against a specific offender by reason of a specific offense. . . . After the interruption, the full period of limitation begins to run anew."<sup>14</sup>

In addition, by the Act of August 9, 1954, on the accession of the Federal Republic of Germany to the 1948 Genocide Convention, Article 220 (a) was inserted in the Penal Code as a special penal provision against genocide; however, by reason of the Constitutional prohibition of *ex post facto* penal laws (Article 103, paragraph 2 of the Fundamental Law), Article 220 (a) cannot have any retroactive effect.<sup>15</sup> Less than a year after the adoption of the convention, on June 26, 1969, the Bundestag of the Federal Republic passed a bill, subsequently approved<sup>16</sup> by the Bundesrat, which provides that crimes based on Article 220 (a) (Genocide) "do not come under the statute of limitation," and extends the limitation period for murder under Article 67 from 20 to 30 years. As a result of this latter legislative change, statutory limitation concerning murders committed during the Nazi period will now enter into force on December 31, 1979.

#### UNITED NATIONS CONCERN WITH STATUTORY LIMITATION

The question of the non-applicability of statutory limitations to war crimes and crimes against humanity was first raised before the United Nations by the Delegation of Poland. On March 5, 1965, Poland proposed,<sup>17</sup> as a matter of urgency,<sup>18</sup> that the Twenty-First Session of the

---

des lois concernant la prescription des crimes contre l'humanité," [1965] *Revue de Science criminelle et de Droit pénal comparé* 337; S. Glaser, "Quelques observations sur la prescription en matière de la criminalité de guerre," 45 *Revue de Droit pénal et de Criminologie* 511 (1964-65).

<sup>12</sup> See German Criminal Code, Arts. 66 and 67.

<sup>13</sup> U.N. Doc. E/CN.4/906, p. 73.

<sup>14</sup> *Ibid.*, p. 75.

<sup>15</sup> *Ibid.*, p. 72.

<sup>16</sup> On July 10, 1969.

<sup>17</sup> U.N. Doc. E/CN.4/L/733.

<sup>18</sup> In accordance with Rule 6, par. 3, of the Rules of Procedure of the functional commissions of the Economic and Social Council.

Commission on Human Rights include on its agenda the question of the punishment of war criminals. It was stressed by Poland that, under the statute of limitations in the Federal Republic of Germany, legal proceedings against war criminals and persons guilty of the crime of genocide would terminate soon (in 1969) and that every effort should be made to ensure that this time limit be extended and other appropriate measures be taken to bring to justice those persons who were accused of such crimes. The Twenty-First Session of the Commission placed this item on its agenda and thus took the first step that led, more than three and a half years later, to the adoption by the General Assembly of the 1968 Convention.

The Polish proposal<sup>19</sup> was discussed at length by the Commission, and its deliberations opened a Pandora's Box of legal, political and human rights issues. Poland also submitted a draft resolution<sup>20</sup> in which the principle of the non-applicability of statutory limitation to Nazi war crimes was taken as an accepted principle of international law. That viewpoint<sup>21</sup> aroused juridical objections on the part of a number of states.

Because of the complexity and importance of the issues raised, the Commission on Human Rights asked<sup>22</sup> the Secretary General to prepare a study of the problems raised in international law by war crimes and crimes against humanity and, by priority, a study of legal procedures to ensure that no period of limitation would apply to such crimes.<sup>23</sup> A detailed and comprehensive study<sup>24</sup> was prepared, which dealt in particular with legal procedures ensuring that no period of limitation shall apply to such crimes in international law. On the Commission's proposal, the Economic and Social Council<sup>25</sup> asked the Commission to prepare a draft convention providing that no statutory limitation should apply to war crimes or crimes against humanity. On the basis of the Commission's work at its next session, and in accordance with the recommendation of the Economic and Social Council, the General Assembly examined this question at its Twenty-Second Session. A Joint Working Group<sup>26</sup> of the Assembly's Third (Social, Humanitarian and Cultural) and Sixth (Legal) Committees was established which submitted to the Third Committee the text of a draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.<sup>27</sup> Acting on the recommendation of that

<sup>19</sup> U.N. Doc. E/CN.4/855. The item proposed by Poland and orally amended by France to add the words: "and of persons who have committed crimes against humanity," at the end of its title, was adopted by the Committee without objection.

<sup>20</sup> U.N. Doc. E/CN.4/L/733, Rev. 1.

<sup>21</sup> See the views expressed by The Netherlands, U.N. Doc. E/CN.4/SR/873, p. 7; Austria, Doc. E/CN.4/SR/873, p. 8; Sweden, Doc. E/CN.4/SR/873, p. 13; Philippines, Doc. E/CN.4/SR/873, p. 15; and France, Doc. E/CN.4/SR/873, p. 9.

<sup>22</sup> See Official Records of the Economic and Social Council, Thirty-Ninth Session, Supp. No. 8 (E/4024), Ch. XX, par. 567.

<sup>23</sup> By Res. 3 (XXI) of the Commission on Human Rights.

<sup>24</sup> U.N. Doc. E/CN.4/906.

<sup>25</sup> By Res. 1158 (XLI) of Aug. 5, 1966.

<sup>26</sup> U.N. Doc. A/6813.

<sup>27</sup> See Report of the Joint Working Group of the Third and Sixth Committees, U.N. Doc. A/C.3/L/1503.

Committee, the General Assembly, on November 26, 1968, formally adopted the convention.<sup>28</sup>

### ARTICLE I

Article I reads as follows:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

This article is the nub of the entire convention and embodies three closely related legal concepts upon which all of the convention's substantive provisions hinge, namely: the principle of the non-applicability of statutory limitation to certain international crimes; the definition of the crimes in question; and the issue of retroactivity in criminal law.

#### I. *The Principle of Statutory Limitation*

Article I positively asserts<sup>29</sup> that no statutory limitation shall apply to war crimes and crimes against humanity, irrespective of the date or place of their commission. In formulating this principle the General Assembly declared that the demands of justice would not admit that those guilty of such atrocities could escape punishment after the expiration of any time limits. Although Article I encompasses crimes committed during the Nazi period, it has an all-embracing temporal sweep in that it applies to all war crimes and crimes against humanity, past, present, and future.

During the debates on the convention before the various United Nations bodies seized of the matter, opinions were sharply divided on the non-applicability of statutory limitations to war crimes as a universal principle. Some states<sup>30</sup> regarded the non-applicability of statutory limitation as an

<sup>28</sup> Res. 2391 (XXIII).

<sup>29</sup> Whether the convention "established" a new principle of international law or "affirmed" an already existing principle was strenuously debated before the Commission on Human Rights and the Third Committee of the General Assembly. See below.

<sup>30</sup> Principally the East European states; e.g., the representative of Poland said: "Most delegations had been of the opinion that the principle of the non-applicability of statutes of limitation to war crimes had already been recognized in international

existing principle of international penal law, which the international community was merely called on to recognize. In their view, the convention would have a declaratory character which simply restated in detail a principle of international law which had existed since the adoption of international instruments to punish war criminals. According to these states, the basic legal principle universally recognized was that crimes should be punished to the full, unless express provision to the contrary was made in penal legislation.<sup>31</sup> They contended that this principle, which was well established in penal laws of all countries, existed in international law as well.

The relevant international instruments relating to war crimes and crimes against humanity were, however, completely silent on this point, and they did not mention, even indirectly, the possibility of applying prescription to such crimes. While the Declaration of St. James of January 13, 1942, the Moscow Declaration of November 1, 1943, the Potsdam Agreements of 1945, the Charter of the International Military Tribunal of Nürnberg annexed to the London Agreement of August 8, 1945, and the Charter of the International Military Tribunal for the Far East called for the arrest of war criminals wherever and whenever they could be found, they did not contain any reference to prescription.<sup>32</sup> Those states accordingly contended that, since none of these instruments contained any reference to statutory limitation, "there could be no doubt about the validity of the principle that there was no period of limitation for war crimes and crimes against peace and against humanity."<sup>33</sup>

Other states<sup>34</sup> considered it a new principle which was yet to be established in international law. The convention would therefore not restate existing principles but would create new rules of international law. In their opinion, all that could be said was that the existing instruments were silent on the matter of statutory limitation and that it was doubtful that this silence implied a prohibition on the application of statutes of limitation to war crimes.<sup>35</sup> That silence was ambiguous and capable of more

---

law." U.N. Doc. E/CN.4/SR/873, p. 5. The representative of the U.S.S.R. stated: "... the Soviet Union considered that the Convention, when adopted, would not make new law, but merely reaffirm an existing principle of international law." U.N. Doc. E/CN.4/SR/931, p. 6.

<sup>31</sup> In this regard see the statement by the representative of the Ukrainian S.S.R. U.N. Doc. E/CN.4/873, p. 10.

<sup>32</sup> The representative of Sweden noted that the main authors of these instruments had been countries whose legislation made no provision for statutory limitation. See U.N. Doc. E/CN.4/SR/873, p. 12.

<sup>33</sup> See U.N. Doc. E/CN.4/SR/875, p. 16, for the statement by the representative of Czechoslovakia.

<sup>34</sup> These states included Austria, France, The Netherlands, Philippines and Sweden. See U.N. Docs. E/CN.4/SR/873 and E/CN.4/SR/875.

<sup>35</sup> E.g., Professor Ermacora, the representative of Austria, noted: "The conclusion that the period of limitation did not exist in international law could not be justified on the sole ground that such period was not expressly mentioned in the relevant international instrument." U.N. Doc. E/CN.4/SR/873, p. 8.



than one interpretation.<sup>36</sup> In addition, it was pointed out<sup>37</sup> that limitations on state sovereignty could not be presumed but should be expressly stated in international law. On that basis, the international agreements on war criminals, which did not refer to the question of prescription for such offenses, should be regarded as leaving each state free to adopt any law or develop any policy which it deemed equitable in the matter. In the absence of any stipulation to the contrary, the question of the applicability of prescription to war crimes and crimes against humanity was a matter of domestic jurisdiction in conformity with Article 2, paragraph 7, of the United Nations Charter.

Two states<sup>38</sup> observed that prescription could not be advanced as a general principle of law recognized by civilized nations, because it was totally absent from various legal systems,<sup>39</sup> and even those states that did embody the principle of prescription in their laws hedged it with various restrictions and limitations.<sup>40</sup>

#### *Statutory Limitation in Municipal Penal Law*

Statutory limitation is provided for in the laws of many countries and in those countries applies to most crimes.<sup>41</sup> The application of any term or limitation to the prosecution of a crime is founded on a basic rule of evidence that, with the passage of time, discovery of the truth becomes increasingly difficult. Prescription operates as a form of protection for accused persons from prosecution and the necessity of furnishing proof or locating witnesses long after the alleged event. "With the passage of time, evidence disintegrates, testimony by witnesses becomes more difficult or even impossible, the traces of the offense are lost, other means of proof disappear,"<sup>42</sup> and the possibility of ensuring a fair trial becomes more remote.

In municipal law, statutory limitation providing a bar to prosecution for a criminal offense is "neither a general rule nor an absolute rule"<sup>43</sup> and, under the Anglo-American legal system, unless there is a specific statutory exception, a criminal act may be the basis of a prosecution at any time

<sup>36</sup> The representative of The Netherlands said: "There was no international codification and no unambiguous answer to the question whether international law, as it currently existed, recognized a period of limitation for war crimes and crimes against humanity," in quoting from a statement of the Co-ordinating Board of Jewish Organizations (U.N. Doc. E/CN/NGO/133). U.N. Doc. E/CN.4/SR/873, p. 7.

<sup>37</sup> By Professor Ermacora, See note 35 above.

<sup>38</sup> Austria and the Philippines. See U.N. Doc. E/CN.4/SR/873, pp. 8 and 15.

<sup>39</sup> E.g., in the United Kingdom and in most Commonwealth countries. See below.

<sup>40</sup> See U.N. Doc. E/CN.4/SR/873, p. 15, for the statement by the representative of the Philippines.

<sup>41</sup> For an excellent description of the various purposes of statutory limitation, see H. Mouzzami, *La prescription de l'action publique en droit français et en droit suisse, Etude de droit Comparé* (Montreux, 1952).

<sup>42</sup> See U.N. Doc. E/CN.4/906, p. 91, quoted from *ibid.*

<sup>43</sup> See U.N. Doc. E/CN.4/SR/943, p. 6, for the statement by Professor Jean Graven, representing the International Penal Law Association.

after its commission.<sup>44</sup> In contrast, civil law countries generally impose a time limitation on the prosecution of crimes,<sup>45</sup> and the rules governing statutory limitation are closely correlated with those governing penalties. Where the penalty is less, the period of statutory limitation is correspondingly shorter.<sup>46</sup>

Despite the widespread application of statutory limitation in civil law countries, prescription has been the subject of considerable criticism.<sup>47</sup> Many commentators<sup>48</sup> have expressed their opposition to it, and, as Professor Graven notes:

Statutory limitation with respect to criminal offenses is not an essential right of the individual, much less of the accused, or even convicted criminal. It is not a requirement of justice itself, generally recognized in the institutions of civilized peoples, it is a practice of expediency which has only quite recently become a rule which, furthermore, has not been accepted in some important legal systems, and which is still disputed or criticized in those systems which have adopted it.<sup>49</sup>

#### *Municipal Statutory Limitation and International Crimes*

Because of the exceptional and extraordinary nature of war crimes and crimes against humanity, several states have adopted special legislation to ensure that prescription does not apply or may be set aside in the case of those crimes. Austria, Bulgaria, China, Czechoslovakia, Denmark, France, Hungary, Israel, Poland and the Soviet Union have all adopted such legislation.<sup>50</sup>

War crimes and crimes against humanity can in no way be equated with crimes under municipal law. The crimes of the Nazis were committed on a scale and with such conscious, deliberate cruelty that the very foundations of civilization were threatened. As the International Military Tribunal at Nürnberg stated in its verdict:

<sup>44</sup> See 2 Stephen, *History of the Criminal Law of England* 1, 2 (1883); Note, "The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution," 102 U. of Penn. Law Rev. 630 (1954).

<sup>45</sup> See report of the Secretary General on measures taken by governments to prevent the application of statutory limitation to war crimes and crimes against humanity. U.N. Doc. E/CN.4/927 and Add. 1-6.

<sup>46</sup> U.N. Doc. E/CN.4/SR/943, p. 9. See also Note, "A Time Limit for Prosecution of War Crimes?", 14 Int. & Comp. Law Q. 627, 628 (1965). "The term is set when, through the passage of time—juridically the length of the interval is made to depend upon the gravity of the crime—the injuries inflicted upon the community by the crime are healed and the act itself has ceased to imperil the life of the community."

<sup>47</sup> See, generally, J. Graven, "Les crimes contre l'humanité peuvent-ils bénéficier de la prescription?", 81 *Revue pénale suisse* 113 (1965); J.-B. Herzog, "Etude des lois concernant la prescription des crimes contre l'humanité," [1965] *Revue de Science criminelle et de Droit pénal comparé* 337; S. Glaser, "Quelques observations sur la prescription en matière de criminalité de guerre," 45 *Revue de Droit pénal et de Criminologie* 511 (1964-65); G. Levasseur, "Les crimes contre l'humanité et le problème de leur prescription," 93 *Journal du Droit. Int.* 259 (1966).

<sup>48</sup> E.g., Beccaria, Bentham, Garafallo, Henke and Graven. See U.N. Doc. E/CN.4/906, pp. 84-87, for a summary of their views on this subject.

<sup>49</sup> J. Graven, *loc. cit.*, note 47 above, at 132.

<sup>50</sup> For details of this legislation see U.N. Doc. E/CN.4/906, pp. 53-82.

The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the high seas, and were attended by every conceivable circumstance of cruelty and horror.<sup>51</sup>

## II. *The Definition of War Crimes and Crimes against Humanity*

As Article I was widely regarded by states as being the keystone to the entire convention, much of the preparatory drafting and debate concerned the definitions contained in the first article. In discussing and formulating those terms, debate principally centered on the purposes of the definitions and the form and scope of the words used.

Many states<sup>52</sup> were of the opinion that it was not the purpose of the convention to attempt to redefine war crimes or crimes against humanity. That task, they believed, should be left to the Sixth (Legal) Committee or to some special body composed of international law experts. In their view it was a project which called for more thorough study and evaluation. Both Italy<sup>53</sup> and France<sup>54</sup> were of the opinion that the convention should be limited in purpose to articulating the principle that prosecution and punishment of certain crimes which were considered important would have no statutory limitation, and that it should not define specific types of crime, however useful such a definition might be.

In contrast, other states<sup>55</sup> were of the view that the convention provided an opportunity to bring up to date the definition of war crimes and crimes against humanity. They suggested that international law was not immutable and that the existing definitions of such crimes, such as those contained in the Nürnberg Charter of 1945, represented only the views of the Allied Powers at that time and that those definitions were no longer suitable for present-day needs. In order for states' prosecuting authorities to ascertain which particular crimes were considered so important that statutory limitations would never apply to them, regardless of domestic legal provisions, it was essential clearly to define those crimes.

### *War Crimes*

Article I (a) defines war crimes by referring to the definition of those crimes contained in several international instruments. The first of these references is to war crimes as they are defined in Article 6 (b) of the Charter of the International Military Tribunal of Nürnberg of August 8, 1945, which reads:

(b) *War Crimes*: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder

<sup>51</sup> See *Nazi Conspiracy and Aggression: Opinion and Judgment* 56 (1947).

<sup>52</sup> E.g., the United States, Belgium, France and New Zealand. See U.N. Doc. A/C.3/SR/1565, pp. 3, 9, 10 and 45.

<sup>53</sup> See *ibid.*, p. 10.

<sup>54</sup> *Ibid.*, p. 5.

<sup>55</sup> E.g., see the statements of Dahomey in particular, U.N. Doc. A/C.3/SR/1567, p. 8; and Iraq, Doc. A/C.3/SR/1565, p. 7; Syria, *ibid.*, p. 4; and Morocco, *ibid.*, p. 9.

of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The definition of war crimes contained in the Nürnberg Charter was generally regarded as being satisfactory to most states, as that definition included such crimes as "murder, ill treatment or deportation to slave labor" and the "killing of hostages." Criticism was voiced<sup>56</sup> that there was no reference to "crimes against peace" in the draft convention, despite the fact that a war of aggression had always caused and preceded the commission of other crimes.

The inclusion of the phrase "plunder of public or private property" was questioned<sup>57</sup> as not being sufficiently serious to warrant exemption from statutory limitation. For instance, it was doubted whether a soldier who stole a chicken was committing a war crime.<sup>58</sup> If the definition of the Nürnberg Charter were used, such a theft might be regarded as imprescriptible as being within the scope of plunder of private property. But by unreservedly incorporating the Nürnberg definition of war crimes, the convention applies not only to war crimes against life and the person, but also to those against property. It was pointed out<sup>59</sup> that "some crimes against property took on, through their effect, the preparation of war crimes; for example, the mass destruction of harvests, forests, the cutting off of water supplies and poisoning wells." These crimes "could hardly be equated with looting and destruction perpetrated by individual members of the armed forces."

Article I also refers to two resolutions adopted by the General Assembly in 1946, which confirm the definition of war crimes in the Nürnberg Charter. Resolution 3 (I) of February 13, 1946, took note of (1) the Declarations of St. James (1942) and Moscow (1943), (2) the laws and usages of warfare established by the Fourth Hague Convention of 1907, and (3) the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal at Nürnberg. In that resolution, the General Assembly called upon all states to apprehend war criminals and to turn them over to the countries where the crimes were committed. Resolution 95 (I) of December 11, 1946, affirmed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal . . ."

The inclusion of these General Assembly resolutions in Article I was supported by many states on the ground that the punishment of war criminals had been established as one of the aims of the Allied war effort. That aim was reaffirmed in the Charter of the Nürnberg Tribunal. The General Assembly had also confirmed the international responsibility of those guilty of war crimes and crimes against humanity by Resolutions 3 (I) and 95 (I). However, objection was voiced to the inclusion of these resolutions as they

<sup>56</sup> By Cuba, U.N. Doc. A/C.3/SR/1565, pp. 2, 3.

<sup>57</sup> By Cyprus, U.N. Doc. A/C.3/SR/1566, p. 2.

<sup>58</sup> By Italy, U.N. Doc. A/C.3/SR/1569, p. 4.

<sup>59</sup> By France, U.N. Doc. E/CN.4/SR/921, p. 5.

"could not be regarded as sources of international law, for they had no mandatory force."<sup>60</sup> It was also pointed out that Resolution 95 (I) "did not have any bearing on the validity of legal foundations, for the Assembly's resolutions could not change principles of law, whether national or international. Furthermore, the composition of the United Nations at that time was both quantitatively and qualitatively much different from its present composition."<sup>61</sup>

To those states critical of the terminology used in Article I, the word "particularly" in the context of "particularly the grave breaches" enumerated in the Geneva Conventions of 1949, was regarded as being objectionable. Chile proposed to substitute "including" for "particularly," since "it could be inferred that the crimes mentioned earlier (in the article) were less deserving of punishment." Cuba said that the word "particularly" appeared "to create a hierarchy among the different texts referred to which is incomprehensible, since they must all be equally important and binding." The Chilean amendment, when voted upon, was rejected by 13 votes to 13, with 67 abstentions.

### *The Gravity of War Crimes*

The question of the gravity and scope<sup>62</sup> of war crimes was raised by delegates when they considered "the grave breaches" enumerated in the four Geneva Conventions of August 12, 1949, for the Protection of War Victims.<sup>63</sup> In general, the "grave breaches" provision of Article I of the 1968 Convention incorporates the concept found in Article 50 of the first of these conventions which, with variations, also appears in the other conventions (Articles 51, 130 and 147, respectively).

Under Article 147 of the Geneva Civilians Convention, "extensive damage and appropriation of property" are a "grave breach" of that convention. Several delegates<sup>64</sup> questioned why certain offenses against property included in the definition of war crimes should be considered of such grav-

<sup>60</sup> By France, U.N. Doc. A/C.3/SR/1548, p. 478.

<sup>61</sup> By Cyprus, U.N. Doc. A/C.3/SR/1516, p. 271.

<sup>62</sup> A considerable widening of the scope of the convention was proposed by the representative of Saudi Arabia who said the convention should include provisions enabling persons accused of such crimes to be tried by a tribunal composed of independent judges. The crimes committed by the defeated states, and the right of asylum of persons accused of war crimes and crimes against humanity would not be prejudiced where the charge against them was open to substantial doubt. In the opinion of most delegates, these suggestions were beyond the scope of the convention and were included in a proposed optional protocol to the convention.

<sup>63</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S., No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S., No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S., No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S., No. 3365, 75 U.N.T.S. 287.

<sup>64</sup> E.g., the representatives of Israel and the Philippines. See U.N. Doc. E/CN.4/SR/919, pp. 11, 16.

ity as to be exempt from statutory limitation while more serious crimes at the national level were subject to limitation. Because of the almost unlimited scope of the crimes to be covered by the convention, the United States submitted an amendment<sup>65</sup> calling for the inclusion of the words "to the extent that they are of a grave nature." This qualification met with opposition from many states<sup>66</sup> whose delegates believed that the amendment would create far too restrictive a definition and who feared that if the scope of Article I were limited to certain crimes regarded as "grave," the convention might lose much of its deterrent effect. The amendment to introduce the criterion of gravity was rejected by the Third Committee by 23 votes to 27, with 44 abstentions.

### III. *The Question of Non-Retroactivity in Criminal Law*

The problem of the retroactive effect of the convention presented considerable difficulty to some states. These states were of the opinion that, by providing that the crimes covered by the convention "shall be prosecuted and punished irrespective of the date of their commission," states parties would be obliged to prosecute and punish those crimes in respect of which the period of statutory limitation had expired at the time of ratification of the convention. Such an obligation would not be acceptable to them, as it would be contrary to the principle of non-retroactivity of criminal law which was embodied in the constitutions of their countries.<sup>67</sup> When Norway introduced an amendment<sup>68</sup> to delete the words "irrespective of the date of their commission" from the introductory sentence of Article I, it was strenuously opposed on the grounds that it would make the convention self-contradictory and that it was incumbent upon those states concerned with the problem of retroactivity to take appropriate steps in view of the exceptional and particularly heinous nature of the crimes under consideration.

#### *Crimes Against Humanity*

Article I (b) deals with crimes against humanity, as set out above.<sup>69</sup> In order to define crimes against humanity,<sup>70</sup> two methods of definition are employed in Article I (b). The first, as in the case of defining war crimes, was to identify those offenses by reference to previously adopted interna-

<sup>65</sup> On behalf of France, Mexico, The Netherlands and the United States.

<sup>66</sup> The strongest opponents of the four-Power proposal were Bulgaria, India, Poland and the Ukrainian S.S.R.

<sup>67</sup> The representative of Honduras said that in his country "no crime was exempt from statutory limitation and no law had retroactive effect except in criminal matters when it introduced a change in favour of the accused." U.N. Doc. A/C.3/SR/1568, p. 8.

<sup>68</sup> U.N. Doc. A/C.3/L/1563. This Norwegian amendment was subsequently withdrawn.

<sup>69</sup> See p. 481.

<sup>70</sup> As to crimes against humanity, see E. Schwebel, "Crimes against Humanity," 23 Brit. Yr. Bk. Int. Law 178 (1946); J. Graven, "Les crimes contre l'humanité," 76 Hague Academy, Recueil des Cours 433 (1950); E. Aronéanu, "Le Crime contre l'humanité," 13 Nouvelle Revue de Droit International Privé 369 (1946).

tional instruments; that is, such crimes "as they are defined in the Charter of the International Military Tribunal of Nuremberg" and "the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide." The second method employed was to list specific offenses as crimes against humanity.

Under Article 6 (c) of the Nuremberg Charter, crimes against humanity are defined as:

. . . murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

While this enumeration of inhuman acts as crimes against humanity encompasses a wide variety of crimes that could be "directed against the essential attributes of human beings,"<sup>71</sup> it has three significant restrictions. First, the crimes must have been committed "either before or during the war";<sup>72</sup> second, those crimes must have been "committed against any civilian population"; and third, they were punishable only if they were committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal." The scope of the jurisdiction of the Tribunal was limited to trying and punishing persons who committed: (a) crimes against peace,<sup>73</sup> (b) war crimes,<sup>74</sup> and (c) crimes against humanity.<sup>75</sup> Thus for the offenses listed as crimes against humanity to come within the jurisdiction of the Tribunal, it was essential that they be connected with crimes against peace or war crimes.

### *The Crime of Genocide*

The second international instrument referred to by Article I (b) is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article II of that convention defines the crime of genocide as:

. . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<sup>71</sup> Consultative Assembly of the Council of Europe, Report on Statutory Limitation as Applicable to Crimes Against Humanity (Rapporteur: Mr. Pierson), Doc. 1968, p. 12.

<sup>72</sup> The Convention on the Prevention and Punishment of Genocide, Art. I, also provides that this crime "whether committed in time of peace or in time of war, is a crime under international law, which the 'Contracting Parties' undertake to prevent and punish."

<sup>73</sup> Charter of the International Military Tribunal of Nuremberg, Art. 6 (a).

<sup>74</sup> *Ibid.*, par. (b).

<sup>75</sup> *Ibid.*, par. (c).

The Genocide Convention provides that genocide is an international crime, whether committed in peace or in war, and applies to both public officials and private citizens.

*Eviction by Armed Attack or Occupation*

The first of the inhuman acts particularized by Article I (b) as a crime against humanity is "eviction by armed attack or occupation." This phrase was originally included in the draft convention prepared by the Joint Working Group following the proposals of the representatives of the United Arab Republic and Lebanon.<sup>76</sup> The Arab states were especially concerned to include in the convention a reference to the crimes against humanity which they said had occurred as a result of the occupation of Arab territories in the Middle East by Israel.<sup>77</sup> Its inclusion was strongly approved by many representatives "as covering some of the most evil crimes against humanity which were being committed at present."<sup>78</sup>

Several states<sup>79</sup> objected to the listing of examples of crimes, which could not be regarded as exhaustive. The term "eviction" was also criticized<sup>80</sup> as introducing new and imprecise elements. "Even if the term was understood in the sense of dispossession or expropriation, or even occupation, it could hardly be maintained that it constituted a crime against humanity no matter what its form or the attendant circumstances."

While the political motivation for including these crimes is evident, it would appear that the framers of the convention overlooked an important legal consideration in drafting this paragraph. "Eviction by armed attack or occupation" is a war crime under present international law, and recourse to the concept of crimes against humanity only weakens that law. Both the Charter of the International Military Tribunal of Nürnberg and the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War make provision for those crimes. Article 6 (b) of the Charter of the Nürnberg Tribunal provides that war crimes include "... deportation

<sup>76</sup> See U.N. Doc. A/C.3/L/1503, p. 7.

<sup>77</sup> E.g., the representative of Iraq said: "... they included violations of the laws and conventions of war, in particular the use of napalm, which had inflicted horrible burns on Syrian soldiers and peasants during the recent military operations, the murder and deportation of civilians, the pillaging of public and private property, the destruction of towns and villages and other inhuman acts of terrorism, and they should feature in the list in Article I. They were crimes which had characterized the history of Israel and ranged from the expulsion and genocide of the Palestine Arabs to the butchery which had time and again steeped the region in blood." U.N. Doc. A/C.3/SR/1523, p. 319.

<sup>78</sup> See U.N. Doc. A/6813, p. 16, par. 25, for the statement of the representative of the United Arab Republic.

<sup>79</sup> France, U.N. Doc. A/C.3/SR/1565, pp. 4-5, and Madagascar. See Doc. A/7174/Add.2, p. 2. "... Article I (b) of the draft gives a vague definition of 'crimes against humanity,' followed by an enumeration which is indicative, not limitative. The wording is not based on a sound conception of law and does not meet the imperative need, recognized in all democratic countries, to define crimes—especially crimes of such a grave nature—in the light of strict and objective constitutive factors."

<sup>80</sup> France, *loc. cit.* note 79 above.



to slave labor or for any other purpose of civilian population of or in occupied territory." The "grave breaches" contained in Article 147 of the Geneva Civilians Convention include "unlawful deportation or transfer or unlawful confinement of a protected person . . ."

*Inhuman Acts Resulting from the Policy of Apartheid*

Article I (b) also refers to "inhuman acts resulting from the policy of *apartheid*." The inclusion of this phrase was the subject of prolonged debate. Although the intention of the original sponsors was to adopt an international convention that applied only to the crimes arising from the Second World War, the convention was expanded at the insistence of the African-Asian states<sup>81</sup> to include what they considered were recent manifestations of crimes against humanity. Representatives of the African-Asian bloc expressed the opinion that international law was not immutable and the convention should be directed not only to events of the past but also to those of the present and the future. Accordingly, they considered it essential that the inhuman acts which resulted from the policies of *apartheid* and the violations of the economic and political rights of indigenous populations should be specifically proscribed in the convention. *Apartheid* and colonialism were of particular significance to those representatives and were regarded as being "equally as serious crimes as nazism."<sup>82</sup>

The East European states also strongly supported the introduction of the term *apartheid* in the text of the convention, and the voting alliance that was formed between the African, Asian and the Socialist states assured the inclusion of this concept. A four-Power proposal<sup>83</sup> deleting all reference to the "policy of *apartheid*" was supported by several states<sup>84</sup> that considered it undesirable for the convention, as a legal text, to contain elements of an essentially political nature. The wording of Article I (b) was also objected to<sup>85</sup> as being "extremely vague and imprecise." Many East European states<sup>86</sup> voiced strong opposition to the four-Power amendment and supported a specific reference to *apartheid* among the crimes against humanity. They were of the view that there was no ground

<sup>81</sup> See U.N. Doc. A/C.3/SR/1548, p. 479, for the statement of the representative of Tanzania: "he must in all sincerity mention the fact of his neutrality towards the part dealing with crimes committed by Europeans against Europeans during the Second World War. On the other hand, he regarded it as particularly important to include among crimes against humanity certain things that were now happening in countries like South Africa, Southern Rhodesia and the Portuguese Territories of Africa."

<sup>82</sup> See U.N. Doc. A/C.3/SR/1547, p. 473, for the statement of the representative of Somalia.

<sup>83</sup> U.N. Doc. A/C.3/L/1561, par. 2.

<sup>84</sup> E.g., New Zealand and France. See U.N. Docs. A/C.3/SR/1568, p. 4, and A/C.3/SR/1565, p. 5.

<sup>85</sup> By Norway, Doc. A/C.3/SR/1565, p. 7.

<sup>86</sup> For the statements made, in turn, by the U.S.S.R., the Ukrainian S.S.R., Byelorussian S.S.R., and Poland, see U.N. Docs. A/C.3/SR/1566, p. 6; A/C.3/SR/1565, p. 8; A/C.3/SR/1567, pp. 8, and 2, respectively.

for opposing the explicit mention of *apartheid* as a crime against humanity and that its deletion would seriously weaken the text.

African delegates unreservedly supported the specific inclusion of the term *apartheid* in the definition of crimes against humanity. That reference, in their view,<sup>87</sup> was by no means superfluous nor was it outside the scope of the draft convention. *Apartheid* was definitely a crime against humanity. Accordingly, whatever might be the legal arguments advanced in favor of deleting references to that policy, those delegations were determined that it should be retained.

### *Inhuman Acts*

The expression "inhuman acts" in Article I (b) was regarded by some delegations<sup>88</sup> as being very vague, and it was suggested that if this idea could not be defined explicitly, it had no place in a juridical instrument.<sup>89</sup> "Either it adds nothing to the previous reference to inhuman acts, in which case it is unnecessary, or it adds something and implies that inhuman acts committed in consequence of a policy of *apartheid* are worse than an identical act committed elsewhere, in which case it is objectionable in principle."<sup>90</sup> The suggestion that this phrase should be deleted was supported<sup>91</sup> on the grounds that it would avoid introducing a political judgment into a text which should remain strictly legal and that the convention declared that all crimes against humanity lacked the protection of statutory limitation, regardless of the political, racial, or social doctrine that gave rise to them.

### *War Crimes as Defined in International Law*

As indicated, many states were dissatisfied with the form of words used in paragraph (b) of Article I.<sup>92</sup> A sweeping change in the wording of that paragraph was submitted by the United Kingdom when it proposed that the entire first article should be replaced by the following provision:

No statutory limitation shall apply to war crimes of a grave nature and crimes against humanity as defined in international law, irrespective of the date of their commission.

The United Kingdom later revised<sup>93</sup> its amendment to leave the introductory sentence of Article I intact and to replace paragraphs (a) and (b) by: "War crimes of a grave nature and crimes against humanity as defined in international law." In proposing this change, the United Kingdom said

<sup>87</sup> See the statement by Mali, U.N. Doc. A/C.3/SR/1565, p. 11.

<sup>88</sup> By the United Kingdom, Chile and France.

<sup>89</sup> See U.N. Doc. A/C.3/SR/1564, p. 2, for a statement by the United Kingdom.

<sup>90</sup> See U.N. Doc. A/7174/Add. 1, pp. 2, 3, for the comments of the United Kingdom Government on the draft convention prepared by the Joint Working Group.

<sup>91</sup> By Chile, see U.N. Doc. A/7174, p. 10.

<sup>92</sup> In addition to the amendments mentioned above, Pakistan proposed an amendment (U.N. Doc. A/C.3/L/1560) to par. (b) of Art. I, to add the words "or on religious grounds" after "armed attack or occupation." The amendment was later withdrawn.

<sup>93</sup> U.N. Doc. A/C.3/L/1564/Rev. 1.

it "would like to see the first article replaced by wording of a general nature, which would not hinder the progressive development of international law and would not exclude the possibility of new crimes being considered crimes against humanity, at some future date . . ." <sup>94</sup> "Accordingly, in order to make provision for the future, it was best to adopt a flexible definition of war crimes and crimes against humanity which could be readily applied by all States and which did not exclude the possibility of including other crimes among crimes against humanity, such as those resulting from the policy of *apartheid*." <sup>95</sup> This amendment was supported by several states <sup>96</sup> which preferred a somewhat less detailed enumeration of crimes against humanity, "as excessive itemization might open the way to abuses, legal sophisms and contradictory interpretations."

The majority of states rejected the United Kingdom proposal. The Soviet Union noted that, "since the principles of international law were subject to different interpretations by the various delegations, it was essential to specify which crimes were meant." <sup>97</sup> Kenya stated that "it was not sufficient to refer to international law in defining the crimes in question since that law which had been formulated in the past by the developed countries, did not take into account the present day realities which were of the highest importance for the young countries." <sup>98</sup>

#### *Effect of Domestic Law on the Convention*

The concluding phrase, "even if such acts do not constitute a violation of the domestic law of the country in which they were committed," was added to Article I at the suggestion of Chile "in order to make it clear that, in that field also, the State authorities responsible could not plead exception by invoking the provisions of their internal legislation." <sup>99</sup>

The International Law Commission, which was directed by the General Assembly <sup>100</sup> to (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and (b) prepare a draft code of offenses against the peace and security of mankind, indicating clearly the place to be accorded to those principles, noted "the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." <sup>101</sup> The International Law Commission observed "that the fact that a person is subject to punishment for an international crime what-

<sup>94</sup> U.N. Doc. A/C.3/SR/1564, pp. 2-3.

<sup>95</sup> U.N. Doc. A/C.3/SR/1566, p. 2.

<sup>96</sup> Those states included Italy, Israel and the United States, U.N. Doc. A/C.3/SR/1565, p. 10.

<sup>97</sup> U.N. Doc. A/C.3/SR/1566, p. 5.

<sup>98</sup> U.N. Doc. A/C.3/SR/1566, p. 3.

<sup>99</sup> U.N. Doc. A/C.3/SR/1563, p. 8. This proposal was adopted by a vote of 30 in favor, with 2 against, and 57 abstentions.

<sup>100</sup> By Res. 177 (II) of Nov. 21, 1947.

<sup>101</sup> Principle II of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, prepared by the International Law Commission. See 1950 I.L.C. Yearbook (II), Doc. A/1316, p. 374.

ever may be the state of municipal law is merely a reflection of the supremacy of international law over municipal law."

## ARTICLE II

If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

The present wording of this article was proposed by the representative of Chile to replace the Article II prepared by the Joint Working Group.<sup>102</sup> The Chilean delegate noted that "the present wording of Article II did not establish clearly the kinds of participation in the crimes defined in Article I, nor the degree of completion of crimes," and he felt that those aspects should be clearly stated.<sup>103</sup>

The convention applies to all individuals whether acting in their private capacity or as representatives of the state authority. Individual responsibility is also extended to state representatives who need not be actively involved in any of the crimes mentioned, but who passively tolerate the commission of such crimes. Inaction, as distinct from active involvement, on the part of state authorities in not preventing the commission of international crimes is sufficient to bring those persons within the ambit of the convention.

The expression "representative of the State authority" was regarded by both France<sup>104</sup> and the Philippines<sup>105</sup> as an imprecise term, and they suggested<sup>103</sup> that the Chilean amendment should also include a clear statement of the responsibility of private individuals who, contrary to the express will of the representatives of the state authority, committed any of the crimes referred to in the convention.

Every degree of accomplishment of a crime is included within the convention's catch-all phrase, "irrespective of the degree of completion." The convention accordingly applies to all degrees of commission of crime, ranging from conspiracy through attempt and frustrated attempt to the completed crime.

## ARTICLE III

Article III of the convention obliges the parties to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons

<sup>102</sup> Art. II prepared by the Joint Working Group read as follows: "If any of the crimes mentioned in Article I is committed the provisions of this Convention shall also apply to complicity in such crime and to direct incitement or conspiracy to commit it."

<sup>103</sup> See U.N. Doc. A/C.3/SR/1569, p. 7.

<sup>104</sup> See U.N. Doc. A/C.3/SR/1570, p. 7.

<sup>105</sup> *Ibid.*, p. 7.

<sup>106</sup> *Ibid.*, p. 5.

referred to in Article II of the convention. This article squarely confronts the multiple issues concerned with the extradition of international criminals.<sup>107</sup> In the final analysis, the effectiveness of the convention depends on the real and practical possibility of bringing accused or condemned persons within the jurisdiction of the authorities competent to try them or enforce their sentences.<sup>108</sup> Nevertheless, several delegations expressed doubts on the appropriateness and wording of this provision.<sup>109</sup> India opposed the inclusion of the article and stated that "extradition was a bilateral procedure, and should not, therefore, be mentioned in the international Convention. Its inclusion would force the signatory States to conclude bilateral treaties among themselves or to revise existing treaties . . . In the view of India, the provisions relating to extradition should appear in an optional protocol."<sup>110</sup>

Article III was adopted by 20 votes to 12, with 64 abstentions. No obligation to extradite is imposed by the convention on states parties. Under Article III the decision to extradite is left to each particular state. All it calls upon states parties to do is to make their legislation or administrative practice such as to permit extradition.

#### ARTICLE IV

Article IV provides for the implementation of the convention in domestic law. In becoming a party to the convention, a state undertakes to ensure that the principle of the non-applicability of statutory limitation to the crimes mentioned in Article I is given effect in its national legislation. That undertaking would also extend to legislation applying to all the acts of commission and participation, mentioned in Article II, as not being subject to statutory limitation. Where national legislation provides for the application of statutory limitation to such crimes, Article IV imposes the obligation upon states parties to enact appropriate legislation or to take other measures to abolish all legal obstacles which might impede, or be invoked as impeding, the application of the principle of the non-applicability of statutory limitations, once that principle had been incorporated in national law.<sup>111</sup>

As some states,<sup>112</sup> including West Germany,<sup>113</sup> distinguish between the barring of prosecution due to time limitation and the barring of execution of final sentences owing to time limitation, the convention provides for that distinction. Article IV accordingly obliges parties to ensure that

<sup>107</sup> See, generally, R. G. Neumann, "Neutral States and the Extradition of War Criminals," 45 A.J.I.L. 495 (1951); M. R. García-Mora, "Crimes Against Humanity and the Principle of Nonextradition of Political Offenders," 62 Michigan Law Rev. 927 (1964).

<sup>108</sup> See statement by Chile on the draft convention prepared by the Joint Working Group, U.N. Doc. A/7174, p. 11.

<sup>109</sup> U.N. Doc. A/7342, p. 15.

<sup>110</sup> U.N. Doc. A/C.3/SR/1570, p. 6.

<sup>111</sup> See U.N. Doc. E/CN.4/928, p. 14, for commentary on the preliminary draft convention prepared by the Secretary General.

<sup>112</sup> See U.N. Doc. E/CN.4/906, pp. 63-62.

<sup>113</sup> *Ibid.*, p. 73.

statutory limitation does not apply to the prosecution and the punishment of the crimes referred to in Articles I and II.

Criticism of Article IV was expressed by the United States, whose representative said it "might require a State which became party to the Convention to abolish statutory limitations for offenses on which the period of criminal liability had already expired . . . that provision . . . would thus have retroactive effect in reactivating penal liability already extinguished by operation of law."<sup>114</sup>

A heated debate was sparked by the proposal of Norway<sup>115</sup> to include a new article after Article III. This article would not oblige states parties to prosecute and punish those crimes as to which the period of limitation had expired at the time of ratification of the convention. This proposed new article would have read:

Nothing in this Convention shall be construed as imposing any obligation on a Contracting Party in respect of crimes to which prescription had already applied prior to the adoption of this Convention by the General Assembly of the United Nations.

In proposing this amendment, the representative of Norway<sup>116</sup> said that the new article would facilitate acceptance of the convention by states in which the statute of limitations had already run. He went on to state that "this amendment did not attempt to justify nor pardon war crimes since the Norwegian people could never forgive nor forget the atrocities they had suffered during the Second World War. However, his delegation was concerned because the Norwegian Constitution prohibited the retroactivity of laws . . ."<sup>117</sup>

Many representatives substantially reiterated the arguments which they had adduced with regard to the principle of non-retroactivity in criminal law during the debate on Article I.<sup>118</sup> Support for the Norwegian proposal came from several Western states<sup>119</sup> whose representatives indicated that their respective Constitutions affirmed the principle of non-retroactivity of penal law and that their countries could not subscribe to a convention which, in their view, "would be tantamount to a request to governments to promulgate retroactive penal laws."<sup>120</sup> African-Asian<sup>121</sup> and East European states<sup>122</sup> categorically objected to the Norwegian amendment.

<sup>114</sup> U.N. Doc. A/PV/1737, p. 48.

<sup>115</sup> See U.N. Doc. A/C.3/SR/1567, p. 3.

<sup>116</sup> *Ibid.*, p. 7.

<sup>117</sup> The Norwegian representative indicated that his government had taken steps to exclude various serious crimes committed during the last two years of the Second World War from the principle of statutory limitation. See U.N. Doc. A/C.3/SR/1567, p. 3.

<sup>118</sup> See U.N. Doc. A/7174, p. 19.

<sup>119</sup> E.g., Belgium, Denmark, Greece, Italy and Sweden. For their statements on this proposal, see U.N. Docs. A/C.3/SR/1563 and A/C.3/SR/1571.

<sup>120</sup> See statement by Sweden, U.N. Doc. A/C.3/SR/1571, p. 3.

<sup>121</sup> E.g., the Sudan and Dahomey. See statements made by them in U.N. Doc. A/C.3/SR/1571.

<sup>122</sup> E.g., the Ukrainian S.S.R., U.S.S.R., Poland and Byelorussian S.S.R. all expressed their opposition to this amendment. See U.N. Doc. A/C.3/SR/1571.

Several of these delegates argued that the proposed new article was incompatible with Articles I and IV which had already been adopted. Article IV, it was pointed out, called upon states to abolish all relevant statutory time limits.

The East European states indicated that acceptance of the Norwegian amendment would make it possible for the undetected Nazi criminals and the perpetrators of crimes resulting from *apartheid* to escape punishment, and they urged the Committee not to adopt any provision which limited the scope of Article III. After Mr. Stavropoulos, the Legal Counsel, had expressed the view that there was no incompatibility in the articles in question, the Norwegian amendment was rejected by a vote of 40 to 18, with 33 abstentions.

#### PREAMBLE

After the completion of voting on the substantive articles, the Third Committee considered the Preamble of the draft convention. The Preamble articulates the spirit and purpose of the convention and outlines its legal, moral and philosophical assumptions. With the exception of the first preambular paragraph, the wording of the Preamble presented little difficulty to the Third Committee.<sup>123</sup> Nevertheless, the inclusion of references to General Assembly resolutions which considerably expanded the scope of crimes against humanity was strongly opposed by several states.

The first paragraph in the Preamble refers to five General Assembly resolutions, of which the first two—Resolutions 3 (I)<sup>124</sup> and 170 (II)<sup>125</sup>—are specifically concerned with the extradition and punishment of war criminals. The third of these resolutions—Resolution 95 (I)<sup>126</sup>—affirms the principles of international law recognized by the Charter and Judgment of the Nürnberg Tribunal. An acrimonious debate ensued following references to General Assembly Resolutions 2184 (XXI) and 2202 (XXI), which condemn certain policies of the Governments of South Africa and Portugal as crimes against humanity. In the first of these<sup>127</sup> the General Assembly condemned as a crime "the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories and by the exporting

<sup>123</sup> The Preamble was adopted by a vote of 58 to 6, with 25 abstentions.

<sup>124</sup> See pp. 486–487 above for discussion of this resolution.

<sup>125</sup> Res. 170 (II) was adopted on Oct. 31, 1947, at the Second Session of the General Assembly, and after reaffirming Res. 3 (I) continues as follows: "*Recommends* Members of the United Nations *inter alia*, which desire the surrender of alleged war criminals or traitors . . . by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable *prima facie* case exists as to identity and guilt."

<sup>126</sup> See pp. 486–487 above for discussion of this resolution.

<sup>127</sup> See General Assembly, 21st Sess., Official Records, Annexes, Agenda item 23 (A/6300/Rev.1) Ch. V, for the Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to the Territories under Portuguese Administration.

of African workers to South Africa." The first operative paragraph of General Assembly Resolution 2202 (XXI) condemned the policies of *apartheid* practiced by the Government of South Africa as a crime against humanity.

These resolutions were introduced into the draft convention prepared by the Joint Working Group, following a proposal by Tanzania,<sup>128</sup> whose representative subsequently explained<sup>129</sup> that

there could be no question but that the inhuman acts which directly flowed from the vicious, cruel, if novel, phenomenon of *apartheid* in southern Africa, embracing genocide, deportation, economic and social exploitation of the indigenous populations and their wasting away by scientific experimentation, were the contemporary manifestations of crimes against humanity.

Supporting this view were the United Arab Republic,<sup>130</sup> Czechoslovakia<sup>131</sup> and the Soviet Union, whose representative noted that the General Assembly, its Fourth (Trusteeship) Committee, and the various bodies dealing with human rights had, on more than one occasion, stated that *apartheid* was a crime against humanity. By including a reference to *apartheid* among crimes against humanity the convention would merely confirm, in his view, a principle already recognized by the United Nations.<sup>132</sup>

Once again there was a marked divergence of views, as several Western states adamantly opposed the introduction of reference to those General Assembly resolutions.<sup>133</sup> The United States<sup>134</sup> said that the draft, particularly the Preamble and Article I, lacked juridical precision. In its opinion, General Assembly Resolutions 2184 (XXI) and 2202 (XXI) should not be referred to in the Preamble, for they did not deal with the question of crimes against humanity in the legal sense, but rather implied moral and political condemnation. In the circumstances, there were no grounds for mentioning in the draft convention any other Economic and Social Council or General Assembly resolutions, as they had no legally binding force.<sup>135</sup>

When the Third Committee voted on the adoption of the Preamble, the representative of the United States requested that a separate vote be taken on the first paragraph. It was retained by 59 votes to 6, with 25 abstentions.

#### CONCLUSION

The convention is a highly political instrument,<sup>136</sup> the product of almost four years of negotiation, compromise and often bitterly contested argu-

<sup>128</sup> See U.N. Doc. A/6813, p. 4. This proposal was adopted in the Joint Working Group by 8 votes to 2, with 4 abstentions.

<sup>129</sup> See *ibid.*, p. 9, in connection with the vote on Art. I.

<sup>130</sup> See U.N. Doc. A/C.3/SR/1574, p. 473. <sup>131</sup> See *ibid.*, p. 474.

<sup>132</sup> See U.N. Doc. A/C.3/SR/1549, p. 489.

<sup>133</sup> France, for instance, maintained that "State policies could not be equated with crimes and that those resolutions were not legally binding on States." See U.N. Doc. A/C.3/SR/1548, p. 478.

<sup>134</sup> U.N. Doc. A/C.3/SR/1549, p. 484.

<sup>135</sup> The delegate of France held a similar view. See U.N. Doc. A/C.3/SR/1548, p. 478.

<sup>136</sup> For instance, the representative of Tanzania stated, "the whole convention was based on political considerations." See U.N. Doc. A/C.3/SR/1548, p. 479.



ment. Its adoption represents another step in the gradual codification and evolution of international penal law. By affirming that war crimes and crimes against humanity are beyond the reach of prescription, the convention contributes to that body of emerging penal law. The convention further adds to international penal law by expanding and up-dating previous definitions of war crimes and crimes against humanity. At the insistence of the African-Asian states, the scope of the convention was enlarged to include modern-day examples of crimes against humanity and to apply to past, present and future international crimes.

While the concept of international crimes has been enlarged, the convention also applies to individuals who might, in any way, be involved in their commission. The net of personal responsibility is flung far and wide by the convention. Individual criminals, whether as participants, accomplices, conspirators or state authorities who tolerate the commission of those international crimes, are covered by its provisions, and statutory limitation will no longer provide them with a juridical shield from prosecution or punishment.

In view of the political nature of the crimes covered by the convention, it is not surprising that the convention should have been used for political purposes. One of the most interesting aspects of the preparation of the convention, which permeated its entire legislative history, was the political motivation of some of the convention's supporters. The convention provided a vehicle for the East European states<sup>137</sup> to attack the Federal Republic of Germany, where they alleged that most of the war criminals were concentrated. Repeated criticism was expressed by those states of West Germany's position concerning the possible application of statutory limitation to international crimes committed during the Nazi period.

The representatives of Western states generally did not share the opinions of the East European countries on West Germany's treatment of war criminals. In addition, some Western delegates said that, in their view, no useful purpose would be served in launching unwarranted attacks on, and making one-sided criticisms of, any particular country.<sup>138</sup> It is significant, nevertheless, that, following the adoption of the convention, the Federal Republic of Germany amended its criminal code by abolishing statutory limitation for the crime of genocide and extending the limitation period for murder from twenty to thirty years.

While the merits and achievements of the convention are many, its universal application is, at best, in the view of the author, a very remote possibility. In the absence of any international criminal jurisdiction, war crimes and crimes against humanity are tried by national authorities. Accordingly, how states viewed the convention is of particular consequence.

<sup>137</sup> See, for example, U.N. Doc. A/PV/1727, the Provisional Verbatim Record of the General Assembly, for statements made on this issue by the following representatives: Poland, p. 8, Bulgaria, p. 21, Hungary, p. 41, and the U.S.S.R., p. 52.

<sup>138</sup> For instance, the U. S. representative said that its delegation would "resist efforts to use the present item as a pretext for politically motivated and specious attacks on a State, the Federal Republic of Germany." See U.N. Doc. A/C.3/SR/1517, p. 5.

As has been indicated, voting support for the convention was by no means overwhelming.<sup>139</sup> No Western states, including members of the anti-Nazi coalition, voted for it and only three Latin American states—Chile, Cuba and Mexico—cast affirmative votes. In substance, the positions adopted by states that abstained were little different from those of states that voted against it.<sup>140</sup> Although both of these groups of states were not unsympathetic to treating war crimes and crimes against humanity differently from crimes under national legislation,<sup>141</sup> and generally to providing for the non-applicability of statutory limitation to those crimes, they regarded the defects of the convention as being so numerous and so fundamental in character that they could not support it.

The principal criticisms of the convention were directed at Article I. By providing in that article that certain crimes, "irrespective of the date of their commission," were subject to prescription, the convention relates to crimes to which statutory limitation already applied. Failure to make allowance for those states which respect the principle of non-retroactivity in criminal law meant that those states could not become parties.

One of the guarantees of the right to a fair trial recognized by most states is that no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed.<sup>142</sup> In order for any accused person to know with which particular criminal offense he is charged, under national law clear, precise and self-contained definitions are called for. Despite the gravity of the international crimes defined in the convention, those definitions have been described by delegates as ambiguous, confusing, obscure and lacking in legal precision. The wording of the definition of crimes against humanity is a cause of particular concern. The inclusion in a legal instrument, and especially in its definitions, of considerations which are essentially political in character seriously detracts from its force, effect, and possible universal application.

In the final analysis it is difficult not to have ambivalent feelings towards the convention. There is a valid social interest in preventing the guilty from going unpunished, no matter how long after the commission of their offense. It is also absurd to punish a crime with life-long imprisonment and yet to refrain from prosecution for that offense after a certain time. Exceptional treatment should be accorded to war crimes and crimes against humanity because of their nature and gravity. Those crimes are both

<sup>139</sup> See p. 477 above. 58 states voted in favor, 7 against, with 36 abstentions.

<sup>140</sup> See U.N. Doc. A/PV/1727, for the verbatim record of speeches made by representatives of states concerning the adoption of the convention.

<sup>141</sup> See N. Lerner, "The Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity," 4 Israel Law Review 512 (1969).

<sup>142</sup> See Art. 11 (2) of the Universal Declaration of Human Rights and Art. 15 of the International Covenant on Civil and Political Rights. It should also be noted that neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the 1949 Geneva Conventions for the Protection of War Victims provide for retroactive application.

qualitatively and quantitatively different from criminal offenses under municipal law and should be treated accordingly.

Yet the convention fails to live up to the high ideals of an international humanitarian instrument. Basic human rights of accused persons are eroded by its endorsement of retroactivity, a concept hostile to most legal systems. Despite the good things accomplished by the convention, they do not balance its defects. The ultimate test of any international instrument is measured by its degree of acceptance and impact at the national and local levels. There is no prospect of universal acceptance of the convention and it is highly unlikely that when the instrument comes into force,<sup>143</sup> those states which refrained from voting for it or opposed its adoption will co-operate in its implementation.

<sup>143</sup> The convention entered into force on Nov. 11, 1970. It has been ratified by Bulgaria, Byelorussian S.S.R., Czechoslovakia, Hungary, Mongolia, Poland, Romania, Ukrainian S.S.R., the U.S.S.R., Yugoslavia, and Nigeria. 7 U.N. Monthly Chronicle 99 (No. 11, 1970); 8 *ibid.* 96 (No. 1, 1971).

## CONTEMPORARY SOVIET DOCTRINE ON THE JURIDICAL NATURE OF UNIVERSAL INTERNATIONAL ORGANIZATIONS

*By Chris Osakwe \**

Whether or not we agree with the statement that international law is nothing but "international public morality" or, what amounts to the same thing, that international law is "primitive law" as compared with its municipal counterpart, we are more likely to agree on the question that Soviet doctrinal international law<sup>1</sup> is nothing but a mirror reflection of official Soviet governmental and party policies. It is essentially a "fighting international law"<sup>2</sup> which has often proved a valuable weapon in the armory of Soviet foreign policy-makers. The zig-zag development of the Soviet doctrinal approach to the question of international personality in general, and in particular to the international legal status of international organizations, vividly demonstrates this fact. We propose to examine in greater detail just one aspect of the Soviet doctrine of international law—the concept of secondary subjects of international law.

### *International Organizations as Secondary (Derived) Subjects of International Law*

The academic debate over the juridical nature of international organizations is closely linked with the more general question of international personality in general international law. On this question there are two leading schools of thought in Soviet doctrinal international law. The first is grouped around Professor G. I. Tunkin's position that in contemporary general international law a subject of international law is not merely an entity possessing international rights and obligations, but one which also actively participates in the international law-creating proc-

\* Magistr iuridicheskikh nauk and Kandidat iuridicheskikh nauk, Moscow State University, Moscow (U.S.S.R.); currently a candidate for the S.J.D. degree in International Law at the College of Law of the University of Illinois.

<sup>1</sup> By "doctrinal Soviet international law" we mean the exposition of the theoretical foundations of contemporary international law by Soviet legal scholars based on the theory of Marxism-Leninism. In this article, however, it is not our intention to exhaust all available Soviet sources, such as the positions taken by Soviet lawyers in the International Law Commission, in the International Court of Justice, and in other international bodies. We shall subsequently base our study principally on the writings of some of the most authoritative contemporary Soviet jurists.

<sup>2</sup> This notion runs through all the works by one of the Soviet Union's most authoritative exponents of this doctrine—Professor G. I. Tunkin. See *Ideologicheskaya Bor'ba i Mezhdunarodnoe Pravo* (Moskva, 1967); "Sorok let sosushchestvovaniia i mezhdunarodnoe pravo" in *Sovetskii Ezhegodnik Mezhdunarodnogo Prava* (SEMP) (1958); *Teoriia Mezhdunarodnogo Prava* (Moskva, 1970).

esses.<sup>3</sup> According to this view, "there is no generally accepted norm which defines the legal status of all international organizations . . . At the same time international law does not contain any norm which precludes the granting of certain elements of international personality to this or that international organization. The scope of such personality shall be determined, in the case of each such organization, by the provisions of the constituent instrument."<sup>4</sup> This in effect means, as Tunkin would argue, that sovereign states no longer possess a monopoly over international personality, as the latter attribute has come to be extended to certain, but definitely not all, inter-state organizations. This point of view is shared by G. I. Morozov,<sup>5</sup> R. L. Bobrov,<sup>6</sup> E. A. Shibaeva,<sup>7</sup> and a host of others. It would be correct to say that this represents a majority opinion in Soviet doctrine today.<sup>8</sup>

It should be pointed out, however, that all G. I. Tunkin did in 1956 was to popularize an already existing point of view in Soviet doctrine. In a textbook of international law which was edited in 1946 by a veteran Soviet international lawyer, the first Soviet judge on the International Court of Justice, Professor S. B. Krylov, it was stated that international organs "cannot be placed on equal terms with states that created them, the full subjects of international law, although some of them are granted some measure of international personality."<sup>9</sup>

This position was reiterated in 1947 by Professor F. I. Kozhevnikov, the successor to S. B. Krylov on the International Court of Justice.<sup>10</sup> He asserted that "the United Nations on its own, even though it is not a subject of international law in the traditional sense of this word, is, according to its Charter, granted certain fairly general and conventional

<sup>3</sup> G. I. Tunkin, *Osnovy Sovremennogo Mezhdunarodnogo Prava* (Moskva, 1956).

<sup>4</sup> *Ibid.* at pp. 17-18. The translations from the Russian here and elsewhere are those of the author.

<sup>5</sup> See G. I. Morozov, *Organizatsiia Ob'edinennykh Natsii* at p. 198 (Moskva, 1962).

<sup>6</sup> See R. L. Bobrov, *Osnovnye problemy teorii mezhdunarodnogo prava* (Moskva, 1968); also his "Iuridicheskaia priroda Organizatsii Ob'edinennykh Natsii," in *SEMP*, 1959.

<sup>7</sup> See E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON* at p. 32 (Moskva, 1966).

<sup>8</sup> In the twilight days of the evolution of Soviet international legal doctrine Eugene B. Pashukanis and Eugene A. Korovin were engaged in a highly ideological debate over the nature, sources, and subjects of international law, with E. A. Korovin alternately holding the position that international organizations were and were not subjects of international law on the basis of reasons which were more political than legal. We do not consider it appropriate to recall the basic positions in these early debates, as they do not seem to make any significant contribution to our present analysis. However, for a textual documentation of these debates, see Hans Kelsen, *The Communist Theory of Law* (London, 1955); see also John N. Hazard, "Cleansing Soviet International Law of Anti-Marxist Theories," 32 *A.J.I.L.* 244-252 (1938).

<sup>9</sup> V. N. Durdenevskii and S. B. Krylov, *Mezhdunarodnoe Pravo—Uchebnik*, vypusk I at 31 (Moskva, 1946).

<sup>10</sup> S. B. Krylov served as the first Soviet judge on the I.C.J. from 1946 to 1952 and was briefly succeeded by S. A. Golunskii (1952-53). The latter died in office and was replaced by Professor F. I. Kozhevnikov from 1953 to 1961.

rights which enable it to operate on the international scene directly and independently."<sup>11</sup>

In the same year Professor D. B. Levin, perhaps the most prolific writer of all Soviet international legal experts,<sup>12</sup> posed the question whether international organizations can rightly be considered subjects of international law. His answer was:

Undoubtedly, they can be [so considered], if such organizations, on the basis of their constituent instruments, possess some measure of individual rights and obligations vis-à-vis states especially the right to conduct [their] external relations independently.

In his view such organizations include, in the first place, the United Nations. He sees the international personality of international organizations to be founded on the fact that these organizations promote the common interests of member states in the sphere of maintenance of international peace and security and the development of inter-state co-operation. In his opinion, these organizations "possess the right to take independent actions within the limits of these interests."<sup>13</sup>

Thus we find that the concept according to which international organizations possess some measure of international personality—today occupying a dominant position in contemporary Soviet doctrine—was first promulgated between the years 1946 and 1947, principally by S. B. Krylov, F. I. Kozhevnikov, and D. B. Levin.

Reviewing the evolution and progressive development of Soviet doctrine on the international legal status of universal international organizations, Professor R. L. Bobrov of Leningrad University recognizes the innovative nature of the contribution of these three authors during these creative years, but he openly regrets the fact that, while these authors pointed out that international organizations possess some measure of international personality, they nevertheless failed to emphasize the "derived and non-sovereign character of such personality as compared to the personality of the real subjects of international law—states."<sup>14</sup>

<sup>11</sup> F. I. Kozhevnikov, *Uchebnik Publichnogo Mezhdunarodnogo Prava* Iurizdat at 54 (Moskva, 1947).

<sup>12</sup> As of December, 1967, when he celebrated his 60th birthday, he had published over 120 scientific works on various aspects of international law, such as the responsibility of states for aggression and war crimes, problems of war and peace, the law of international organizations, the problems of diplomatic immunity. See "Personalia" on D. B. Levin in *SEMP*, 1968, at 336-337.

<sup>13</sup> See D. B. Levin, "O poniatii i sisteme sovremennogo mezhdunarodnogo prava" in *Sovetskoe Gosudarstvo i Pravo (SGP)*, 1947, No. 5 at pp. 11-12. For a current restatement of this view see his *Osnovnye problemy teorii mezhdunarodnogo prava* at 85 (Moskva, 1958).

<sup>14</sup> R. L. Bobrov, "Iuridicheskaia priroda Organizatsii Ob'edinennykh Natsii," in *SEMP*, 1959, at 233-234. R. L. Bobrov, however, concedes that credit for introducing this new element of "derived and limited personality" for international organizations goes to Professor D. B. Levin, who first made this distinction in his book, *Osnovnye problemy sovremennogo Mezhdunarodnogo prava* at 85 (Moskva, 1958).

In 1955 Professor V. N. Durdenevsky, in a Preface to the Russian edition of Labeyrie-Menahem's *Des Institutions Spécialisées—Problèmes Juridiques et Diplo-*

As if summarizing the salient points of this school of thought in contemporary Soviet doctrine, R. L. Bobrov in a most elaborate manner writes:

... the United Nations [qua international organization] is a secondary, derived (non-typical) subject of contemporary international law, created by the expressed will of sovereign states—the principal and real subjects of this law. Created as a center for the co-ordination of the actions of states in the name of peace and development of international co-operation based on democratic grounds, the UN is granted a certain measure of international personality which is essential and necessary if it is to execute its functions properly. The significant characteristics of the international legal personality of the UN are interdependent and in their totality constitute a specific legal personality which is based on legal grounds that are different from those upon which the legal personality of states is founded. The capacity of the UN is strictly limited to those powers granted under its Charter . . .<sup>15</sup>

A minority opinion on the question of international personality in general and on the juridical personality of international organizations in particular is held by Professor L. A. Modzhorian, Professor V. M. Shurshalov, and a number of other Soviet writers. This opinion, in contradistinction to that described above, grants a monopoly of international personality to sovereign states<sup>16</sup> to the complete exclusion of all international organizations, including the United Nations.

Professor L. A. Modzhorian maintains that the possession of sovereignty is a *conditio sine qua non* for any international person and that, so long as international organizations are not sovereign entities, they are *ipso facto* not subjects of international law.<sup>17</sup> In conclusion she writes that

[A] necessary attribute for any subject of international law is the capacity to be represented on the international plane by a supreme authority which is capable of participating in law-creating processes, is capable of undertaking international legal obligations and of fulfilling them, and is also capable of taking part in measures aimed at the enforcement of the observation of norms of international law by other subjects . . . All subjects of international law are sovereign and, *ipso facto*, have equal rights.<sup>18</sup>

To her mind, any attempts to grant any measure of international personality to international organizations would not only undermine state sovereignty but would also result in a fundamental "perversion of international

---

matiques de l'Administration Internationale (Paris, 1953), briefly stated that the specialized agencies of the U.N. "cannot lay claims to equal status with states as sovereign subjects of international law." See p. 5 of the Russian edition of this book published in Moscow in 1955 by Izdatel'stvo "Innostrannaia Literatura."

<sup>15</sup> R. L. Bobrov, "Iuridicheskaia priroča OON," in SEMP, 1959, at 239-240.

<sup>16</sup> The attribute of international personality is partially granted to what is vaguely referred to as "belligerent nations" and also to national liberation fronts. See L. A. Modzhorian, Sub'ekty mezhdunarodnogo prava (Moskva, 1958).

<sup>17</sup> L. A. Modzhorian, Sub'ekty Mezhdunarodnogo Prava (Moskva, 1958).

<sup>18</sup> *Ibid.* at 17.

reality."<sup>19</sup> The same point of view is held by Professor V. M. Shurshalov who, while denying that international organizations are international persons on the ground that they are fundamentally different from states, still concedes to these entities some degree of international rights.<sup>20</sup>

Recent Soviet textbooks on international law have, as a matter of course, consistently conceded to international organizations some measure of international personality,<sup>21</sup> the only embarrassing exception being the recent poorly co-ordinated six-volume *Treatise on International Law* which comes dangerously close to granting objective international personality to international organizations.<sup>22</sup>

For example, discussing the international legal personality of the United Nations, *qua* international organization, the authors of a 1964 textbook on international law stated that

the United Nations, within the limits spelled out in its Charter, possesses such specific measure of international personality as is deemed necessary for the execution of its functions. The specificity of the legal personality of the United Nations is to be seen, first and foremost, in its strictly limited scope as compared to the legal personality possessed by states. The scope of the personality of the Organization is determined by the Charter of the UN in a totality of all its provisions and in particular in Article 105 of the Charter.<sup>23</sup>

Similarly, in a textbook of international law published by a rival Soviet law publisher—the Izdatel'stvo "Iuridicheskaya Literatura"—the United Na-

<sup>19</sup> *Ibid.* at 8; see also, by the same author, "O sub'ektakh mezhdunarodnogo prava" in SGP, 1956, No. 6 at 95-97.

<sup>20</sup> See V. M. Shurshalov, *Osnovnye voprosy teorii mezhdunarodnogo dogovora* (Moskva, 1959). Similarly, Professor G. P. Zadorozhnyi maintains that whereas only "sovereign entities," an expression which he uses to mean only states and nations, "are subjects of international law, such entities like international organizations, juridical persons and physical persons are, at best, only subjects of international legal relations and not of international law." See SEMP, 1968, at 364-365.

<sup>21</sup> See *Mezhdunarodnoe Pravo—Uchebnik* (IMO, Moskva, 1964); see also the revised edition of the same textbook issued in 1966, *Mezhdunarodnoe Pravo—Uchebnik dlia Iuridicheskikh Vuzov*, published by Izdatel'stva "Iuridicheskaya Literatura" (Moskva, 1964).

<sup>22</sup> Vol. I of this six-volume *Kurs Mezhdunarodnogo Prava* (Moskva, 1967), at p. 159, openly grants international personality to "all legally existing international organizations"—a concept which if accepted would convey, except for the interjection of the word "legally," the same meaning as does the theory of objective international personality which is strongly condemned by Soviet doctrine.

However, an interview with Professor G. I. Tunkin, himself a member of the Editorial Committee which was appointed to edit this treatise, reveals some poor co-ordination among the Committee members. He specifically mentioned that the Committee did not edit this particular section of the treatise before it was sent out to the publishers and, consequently, it is not representative of Soviet doctrine on the issue raised. Professor N. A. Ushakov, the present Soviet member of the U.N. International Law Commission and Head of the International Law Section of the Institute of State and Law of the Soviet Academy of Sciences, is supposed to be the author of the controversial passage from the treatise.

<sup>23</sup> *Uchebnik Mezhdunarodnogo Prava* at 450 (edited by F. I. Kozhevnikov) (Moskva, IMO, 1964). This point of view is repeated in the 1966 edition of the same textbook at 438-440.



tions is considered as "a special subject of contemporary international law which is devoid of any sovereignty, territorial supremacy, or any other such qualities generally accorded to the fundamental subjects of International Law—states."<sup>24</sup> This, at least, is the dominant position today in the contemporary Soviet doctrine of international law.

But having defined a subject of international law as "an entity participating or capable of participating in international legal relations," the authors of the recent *Treatise on International Law* (*Kurs Mezhdunarodnogo Prava*) had this to say on the legal personality of international organizations:

On the legal personality of international organizations we can only speak of such international organizations that were not only legally constituted, but also function legally. The rights and obligations which can be granted to international organizations by their founding states must remain in strict accordance with the generally binding principles and norms of international law . . . We can assert that any international (inter-state) organization whose existence is legally justifiable is a subject of international law because its constituent instrument compulsorily regulates relations between the organization and its member states . . .<sup>25</sup>

The various opinions cited above represent the general trend in Soviet doctrinal international law with regard to the general question of the international legal personality of international organizations. We must now move on from this general position to a closer examination of certain component elements of this international personality and try to see what current Soviet doctrine has to offer on each of these.

There is probably no generally accepted definition of an international organization, as different authors are likely to incorporate different elements into their definitions. However, for the purposes of our analysis we shall define an international organization as a legal order, or what amounts to the same thing, a corporate entity which possesses a distinct individual will, a permanent organ, and individual responsibility within the limits set for the exercise of its individual will; is made up of three or more entities; and is established on the basis of an international agreement which serves as its constituent instrument. Any analysis of contemporary Soviet doctrine on the juridical nature of universal international organizations must reflect Soviet attitudes on the following cardinal questions: (1) Does an international organization possess a distinct individual will of its own in contradistinction to the political wills of its member states? (2) If so, to what extent is this individual will dependent upon and/or distinguishable from the individual wills of its member entities or from a mere mechanical totality of the separate wills of these member entities? (3) Is this individual will necessarily a supreme will vis-à-vis the individual wills of the member states or is it just a common will of the member entities

<sup>24</sup> *Mezhdunarodnoe Pravo—Uchebnik dlia Iuridicheskikh Vuzov* at 292 (edited by D. B. Levin et al.) (Moskva, Iuridicheskaiia Literatura, 1964).

<sup>25</sup> 1 *Kurs Mezhdunarodnogo Prava* 159 (Izdatel'stvo Nauka, Moskva, 1967).

(in which case it is a reflection of full agreement among the members), or is it the co-ordinated will of the member entities, based on politically motivated half-hearted compromise and incapable of any superior enforcement? (4) Must an international organization have permanent organs to qualify it for any international rights and obligations? (5) Does an international organization have an individual responsibility for its actions or should it be looked upon as a mere agent acting on behalf of its member entities, thereby introducing a principal-agent relationship between an international organization and its member entities? (6) How many entities must have to come together before we can speak of an international organization's having been established? (7) Must these entities necessarily be uniform in their legal character, *i.e.*, must they all be states? (8) Must any formal international agreement between the member states constitute the operational basis for this international organization? (9) If such an agreement exists, must it go to the extent of enumerating the powers of such an organization? And if not, to what extent can we readily infer such powers, not enumerated in the constitution of the relevant international organization? We shall begin by examining the first question in this series—the question of the individual will of an international organization.

#### *Individual Will and Individual Responsibility of International Organizations*

Defining a "general international organization" as an international organization the membership of which is open to states from both ideological camps, imperialist and Communist, Professor G. I. Morozov goes on to state that the individual wills of these various states cannot under any circumstances merge into one common will. He maintains that Leninist principles do not permit any measure of compromise with the imperialist camp in the sphere of ideology and that this basic tenet of Marxist-Leninist philosophy equally applies to international organizations.<sup>26</sup>

The deep dichotomy in the different class interests rules out any possibility of any such synthesis of wills about which bourgeois international lawyers write . . . An international organization, created as a result of a voluntary union of states from different social systems cannot create any supreme common will of its participants. At the same time, however, such an organization is not an arithmetical totality of its members.<sup>27</sup>

Reading between these lines written by G. I. Morozov, one gets the unmistakable impression that the author has not really made up his mind whether or not an international organization possesses an individual will of its own. On the one hand, the author asserts that an international organization is not an arithmetical totality of its member states—an assertion which would lead one to expect that the author would concede to these organizations some sort of corporate personality, the possession of a single

<sup>26</sup> See G. I. Morozov, *Mezhdunarodnye Organizatsii* at 110 *et seq.* (Moskva, 1969).

<sup>27</sup> *Ibid.* at 110.

individual will. But then he goes on to say that as long as these organizations are made up of states representing opposing ideological camps, it is impossible to arrive at any given common will for this organization.

Professor E. A. Shibaeva probably went a step further when, in her doctoral dissertation, she stated that

the recognition of international organizations as subjects of international law obliges us to recognize the possession by such entities of an autonomous (but not sovereign) will, a will that is distinct from the wills of the member states and which the international organization freely expresses and manifests in an international legal act.<sup>28</sup>

The "autonomous but not sovereign will" formula propounded by E. A. Shibaeva raises serious problems of interpretation. If by the expression "autonomous will" she means a will that can be exercised freely and independently of any legally constituted external control, then the difference between sovereign and autonomous in this context is only one of semantics. Even the sovereign will of a state does not confer any absolute right on the state itself. Its exercise is subject to such restrictions as are imposed on it by general international law.<sup>29</sup>

Similarly, one would expect that the autonomous will of an international organization would be subjected to a certain legal and political control, such as, for example, that it be exercised subject to legal restrictions "ratione temporis," "ratione materiae," and "ratione personae." In the same manner the political foundations of international law in general and of the law of international organizations in particular place certain political restrictions on the exercise of this will. This does not in any way derogate from the legal independence which such a will enjoys vis-à-vis the various individual wills of the member-entities of such an international organization.

If, on the other hand, E. A. Shibaeva means by "autonomous will" a will that may be exercised only after prior consultation with the member states, or only on the basis of some general authorization, then we find ourselves coming back to the old concept of principal-agent relationship in the ties between an international organization and the member states. It is submitted that E. A. Shibaeva did not intend this latter interpretation. She probably meant a legally independent individual will, exercisable within the framework of the derived personality which we understand her to concede to such international organizations. Her choice of the formula "autonomous but not sovereign" was probably dictated by political considerations; one must bear in mind that her statements had to be submitted to the official political censorship by state organs.<sup>30</sup> It is most interesting to note that this concept of "autonomous but not sovereign will" was voiced by E. A. Shibaeva for the first time only in 1969. In her pre-

<sup>28</sup> See E. A. Shibaeva, *Avtoreferat doktorskoi dissertatsii* on "Turidicheskaiia priroda i pravovoe polozhenie spetsializirovannykh uchrezhdenii OON" at 16 (Moskva, 1969).

<sup>29</sup> Cf. the concept of *jus cogens* in general international law.

<sup>30</sup> See E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON* (Moskva, 1962); see also, by the same author, *Spetsializirovannye Uchrezhdeniia OON* (revised and enlarged edition, Moskva, 1966).

vious research works on the subject she, for reasons that are not known to the writer, chose to sidetrack the entire question of individual will for international organizations.<sup>31</sup>

The most recent and perhaps the most authoritative pronouncement on the subject by a Soviet scholar is the opinion expressed by Professor G. I. Tunkin in his most recent work, *Teoriia Mezhdunarodnogo Prava*,<sup>32</sup> in which he stated that

In international practice treaties concluded by international organizations take their special place as treaties by which international organizations acquire rights and take upon themselves certain obligations. International organizations are created by states; they are brought into being by states but the actions of international organizations are not in any way, de facto or de jure, to be equated to the actions of states.<sup>33</sup>

In this passage Professor Tunkin openly acknowledges the fact that an international organization possesses an individual will and, consequently does not act as agent for its member states. Obviously Professor G. I. Tunkin had no particular international organization in mind at this point. The reference was a general one and therefore was apt to be less politically motivated. But when he directed his attention to a particular international organization, a shift in his position can be noticed. In his lecture at the Hague Academy of International Law on "The Legal Nature of the United Nations," he strongly criticized Sir Gerald Fitzmaurice for the latter's statement that "The personality and capacities of the [United Nations] Organization have their origin in an instrument contractual in form, but once created and established they come to assume an objective, self-existent character, effective for all the world."<sup>34</sup> Disagreeing with the above statement, Professor G. I. Tunkin goes on to state his point of view in the following words:

The legal personality of an international organisation is on the contrary based on its constituent instrument.

And with regard to the statutes of International organisations it should be stated that there is practically none which would contain carte-blanche provisions concerning the legal personality of a particular international organisation.

The case is actually the converse. A constituent instrument of an international organisation provides for certain rights and capacities

<sup>31</sup> At the "publichnaia zashchita" of this dissertation at the Faculty of Laws of Moscow State University this formula was violently attacked by Professor L. A. Modzhorian and Professor V. M. Shurshalov, who both tried to read into it a meaning which, from their point of view, "was alien to the Soviet doctrine of international law" and only intended by the author, knowingly or unknowingly, "to grant support to the dominant bourgeois concept" on the question. See Stenograficheskii Otchet of the proceedings of the publichnaia zashchita of the dissertation, Moskva, Iuridicheskii Fakul'tet MGU, December, 1969.

<sup>32</sup> G. I. Tunkin, *Teoriia Mezhdunarodnogo Prava* (Moskva, 1970).

<sup>33</sup> *Ibid.* at 124-125.

<sup>34</sup> Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organizations and Tribunals," 29 Brit. Yr. Bk. Int. Law at 21 (1952).

of the organisation which lead to the conclusion that the organisation possesses a certain degree of international legal personality . . .

The important organs of the United Nations having the power of decision, such as the General Assembly, the Security Council, etc., are composed of the representatives of States who act according to their governments' instructions, expressing the wills of their respective States . . .

It is, therefore, inaccurate to assume that the United Nations is an entity independent of its member States.<sup>35</sup>

Professor Tunkin therefore finds it difficult to see how a decision which is conceived and born out of a heated political debate within an organ of an international organization, can subsequently lay claim to any legal independence of those various wills which, in the final analysis, led to its creation. In other words, the distinction between the political dependence (which constitutes the procedural aspect of this will) and the subsequent legal independence (*i.e.*, the substantive aspect of the will) of the individual will of an international organization is unacceptable to Tunkin.

One finds it difficult to reconcile these two positions expressed by Professor Tunkin. The writer's surmise is, however, that Tunkin would grant priority to his statement of 1966, *i.e.*, that international organizations do not and cannot possess any individual will independent of that of their member states. To him such a will is necessarily dependent upon the wills of the member states of the organization, from the points of view both of its content and its subsequent exercise.

This is as far as the first school of thought goes.<sup>36</sup> The second school of thought, as represented by Professor L. A. Modzhorian and Professor V. M. Shurshalov, in most categorical terms denies to all international organizations any degree of individual will. In the opinion of the authors, international organizations are nothing but mere agents of the various states which participate in them. As long ago as 1948 Professor L. A. Modzhorian presented this position,<sup>37</sup> which was to be repeated in greater detail in 1958.<sup>38</sup> In her view, all international agreements concluded by the United Nations "create obligations and rights not for the UN, *qua* international organization, but for the member states of the UN."<sup>39</sup> However, "the activities of the UN, as well as of the Specialized Agencies, as strictly determined by the member states, create rights and obligations only for such states as are members of the Organization."<sup>40</sup>

Thus, we find that, whereas the Tunkin school in contemporary Soviet doctrine would concede to public international organizations some measure of international personality, it insists on emphasizing the derivative

<sup>35</sup> G. I. Tunkin, "The Legal Nature of the United Nations," 119 *Hague Academy, Recueil des Cours* 31, 32 (1966, III).

<sup>36</sup> See above, p. 502, for a presentation of the basic concepts of the two rival schools of thought.

<sup>37</sup> See L. A. Modzhorian, *O Sub'ekтах Mezhdunarodnogo Prava* at 13-14 (Moskva, 1948).

<sup>38</sup> L. A. Modzhorian, *Sub'ekty Mezhdunarodnogo Prava* (Moskva, 1958).

<sup>39</sup> *Ibid.* at 33.

<sup>40</sup> *Ibid.* at 33-34.

nature and the non-sovereign and secondary character of this personality. While conceding to public international organizations the limited capacity to conclude treaties in their own name, the Tunkin school quickly adds that this treaty-making power is a manifestation of powers originally delegated to these international organizations by the original subjects of international law—states.

Summing up the basic position of this school of thought, Professor F. I. Kozhevnikov states *ex abundante cautela* that

the subjects of an international treaty are, first and foremost, states. International organs can conclude international agreements within the limits of their powers as prescribed by their constituent instruments. However, in these treaties expression is given to powers delegated by states themselves, representing the principal subjects of international law.<sup>41</sup>

On the other hand, the Modzhorian-Shurshalov school, as if feeling that it is being overtaken by the course of events, seems to be showing some signs of a half-hearted departure from its basic tenets, particularly on the question of the capacity of international organizations to conclude treaties in their own name. In a recent article on "*Sub'ekty Mezhdunarodno-pravovoi Otvetstvennosti*" Professor L. A. Modzhorian gives one the impression that she is prepared to modify her minority opinion on this subject. She states that:

To bear international legal responsibility means to answer for one's actions and in certain cases, also for the actions of others. Therefore, to be subjected to international legal responsibility an entity must possess the relevant legal capacity, i.e. international personality . . . The question of the international legal responsibility of international organizations cannot be decided other than in close association with their international personality. The highly limited and conditional personality which member states grant to international organizations must serve, in our opinion, as the basis for the determination of the international legal responsibility of these organizations.<sup>42</sup>

For the first time Professor Modzhorian concedes to international organizations some degree of what she preferred to term "highly limited and conditional [international] personality." However, such a grudging concession on the part of Professor Modzhorian is not sufficient to lead us to believe that she is now prepared to concede that some international organizations possess an individual will that is independent of the wills of the member states of such organizations.

The general conclusion one can reach from this analysis is that Soviet doctrinal international law, for the most part, refuses to concede to any universal international organization an individual will that is independent of the wills of the member states. This will is seen as being not only

<sup>41</sup> *Mezhdunarodnoe Pravo—Uchebnik dlia Iuridicheskikh Vuzov* at 327 (Moskva, 1966).

<sup>42</sup> L. A. Modzhorian, "*Sub'ekty Mezhdunarodno—pravovoi Otvetstvennosti*," in SGP, No. 12 (1969), pp. 122, 124.

derived from and limited by, but also as being wholly dependent upon, the wills of the member states. The "autonomous but not sovereign will" concept raises more questions of interpretation than it ever resolves, and until it is fully developed and elaborated upon by its author, it should not be taken as truly representative of any liberal trend in Soviet doctrinal international law on the subject.

### *The Question of Permanent Organs for International Organizations*

One would suppose that Soviet doctrinal international law is almost unanimous that a permanent organ is a necessary characteristic of an international organization. Professor Tunkin refers to international organizations as "permanent bodies" created by states "to handle matters entrusted to them."<sup>43</sup> This is quite understandable, because an international institution without a permanent organ is not much different from an *ad hoc* international institution, such as an international conference or congress.

In light of this general assumption, it is surprising that Professor G. I. Morozov divides international organizations into what he calls "permanent" and "*ad hoc*."<sup>44</sup> This, in the writer's opinion, seems a misapplication of terms, because what he terms "*ad hoc* international organizations"—international conferences, consultations, congresses, etc.—are nothing but *ad hoc* international institutions, and his subsequent reference to "permanent international organizations" is tautological. An organization is, by definition, a permanent institution. Permanence in this context does not mean, of course, that the organization is intended to last forever or that all its organs are permanently in operation. All it means is that some of its organs are set up in such a manner as to make it possible for them to function continuously, e.g., the secretariat and, in the case of the United Nations, the Security Council as well.

### *Membership of International Organizations*

Traditionally, an international organization, if it is to be distinguished from the association of states created by a mere bilateral agreement, must comprise at least three member entities.<sup>45</sup> Once an international organization with three or more member entities fulfills the other criteria mentioned above, there is no inherent reason why it cannot justly lay claim to international personality, except if this is specifically denied in its constituent instrument.<sup>46</sup> The assumption, therefore, is that membership in an international organization, so long as it exceeds two, does not act as a hindrance to granting international personality to an international organization.

<sup>43</sup> G. I. Tunkin, 119 Hague Recueil (1966, III).

<sup>44</sup> G. I. Morozov, *Mezhdunarodnye Organizatsii* at 70 (Moskva, 1969). Attention should, however, be drawn to the enumeration of "international organizations without permanent organs" cited at the bottom of p. 62, *ibid*.

<sup>45</sup> For example, the ANZUS. See also G. I. Morozov, *Mezhdunarodnye Organizatsii* at 62.

<sup>46</sup> Cf. The Bank for International Settlements.

The Soviet approach to this basic concept is slightly different. One gets the impression that Soviet doctrine directly subjects the entire question of international personality, or at least its scope, to certain quantitative and qualitative membership considerations. Some of the criteria of legal personality generally voiced in Soviet international legal literature are the inter-state character of the organization and the universality of its membership.

Professor I. I. Lukashuk, enumerating the conditions which, in his view, must be satisfied by any international organization which lays claim to international personality, writes that the members of such an organization must be states, duly represented by their governments and, secondly, that a treaty between states must form the foundation of such an organization.<sup>47</sup>

E. A. Shibaeva, commenting on the subject in 1966, stressed that

From our point of view one can point to the following four criteria which must be satisfied by any international organization which lays claim to the status of an international person: first, the inter-state (intergovernmental) character<sup>48</sup> of the organization; secondly, universal membership; . . . thirdly, a specific charter provision granting it legal capacity for certain international rights and obligations; and, fourthly, compatibility of its aims and objectives with the generally recognized principles and norms of general international law.<sup>49</sup>

One can conveniently say that the first requirement—membership by *States*—is common to all Soviet scholars.<sup>50</sup> This is hardly consistent with contemporary international practice. There exist today many international organizations the membership of which is not strictly limited to states. Article 11, paragraph 3, of the Constitution of UNESCO grants associate membership to "territories or groupings of territories which are not responsible for the conduct of their international relations." This is also the case with the ITU,<sup>51</sup> and the WHO,<sup>52</sup> to mention just a few. The Soviet view could be acceptable if the contention were that the granting of associate membership to these dependent territories does not in any way alter the basic inter-state character of these organizations. It could, after all, be argued that these organizations were initially set up by states and that partial membership rights were then extended to these non-sovereign territorial entities.

<sup>47</sup> I. I. Lukashuk, "Mezhdunarodnaia Organizatsiia kak storona v mezhdunarodnykh dogovorakh," in SEMP, 1960, at 148.

<sup>48</sup> E. A. Shibaeva does not seem to distinguish between the "inter-state" and the "intergovernmental" criteria in the classification of international organizations.

This free interchange of the terms "inter-state" and "intergovernmental" is also to be noticed in the writings of many other Soviet authors. Cf. G. I. Tunkin, "The Legal Nature of the United Nations," 119 Hague Recueil at 1 and 22 (1966, III); G. I. Morozov, *Mezhdunarodnye Organizatsii*, Ch.3 (Moskva, 1969).

<sup>49</sup> E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON* at 32 (Moskva, 1966).

<sup>50</sup> Except, of course, those who deny any measure of international personality to international organizations as a whole. See above.

<sup>51</sup> See also Art. 1, par. 3 of the Constitution of the ITU.

<sup>52</sup> See Art. 8 of the WHO Constitution.



The fact is that we have today an instance of an entity which is neither a state nor a sovereign territorial unit nor a combination of both of these, but rather an international organization itself which is an ordinary member (and an original member) of another international organization. The agreement between the International Atomic Energy Agency (IAEA), an undoubted international organization, and certain Arab states for the setting up of a Regional Center for Radio Isotopes in Cairo provides that the IAEA enjoys full rights of membership, including active and passive voting rights.<sup>53</sup>

The Soviet argument that only inter-state organizations can lay claims to international personality perhaps stems from the traditional Soviet concept that only states are "original subjects of international law" and hence that only states are capable of delegating international personality to what Soviet doctrine terms "secondary subjects" or "derived subjects" of international law.

The second requirement laid down by E. A. Shibaeva, that any international organization must be universal in order to lay claim to international personality, is quite untenable. The Soviet Union itself is a member of many regional international organizations, such as the COMECON and the Warsaw Pact. These are international organizations which cannot by any stretch of the imagination be described as universal, and yet it has not occurred to any Soviet scholar to deny to any of these organizations the crucial attribute of international personality. It is possible that E. A. Shibaeva intended her observations to apply specifically to universal international organizations to the exclusion of their regional counterparts. If this was so, then it would have been appropriate for her to say so.

Professor Tunkin tends to suggest that the extent of international personality to be accorded to international organizations varies directly with the size of their membership; in other words, the more members there are in an international organization, the wider the scope of the international personality to which it can lay claim. In his own words,

The participation of all states in this or that international organization, possessing international personality, or the recognition of the personality of such an organization not only by its members but also by all other states, converts such an international organization into a generally recognized subject of international law, a subject *erga omnes*. Such subjects of international law, or what might be close to it, are the United Nations and a majority of the UN Specialized Agencies.<sup>54</sup>

<sup>53</sup> See 494 U. N. Treaty Series at 220. On the regional level we have the example of four international organizations teaming up with the Inter-American Development Bank to create a new "corpus separatum"—the Inter-American Committee on Agricultural Development. For fuller details see G. I. Morozov, *Mezhdunarodnye Organizatsii* 65 (Moskva, 1969).

<sup>54</sup> G. I. Tunkin, *Teoriia Mezhdunarodnogo Prava* at 410–411 (Moskva, 1970). The reference to "a majority of the U.N. Specialised Agencies" in this passage obviously means those specialized agencies of the U.N. of which the Soviet Union and/or at least some of her East European allies are members—a fact which leads one to wonder

It is easy to understand this quantitative-qualitative Soviet approach to the entire question of international personality for international organizations. The quantitative criterion—the insistence on the need for universal membership—is obviously intended to guarantee adequate representation in these organizations to the Socialist camp and thereby to enhance the chances of victory for the Socialist camp in its declared political warfare against the West. For the conduct of such tactical warfare against the West—or what is sometimes very vaguely referred to as the policy of “peaceful coexistence”—there is no better place than the fora which these international organizations provide.

Reviewing the development of contemporary international organizations in an article dedicated to the memory of Professor Antonio de Luna, Professor Tunkin stated:

The nature of contemporary international organizations is to a very great extent determined by the existence of states belonging to different socio-economic systems and the inevitable struggle between them. That is why peaceful coexistence is now the basic condition of the development of general international organization . . .<sup>55</sup>

Thus, any international organization which does not embrace member-states of the Socialist camp or, to be more specific, the Soviet Union, is immediately suspect. This was the case with the League of Nations between 1919 and 1934 and from 1939 until 1946, when it was officially dissolved. This also was the case with the International Labor Organization between 1919 and 1934 and from 1939 until 1954, was true until recently of the International Civil Aviation Organization, and is still the case with the Food and Agriculture Organization and the Bretton Woods institutions. To the Soviet legal mind these organizations at various stages represented or still represent an international plot against the Soviet Union itself or against her political, economic, or ideological interests.

On the other hand, the insistence on qualitative considerations, *i.e.*, the demand that only states be members of international organizations, is actually intended to keep out from such participation entities like the various international business consortiums, as well as physical persons.

if the author intends direct Soviet participation as one of the requirements for granting international personality to such universal international organizations.

Unfortunately, the scantiness of available Soviet literature on the legal nature of those specialized agencies in which the Soviet Union does not participate, *e.g.*, the financial institutions of Bretton Woods, makes it difficult for us to reach any firm conclusion on this question. This prevalent academic disinterestedness of Soviet scholars in the international organizations in which the Soviet Union does not participate is demonstrated not only by the scanty references to these organizations in major Soviet works devoted to international organizations (see *Spetsializirovannye Uchrezhdeniia OON*, edited by G. I. Morozov, Moskva, 1967; E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON*, Moskva, 1966), but also most vividly by the fact that courses in international organizations in Soviet law schools almost completely omit the League of Nations, the Permanent Court of International Justice, the Bretton Woods institutions, etc. See *Programma po Mezhdunarodnomu Pravy dlia Iuridicheskikh Vuzov* issued by the Ministerstvo Vysshego i Srednogo Spetsial'nogo Obrazovaniia SSSR (Moskva, 1967).

<sup>55</sup> G. I. Tunkin, “Remarks on the normative function of Specialised Agencies,” *Instituto Francisco de Vitoria de Derecho Internacional* 11 (Madrid, 1969).

The participation of these entities in an international organization alongside states is considered incompatible with the sovereign status of such member states. The Soviet doctrine remains impervious to the revolutionary changes that have taken place in international law since the days when states were considered the only subjects of this law. Soviet doctrine still refuses to recognize non-governmental international legal entities or physical persons as possible subjects of international law, even though contemporary international practice shows that the former category of international entities does enjoy some measure of *ad hoc* international personality. There is no doubt, of course, that the Soviet decision to deny to all private international entities and physical persons any measure of international personality is more political than it is legal. We can only hope that this Soviet position will be modified as time goes on.

*The Constituent Instruments of International Organizations as their Operational Basis*

The basic Soviet concept of the rôle of the constituent instruments of international organizations, first, with regard to the establishment of these organizations and, secondly, in the determination of the scope of their international personality, can be summarized as follows: First, the conclusion of an international agreement is essential<sup>56</sup> for the establishment of an international organization.<sup>57</sup> The constituent instrument of an international organization, like all other treaties and international agreements, is the result of the co-ordination of the wills of the contracting states.<sup>58</sup>

Any contemporary international organisation (intergovernmental) is created by States by means of concluding an international treaty for the purpose. A treaty creating an international organisation, usually called charter, statute, etc., like any other international treaty is the result and an expression of the coordinated wills of participating States.<sup>59</sup>

<sup>56</sup> See E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON* (Moskva, 1966); see also I. I. Lukashuk, "Mezhdunarodnaia Organizatsiia kak storona v mezhdunarodnykh dogovorakh," *SEMP*, 1960.

<sup>57</sup> It is interesting to note, however, that G. I. Morozov in his definition of an international organization relegates to a secondary position the question of having a constituent instrument or not. See G. I. Morozov, *Mezhdunarodnye Organizatsii* at 62 (Moskva, 1969).

The fact that the COMECON, a Socialist international organization which was founded in January, 1949, at the Moscow Economic Conference of East European states, existed for eleven years (until Dec., 1959) without a formally concluded constituent instrument lends support to this thesis. Cf. also the Pan American Union, which existed prior to the adoption of the Bogotá Charter in 1948 that formally set up the O.A.S.

<sup>58</sup> See G. I. Tunkin, *Ideologicheskaiia Bor'ba i Mezhdunarodnoe Pravo* (Moskva, 1967); also by the same author, *Teoriia Mezhdunarodnogo Prava* (Moskva, 1970); see also R. L. Bobrov, *Osnovyie problemy teorii mezhdunarodnogo prava* (Moskva, 1968); D. B. Levin, *Osnovnye problemy sovremennogo mezhdunarodnogo prava* (Moskva, 1958).

<sup>59</sup> G. I. Tunkin, "The Legal Nature of the United Nations." 119 *Hague Recueil* 7 (1966, III).

This in effect means that the process of co-ordination of these wills does not result in any perfect (complete) elimination of all the original antagonisms to be found in these wills. In other words, the constituent instruments of international organizations, while on the one hand regarded as the co-ordinated will of the founding members, are equally considered as an embodiment of certain uneliminated antagonisms between the contracting Powers.<sup>60</sup>

Second, the constituent instrument of an international organization stipulates not only the aims and objectives of the organization, but also the methods for achieving such aims. In the words of Professor Tunkin, "The United Nations is an inter-State organisation; States have created it for certain purposes, they have prescribed certain means for the realisation of its objectives, and the Organisation may not go beyond these limits without their consent."<sup>61</sup>

The international personality of an international organization is to a great extent defined and limited by those powers which the founding fathers found it necessary to incorporate into its constituent instrument. This is the widely acknowledged Soviet concept of secondary international personality for international organizations. Whereas a state is a primary subject of international law by the very fact of its objective existence, international organizations are secondary or derived subjects of this law only by virtue of those powers enumerated in their constituent instruments.<sup>62</sup>

Under certain circumstances the competence of the organization may extend to those powers which may be directly inferred from those enumerated. But powers not enumerated cannot be freely inferred. As if driving home the Soviet concept on implied competence for international organizations, Tunkin states with great caution that

Of course, practice has abundantly shown that no statute of an international organisation, and especially of such a multifunctional organisation as the United Nations, can contain specific provisions for all its activities. When drafting a statute of an international organisation representatives of States always assume that some secondary problems which may arise in the course of its functioning will be settled later on the basis of the provisions of the statute.

Thus far we may speak of an implied competence. The implied competence is not a rule of general international law; it is a problem of interpretation of the statute of a particular international organisation.<sup>63</sup>

Thus the majority<sup>64</sup> of Soviet international legal doctrine holds that international organizations, to a varying degree, depending on the extent

<sup>60</sup> A. N. Talalaev, *Iuridicheskaja Priroda Mezhdunarodnogo Dogovora* (Moskva, 1963).

<sup>61</sup> G. I. Tunkin, 119 *Hague Recueil* 22 (1966, III).

<sup>62</sup> *Ibid.* at 30-31.

<sup>63</sup> *Ibid.* 23, 25.

<sup>64</sup> With the insignificant exception of the Modzhorian-Shurshalov school of thought which denies to all international organizations, including even the U.N. and its specialized agencies, any degree of international personality.

of their membership and on the functions conferred on them, possess some measure of international personality. That the United Nations and some of the Specialized Agencies of the United Nations possess some measure of international personality is undisputed.

Similarly, the fact that the United Nations possesses the widest scope of international personality, as compared with its various specialized agencies, is equally undisputed. The component elements of the international personality which Soviet doctrine would concede to international organizations include, among other things, the power to make treaties, to enter into private contracts, and to claim reparation for injuries caused to it.<sup>65</sup>

Elaborating on the treaty-making powers of international organizations, Professor Tunkin writes:

It is well known that many international organizations are endowed, on the basis of their constituent instruments, with the right to conclude agreements with other international organizations as well as with states. . . . These agreements establish international rights and obligations. . . . However, the granting to international organizations of this capacity to enter into international agreements does not mean that these agreements can be placed on an equal footing with agreements concluded by states *inter se*, nor does it mean that we can automatically extend to the former the application of norms of international law which are intended to regulate inter-state agreements.<sup>66</sup>

In other words, while conceding to international organizations the capacity to make treaties, Tunkin insists on drawing a distinction between such treaties concluded by international organizations either *inter se* or with states and those treaties concluded by states strictly *inter se*.<sup>67</sup>

In the light of the above analysis one finds it extremely difficult to subscribe to the interpretation given by Grzybowski to Tunkin's position on the question of the treaty-making power of international organizations. Professor Grzybowski stated that "Mr. Tunkin . . . in the discussion on the Draft Convention on the Law of Treaties . . . has rejected the idea of the right of an international organization to make treaties . . . A year later he confirmed his earlier opinion. In 1965 he was still firm in this view that no international treaties could be made by international organizations."<sup>68</sup> The fact remains that as far back as 1962<sup>69</sup> Professor Tunkin recognized that international organizations had the limited and "derived" capacity to enter into treaties. But he asserted then, just as he

<sup>65</sup> E. A. Shibaeva, *Spetsializirovannye Uchrezhdeniia OON* (Moskva, 1966); see also R. L. Bobrov, "O iuridicheskoi prirode OON" in *SEMP*, 1959; G. I. Morozov, *Mezhdunarodnye Organizatsii* (Moskva, 1969).

<sup>66</sup> G. I. Tunkin, *Voprosy Teorii Mezhdunarodnogo Prava* at 82 (Moskva, 1962); see also by the same author, *Teoriia Mezhdunarodnogo Prava* (Moskva, 1970).

<sup>67</sup> As a matter of fact, this position eventually prevailed in the International Law Commission and at the Vienna Conference on the Law of Treaties. See Art. 1 of the Vienna Convention on the Law of Treaties adopted at the Vienna Conference on May 23, 1969.

<sup>68</sup> See Kazimierz Grzybowski, *Soviet Public International Law—Doctrines and Diplomatic Practice* at 363 (Leiden, 1970).

<sup>69</sup> See above.

did in 1966,<sup>70</sup> and as he still maintains today,<sup>71</sup> that treaties to which international organizations are parties ought to be kept separate from treaties to which only states are parties, and it was on this basis that he vigorously argued at the sessions of the International Law Commission that separate conventions ought to be drafted to regulate these basically different types of treaties. This statement in itself, at least as it stands, does not mean a complete rejection by Professor Tunkin of the capacity of international organizations to conclude treaties.

The final question to be discussed is the problem of the legal effect, if any, of the international personality of international organizations on third parties. Granting that Soviet doctrine concedes to certain international organizations some measure of international personality, does this mean that this personality exercises its effects in relations with states that are not members of the organizations and have not shown any intention of recognizing the application of that personality to themselves? The readily ascertainable answer is no. Soviet doctrine would argue that, whereas states are subjects of international law *erga omnes*, international organizations are only subjects *sui generis*. Thus, whereas the international personality of primary subjects of international law—states—is exercisable irrespective of the recognition of such a state by other subjects of this law, the international personality of derived subjects of international law—international organizations—applies only to members of such organizations and to those non-member states which accorded recognition to such an entity (*e.g.*, Switzerland vis-à-vis the United Nations).

However, Soviet doctrine does not hesitate to lift the U.N. Charter to lofty heights within the hierarchy of norms of general international law. "It should also be borne in mind," wrote Tunkin, "that the Charter of the United Nations stands out among statutes of international organisations as an instrument of the highest authority. It is a statute of an international organisation which has been put by States in a predominant position with regard to all other international organisations . . . ."

"The Charter puts the United Nations in a superior position with regard to regional organisations of collective security and gives it wide powers over actions of those agencies, especially as to the use of force."<sup>72</sup>

While Professor Tunkin openly grants to the U.N. Charter a supreme status vis-à-vis all other existing treaties to which U.N. Member States are parties, he, like most Soviet scholars, still regards the U.N. Charter essentially as a treaty. Like all other treaties, its application extends only to its member states or to those states which directly or indirectly, expressly or tacitly, grant their recognition to the instrument.

One other aspect of the U.N. Charter which bears noting is that it embodies a number of fundamental principles of general international law. In this aspect, it is binding even on those non-Member States that have

<sup>70</sup> See 119 Hague Academy, *Recueil des Cours* (1966, III).

<sup>71</sup> See G. I. Tunkin, *Teoriia Mezhdunarodnogo Prava* (Moskva, 1970).

<sup>72</sup> G. I. Tunkin, "The Legal Nature of the United Nations," 119 Hague Academy, *Recueil des Cours* 18-19 (1966, III).

not expressly or tacitly submitted themselves to be bound by the U.N. Charter. The binding force of these U.N. principles on such states should be traced back to the fact that the U.N. Charter itself is only a restatement of the general principles of general international law which in any event, under the principle of *jus cogens*, would be binding on such states.

In conclusion, it must be noted that contemporary Soviet doctrine on the juridical nature of universal international organizations was formulated under the impact of the creation of the United Nations. The doctrine built up in the era of the great debates over the juridical nature of the United Nations, *i.e.* during the crucial years 1946-1947. The establishment of the League of Nations in 1919, despite the fact that this was a real revolution in the organization of the international community of nations, had not stimulated the Soviet legal mind into inquiring about the legal status of such an international organization.

If, therefore, the creation of the United Nations in 1945 was the single most influential factor in the evolution of contemporary Soviet doctrine on the juridical nature of universal international organizations, the establishment of a network of U.N.-related agencies, especially the specialized agencies, was another factor that impelled the Soviet writers to think seriously about this problem. After all, if the Soviet Union was to participate in some of these agencies, as it showed that it was prepared to do, her scholars had first to work out legal doctrine to be included in the ideological baggage which all Soviet diplomats carry along with them to the sessions of these organizations.

Despite this remarkable development of Soviet legal thinking on this question since 1946, one must note that the Soviet doctrine still has a long way to go before it can accept some of the "ideologically abhorrent" and "politically bankrupt" concepts of contemporary Western scholars on the question of the international legal personality of universal international organizations. It is to be hoped that the same sophisticated Soviet legal minds that introduced the concept of "limited and non-sovereign" international personality for international organizations will one day concede to these same international bodies full legal personality, limited, as in the case of states, only by such restrictions as may be imposed by general international law. The problem, however, is not as simple as it seems. It touches upon a highly sensitive aspect of Soviet foreign policy—the manipulation of international organizations to reach certain set ends. After all, what is international law if not a convenient vehicle placed at the disposal of the foreign office?

## EDITORIAL COMMENT

### TWO PERSPECTIVES ON THE BARCELONA TRACTION CASE

#### THE RIGIDITY OF BARCELONA

The Judgment of the International Court of Justice in the *Barcelona Traction* case,<sup>1</sup> like the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*,<sup>2</sup> was completely unexpected, both as to outcome and to the near unanimity of the result.<sup>3</sup> While the Court disposed of the case on a rather narrow ground—Belgium's lack of *jus standi* to present the claim of Belgian shareholders in Barcelona Traction, a Canadian corporation allegedly put out of business by acts attributable to Spain—its Judgment raises a whole host of complex issues which in due course will generate scores of learned monographs.<sup>4</sup> This comment, by no means definitive, constitutes a modest critique of a single but significant aspect of the Court's Judgment, namely, its method of ascertaining the customary international law rule governing the case.

The Judgment in *Barcelona Traction* turned upon the Court's resolution of what originally had been Spain's Third Preliminary Objection: its contention that Belgium lacked *jus standi* to protect the interests of Belgian shareholders in Barcelona Traction, Light & Power Co., Ltd., a Canadian corporation with headquarters in Toronto, which allegedly suffered damage by internationally unlawful acts and omissions attributable to Spain.<sup>5</sup>

<sup>1</sup> *Barcelona Traction, Light & Power Co., Ltd. Case*, [1970] I.C.J. Rep. 3, 64 A.J.I.L. 653 (1970). It is assumed that readers are familiar with the facts and holding of the case.

<sup>2</sup> 376 U.S. 398 (1964); 58 A.J.I.L. 779 (1964). See Falk, "The Complexity of *Sabbatino*," *ibid.* 935.

<sup>3</sup> At a regional meeting of the American Society of International Law in March, 1969, on the topic "International Claims: Their Settlement by Lump Sum Agreements," none of the discussants anticipated the outcome in the case. Note, Regional Meeting of the Society at Syracuse, 63 A.J.I.L. 550 (1969). Furthermore, at the annual meeting of the Society that year every speaker on a panel entitled "Nationality of Claims—Individuals, Corporations, Stockholders" agreed that the Court would ratify well-established past trends allowing shareholder claims. See 1969 Proceedings, Am. Soc. Int. Law 30–53.

<sup>4</sup> See Briggs, "Barcelona Traction: The *Jus Standi* of Belgium," 65 A. J. I. L. 327 (1971); Higgins, "Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.," 11 Va. J. Int. Law 327 (1971); and Metzger, "Nationality of Corporate Investment under Investment Guaranty Schemes—The Relevance of *Barcelona Traction*," this JOURNAL, below, p. 532. See also Note, 5 J. Int. Law & Economic Development (Geo. Wash.) 239 (1971); Note, 3 N.Y.U.J. Int. Law & Politics 391 (1970); and Note, 38 Fordham Law Rev. 809 (1970).

<sup>5</sup> See Flemming, "Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application, 1962; Belgium v. Spain). Preliminary Objections," 3 Canadian Yr. Bk. Int. Law 306, 312–313 (1965).



Belgium argued that these acts and omissions "rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholders as it is recognized by international law. . . ." <sup>6</sup> Absent the payment of compensation to Barcelona Traction for the damage inflicted upon it, which of course would have benefited the Belgian shareholders, Belgium argued that they had "separate and independent rights and interests to assert" which she had *jus standi* to claim for them through international judicial proceedings.<sup>7</sup> Spain, on the other hand, took the view that:

the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the national State of shareholders or 'interests', whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State. . . .<sup>8</sup>

Hence, the Spanish argument went, "the Belgian Government therefore lacks *jus standi* in the present case. . . ." <sup>9</sup>

In approaching what was for it a case of first impression,<sup>10</sup> the Court rightly notes that "this essential issue has to be decided in the light of the general rules of diplomatic protection," bearing in mind "the continuous evolution of international law."<sup>11</sup> Its Judgment, however, fails to articulate the criteria the Court thinks applicable in determining the existence and content of the customary international law rule.<sup>12</sup> Indeed, ignoring the problem entirely and foregoing any serious effort to evaluate the constituent elements of custom present, it reaches the astonishing conclusion that international law actually is silent as to shareholder claims.<sup>13</sup> This conclusion, in turn, leads the Court to the equally surprising conclusion

<sup>6</sup> [1970] I. C. J. Rep. at 25-26.

<sup>7</sup> *Ibid.* at 26.

<sup>8</sup> *Ibid.* at 14.

<sup>9</sup> *Ibid.*

<sup>10</sup> The American Law Institute's Restatement, which adopted a rule permitting shareholder claims in *Barcelona* situations, acknowledged that "[t]here appear to be no decided cases dealing with the rule stated in this Section independently of international agreement." Restatement (Second), Foreign Relations Law of the United States §173, Reporters' Note at 525 (1965). See also Higgins, note 4 above at 341, and Metzger, below, at 534.

<sup>11</sup> [1970] I. C. J. Rep. at 33.

<sup>12</sup> In this regard, the Court is consistent with its past practice, which generally has failed to articulate criteria governing the formation of customary law. See text at note 21 below. As Parry has pointed out, beyond "a few scattered observations of the vaguest and most general sort the Court has said nothing else about customary law, and, in particular, about general as opposed to special custom." C. Parry, *The Sources and Evidences of International Law* 59 (1965).

<sup>13</sup> [1970] I. C. J. Rep. at 38. "As to the shareholder, while he has certain rights expressly provided for him by municipal law . . . , appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder." *Ibid.* See text accompanying note 19 below.

that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it *has to refer* to the relevant rules of municipal law.<sup>14</sup>

The municipal law of corporations thus became the basis for the Court's fabrication of its international law rule governing shareholder claims.<sup>15</sup>

One scarcely knows where to begin one's criticism of this aspect of the Court's Judgment, here as elsewhere a mixture of flaccid thought laced with rigid conceptualism. Surely, as Judge Koo remarked when the case was first before the Court in 1964, an abundance of international practice exists sanctioning shareholder claims.<sup>16</sup> By disregarding such practice, as Jenks has warned, the Court thereby "debars itself from playing a constructive part in the progressive crystallisation of custom into law."<sup>17</sup> Yet the Court in *Barcelona*, somewhat like the Vermont justice of the peace in Mr. Justice Holmes's anecdote, who would not allow a suit by one farmer against his neighbor for the breaking of a churn because he could find nothing about churns in the lawbooks,<sup>18</sup> seemingly considered that its own prior silence on shareholder claims precluded it from considering the many instances where such claims have been allowed by other international decision-makers.<sup>19</sup>

Admittedly, the process of determining whether a rule of customary international law has evolved from international practice is a difficult one. In the apt words of Judge Koo, "[t]his is obviously because, *in the absence of a generally accepted norm for evaluating the factors*, it must depend, to a certain extent, upon a subjective appreciation, both of the recurrence of the same facts and of the rapid development of foreign investments in the international community, in arriving at a conclusion."<sup>20</sup>

<sup>14</sup> [1970] I. C. J. Rep. at 33-34 (emphasis added).

<sup>15</sup> "Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court *must devote attention* to the nature and interrelation of those rights." *Ibid.* at 34 (emphasis added).

<sup>16</sup> "[T]here is seen a substantial body of evidence of State practice, treaty arrangements and arbitral decisions to warrant the affirmation of the inexplicit existence of a rule under international law recognizing such a right of protection on the part of any State of its nationals, shareholders in a foreign company, against another wrongdoing State, irrespective of whether that other State is the national State of the company or not, for injury sustained by them through the injury it has caused to the company." *Barcelona Traction, Light & Power Co., Ltd. case* (Preliminary Objections), [1964] I. C. J. Rep. 6, 63 (separate opinion of Judge Koo). See text at notes 25-33 below.

<sup>17</sup> C. W. Jenks, *The Prospects of International Adjudication* 237-238 (1964).

<sup>18</sup> *Ibid.* at 265.

<sup>19</sup> Judge Koo, had he not found ample international practice supporting shareholder claims, nevertheless would have interpreted what the Court now considers "the silence of international law" to permit such claims. "In my view the evidence placed before the Court has not established the existence of any rule denying recognition of the existence of the interests of shareholders or beneficial owners of shares in a foreign company or prohibiting their protection by their national State or States by diplomatic intervention or recourse to international adjudication." [1964] I. C. J. Rep. at 63. Compare the Court's view in the text at and accompanying note 13 above.

<sup>20</sup> [1964] I.C.J. Rep. at 63 (emphasis added). See text at and accompanying note 12 above.

Granted the difficulty of its task, however, the Court in *Barcelona* certainly must be faulted for the perfunctory fashion in which it sought to ascertain and apply customary prescriptions. The general critique of the Court's performance in this area, made by a commentator some years ago, is especially applicable to its Judgment here:

It may be that the Court's conclusions were reached after a contextual analysis on the lines similar to those suggested here; but its opinions do not articulate in any perceptible manner that this has been so. . . . The unique position of the Court in the general scheme of institutional decision-making enjoins it to take every available opportunity to clarify the significance of each particular feature in the process of customary prescription, with appropriate emphasis on the overriding policies of the community governing the requirements for determining a prescription of customary international law.<sup>21</sup>

One does not have to be a member of the policy-science school of jurisprudence to recognize that the Court in *Barcelona* not only failed to clarify its approach to ascertaining customary international law,<sup>22</sup> but also that its attitude towards the sources to which it could turn in its search for an applicable rule was far too restrictive.<sup>23</sup>

Summarily rejecting as irrelevant the bulk of traditional international practice governing shareholder claims,<sup>24</sup> the Court also characterizes as

<sup>21</sup> Raman, "The Rôle of the International Court of Justice in the Development of International Customary Law," 1965 Proceedings, Am. Soc. Int. Law 169, 177.

<sup>22</sup> "The task of identifying a prescriptive communication from amorphous and seemingly inconclusive manifestations of behavior is almost impossible if the decision-maker does not clarify the fundamental goals of the community which he regards as relevant." *Ibid.* at 174.

<sup>23</sup> McDougal, discussing the law of the sea, adopts a more enlightened approach readily transferable to the law of state responsibility: "From the perspective of realistic description, the international law of [state responsibility] is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character . . . , and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests . . . and by other continually evolving conditions in the world arena." McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 A. J. I. L. 356, 356-357 (1955). This approach has been taken by the author of a recent book on France's postwar experience in the state responsibility field. See B. Weston, *International Claims: Postwar French Practice* (1971).

<sup>24</sup> The Court takes only eight lines to dismiss "the general arbitral jurisprudence which has accumulated in the last half-century," giving as its reason the fact that "in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case." [1970] I. C. J. Rep. at 40. See also the separate opinion of Judge Padilla Nervo, in which he categorically concludes, with no

*lex specialis*, and hence apparently not worthy of discussion, the approximately 80 lump-sum settlement agreements that have been concluded in the past 25 years providing compensation for the nationalization of foreign property, agreements which uniformly authorize or have been construed to authorize shareholder claims and which, in the opinion of Dr. White, "constitute a valuable potential source of customary international law. . . ." <sup>25</sup> The rationale of such agreements, according to the Court,

derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case. <sup>26</sup>

This singularly restrictive attitude towards one potentially significant source of customary international law is unfortunate in the extreme. "To suggest," Dawson and Weston warned nearly a decade ago, "that internationally negotiated settlements which seek the fair adjustment and compro-

---

citation of authority, that "arbitral decisions rendered on the basis of special bilateral conventions are not norm-creating, nor have [they] constituted the foundation of, or generated a rule of customary international law which is now accepted as such by the *opinio juris*." *Ibid.* at 261.

As a newswriter has remarked, "[i]t can be inferred that the Court's lack of reliance upon *Delagoa Railway* is a manifestation of its general distrust of international claims arbitrations as a source of international law." Note, 3 N.Y.U.J. Int. Law & Politics 391, 395, note 25 (1970). Since international arbitrations traditionally have been the fountainhead of the customary law of state responsibility, this distrust comes as something of a surprise. The ample jurisprudence available in the reports of arbitral tribunals is a prime reason why this area of international law has been considered ripe for codification. See Baxter, "Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens," 16 Syracuse Law Rev. 745, 756-758 (1965).

<sup>25</sup> G. White, *Nationalisation of Foreign Property* 183 (1961). *Accord*, van Hecke, "Nationality of Companies Analyzed," 8 Netherlands Int. Law Rev. 223, 236 (1961). The present writer remarked several years ago that "it is just not possible to study stockholder claims realistically without examining recent lump sum settlement practice." Lillich, "International Claims: Their Settlement by Lump Sum Agreements," in *International Arbitration: Liber Amicorum for Martin Domke* 143, 154, note 40 (P. Sanders ed., 1967). He still holds this opinion. See generally Lillich, "Eligible Claimants Under Lump Sum Agreements," 43 Indiana Law J. 816 (1968). See also text accompanying note 34 below.

<sup>26</sup> [1970] I. C. J. Rep. at 40. This view previously found but limited support among the commentators. See Bagge, "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders," 34 Brit. Yr. Bk. Int. Law 162, 174 (1958): "To draw any conclusions concerning the present state of international law from political inter-state treaties . . . is not possible before it can be stated that the stipulations there found have been accepted also by a sufficient number of other 'civilized' nations or are otherwise to be considered as international law under the rules in Article 38 in the Statute of the International Court of Justice. In the present matter this can hardly be said to be the case." Compare text at note 35 below. Since the publication of the above article in 1958, it should be noted, at least 60 additional lump-sum settlements have been concluded between 30 or more different states. See note 34 below.

mise of conflicting interests are but quasi-legal aberrations, not indicative of uniformity, is to espouse a parochial view of international law."<sup>27</sup>

Even by traditional lights, the Court in *Barcelona* is guilty of parochialism in this regard. As one of several alternative methods of claims settlement,<sup>28</sup> lump-sum agreements long have been part of the process of claim and counterclaim creating and clarifying the law of international claims.<sup>29</sup> "A series or a recurrence of treaties laying down a similar rule," Starke reminds us, "may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges."<sup>30</sup> Writers from the nineteenth century<sup>31</sup> to the present day<sup>32</sup> confirm that a consistent pattern of bilateral treaties may have "considerable evidential importance" in determining the existence and content of a customary international law standard.<sup>33</sup> Yet the Court rejected this important evidence of international custom out-of-hand.

Had the Court seriously considered the juridical impact of these agree-

<sup>27</sup> Dawson & Weston, "'Prompt, Adequate and Effective': A Universal Standard of Compensation?" 30 *Fordham Law Rev.* 727, 750 (1962). Cf. Harris, "The Protection of Companies in International Law in the Light of the *Nottebohm Case*," 18 *Int. and Comp. Law Q.* 275, 281-282 (1969).

<sup>28</sup> Individual espousal and international arbitration are the other methods most frequently used. See Department of State Memorandum entitled "Nationalization, Intervention or Other Taking of Property of American Nationals," March 1, 1961, reprinted in 56 *A.J.I.L.* 166 (1962).

<sup>29</sup> Indeed, they date back to the commencement of modern international arbitration. When one of the three international claims commissions under the Jay Treaty of 1794 broke down, the United States paid a lump sum to Great Britain, which thereupon established its first national claims commission to distribute the fund. See III Moore, *International Adjudications: Modern Series* 349-433 (1931).

<sup>30</sup> Starke, "Treaties as a 'Source' of International Law," 23 *Brit. Yr. Bk. Int. Law* 341, 344 (1946). He adds that the operation of treaties "in the creation of rules of international law is generically part of the process whereby usage and practice crystallize into custom, and because of the peculiar authority of treaties the process is invested with additional value and weight. For this reason, apart from their constitutive effect, these treaties may often be of considerable evidential importance." *Ibid.* at 346.

<sup>31</sup> "What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties." H. Wheaton, *Elements of International Law* 21 (*Classics of International Law*, 1936 ed.).

<sup>32</sup> "Bilateral treaties may provide evidence of customary rules, and indeed there is no clear and dogmatic distinction between 'lawmaking' treaties and others. If bilateral treaties . . . are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation." I. Brownlie, *Principles of Public International Law* 11 (1966).

<sup>33</sup> "This function treaties share with state practice, with diplomatic declarations, judicial decisions of municipal prize courts, and instructions issued by states to their diplomatic representatives and military commanders." Starke, note 30 above, at 345. Cf. R. Lillich, *International Claims: Their Adjudication by National Commissions* 118 (1962).

ments,<sup>34</sup> there of course is no guarantee that its decision would have been contrary to the one it actually reached. Starke has written:

Before a particular rule of law can be spelled out of a series of treaties, the same tests as in respect of the growth of a customary rule of international law must be satisfied. It must in other words be shown that the rule which is claimed to exist as a matter of deduction from a repetition of treaties is one generally recognized by the international community.<sup>35</sup>

The thrust of the present criticism, however, is not that the Court drew the wrong inference from fourscore lump-sum settlements, which it did, but that it woefully abdicated its judicial function by refusing even to consider their effect upon the customary norms governing the eligibility of claimants who are shareholders. Judge Gros, in a remarkably perceptive separate opinion, joined issue with the Court's Judgment on this particular score. Citing "numerous agreements" which indemnified shareholders, several of which even granted compensation to the holders of single shares, he found it

impossible to dismiss these agreements with a stroke of the pen, in particular those of Switzerland, which are not peace settlements imposed by a victorious State; it is not the habit of States to make each other free gifts, and the number of agreements for the compensation of shareholders considered apart from the limited company does imply the recognition of an obligation.<sup>36</sup>

Judge Jessup, in a separate opinion, also took note of a lump-sum settlement, the Swiss-Yugoslav Agreement of 1948,<sup>37</sup> in his discussion of diplomatic protection.<sup>38</sup>

Having dismissed both the jurisprudence of international arbitral tribunals and the provisions of lump-sum agreements, along with other evidence of customary prescription,<sup>39</sup> the Court, by a process difficult to follow, thought itself *compelled* to refer to the municipal law of corporations to construct an international rule governing shareholder claims.<sup>40</sup> The Judgment states:

<sup>34</sup> They are the subject of a two-volume work by the present writer and Weston entitled *International Claims: Their Settlement by Lump Sum Agreements*, to be published by the Syracuse University Press in the *Procedural Aspects of International Law Series*. Interestingly enough, of the one obtainable lump-sum settlement concluded by Spain and the six such settlements negotiated by Belgium, several agreements specifically compensate claimants for share interests they had held in third-state corporations. See, e.g., the Protocol-Annex to the Agreement Between Belgium/Luxembourg and Czechoslovakia, Sept. 30, 1952, [1966] *Moniteur Eelge* 9296.

<sup>35</sup> Starke, note 30 above, at 345.

<sup>36</sup> [1970] I.C.J. Rep. at 277-278.

<sup>37</sup> Agreement Between Switzerland and Yugoslavia, Sept. 27, 1948, [1948] *Recueil Officiel des Lois Fédérales* 995. As did Judge Riphagen in his dissenting opinion, [1970] I.C.J. Rep. at 348.

<sup>38</sup> *Ibid.* at 197. Judge Ammoun, in a prolix separate opinion, refused to infer "a rule of international law" from lump-sum settlements. At the most, he thought they might "contribute to the eventual formation of custom." *Ibid.* at 306.

<sup>39</sup> E.g., enemy property provisions in peace treaties and other international instruments. *Ibid.* at 39-40.

<sup>40</sup> See text at and accompanying notes 14 and 15 above.

If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. *It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.* Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.<sup>41</sup>

While the Court obviously may resort to the general principles of the municipal law of corporations,<sup>42</sup> it is not clear why it thought itself compelled to regard "municipal law as an exclusive touchstone."<sup>43</sup> It is even less understandable why it believed it lacked the power to modify municipal law rules to take into account the different demands of the international legal order.<sup>44</sup>

On the first point, it already has been suggested that the Court takes an extraordinarily restrictive approach towards the available sources of international law. No need exists for the automatic application of municipal law rules by reference just because customary international law is presumed, and erroneously at that, to be silent on the subject of shareholder claims. Even had international law not established its own rules,<sup>45</sup> Higgins is right to point out:

The Court surely has the authority, indeed the duty, to fill the gaps in international law. . . . To assume that because a municipal law creation, a company, is concerned, municipal law necessarily has to be applied where there presently are gaps in international law, is both to deny any law-developing role to the Court and to assume that the functions of international law are the same as those of municipal law.<sup>46</sup>

By its failure to follow this gap-filling approach, the Court in *Barcelona* completely ignores the historic rôle which it and other international tri-

<sup>41</sup> [1970] I.C.J. Rep. at 37 (emphasis added).

<sup>42</sup> I.C.J. Statute, Art. 38, par. 1(c).

<sup>43</sup> [1970] I.C.J. Rep. at 343 (separate opinion of Judge Riphagen).

<sup>44</sup> Much of the international law of state responsibility, of course, has been borrowed from municipal law. See H. Lauterpacht, *Private Law Sources and Analogies of International Law* 134-143 (1927). This borrowing process is common and of itself not subject to criticism. Indeed, the present writer is somewhat hesitant to criticize the municipally derived rules of *Barcelona* in view of Lauterpacht's warning that "[i]t has become a custom with publicists writing on certain disputed questions of international law to base their argument on the assertion that the opinion with which they happen to disagree is nothing else than a misleading analogy to a conception of private law." *Ibid.* at vii. What has overcome his hesitation is the fact that the analogy here is misleading, and that the Court nevertheless considered itself powerless even to "modify," much less "deform," the borrowed rules.

<sup>45</sup> See text at note 14 above.

<sup>46</sup> Higgins, note 4 above, at 331.

bunals have played in ascertaining and applying principles of customary international law.<sup>47</sup>

On the second point, even assuming the need to refer to municipal law exclusively, certainly the Court unnecessarily confines itself by taking the position, wholly without precedent, that it must accept this body of law subject to no modifications whatsoever. Several judges who concurred in the Court's Judgment registered strenuous objections to this portion of it.<sup>48</sup> Thus, Judge Tanaka protested that the Court:

should approach the customary rule of diplomatic protection from a teleological angle, namely from the spirit and purpose of diplomatic protection, without being bound by municipal law and private law concepts, recognizing its relative validity according to different fields and institutions. The concept of juridical personality mainly governs private law relationships. It cannot be made an obstacle to diplomatic protection of shareholders. Concerning diplomatic protection, international law looks into the substance of matters instead of the legal form or technique; it pays more consideration to ascertaining where real interest exists, disregarding legal concepts. International law in this respect is realistic and therefore flexible.<sup>49</sup>

Judge Gros also objected to erecting "definitions taken from certain municipal systems of law into a rule of international law,"<sup>50</sup> contending that the Court's use of "*renvoi* to municipal law leads eventually, in the present case, to the establishment of a superiority of municipal over international law which is a veritable negation of the latter."<sup>51</sup> He argued:

<sup>47</sup> The parallel to the Sabbatino decision is striking. There, in McDougal's sprightly phraseology, the majority opinion "forsook the historic, creative role of the Supreme Court for the expression of timid and suicidal conceptions." McDougal, Comments, 1964 Proceedings, Am. Soc. Int. Law 49. For the present writer's views on Sabbatino, see R. Lilich, The Protection of Foreign Investment: Six Procedural Studies 45-113 (1965).

<sup>48</sup> In the only dissenting opinion, Judge Riphagen categorically repudiated "the idea of a 'reference' by the rules of international law to the rules of municipal law." [1970] I.C.J. Rep. at 338. "It is in making the rights and obligations of *States* under customary *international* law depend purely and simply on the rules of *municipal* law concerning the rights and obligations of *private persons* in their relations *inter se*, that the Judgment seems to me to fail to appreciate the nature of the rules of customary international law, including the rules of international law concerning the rights and obligations of States in the field known as 'the treatment of aliens.'" *Ibid.* at 335.

<sup>49</sup> *Ibid.* at 127. See also *ibid.* at 121:

"The Spanish concept of the impenetrability of a company's wall of juridical personality is based on a principle of private law, and therefore it cannot be applied to the question of diplomatic protection of shareholders.

"Since the matter of diplomatic protection of shareholders belongs to an entirely different plane, namely to the field of international law, the juridical personality created from the necessity of the viewpoint of private law or commercial law cannot be recognized as an obstacle for the protection of shareholders on the plane of international law.

"For this reason the fact that a corporation has juridical personality under the law of a State does not necessarily justify protection by that State only."

<sup>50</sup> *Ibid.* at 277.

<sup>51</sup> *Ibid.* at 272.



In the present case, the rules of municipal law are nothing more than facts in evidence, and they deserve the same attention as the other facts, and the same rigour in their interpretation, but no more.<sup>52</sup>

Finally, Judge Fitzmaurice, noting that "conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level,"<sup>53</sup> protested that the Court's

partial application of domestic law principles connected with the inherent structure of the corporate entity . . . leads to the inadmissible consequence that important interests may go wholly unprotected, and that what may possibly be grave wrongs will, as a result not be susceptible even of investigation.<sup>54</sup>

The Court's Judgment in *Barcelona* produced just that result.

The International Court of Justice in the *Barcelona Traction* case, foregoing an excellent opportunity to place its judicial imprimatur upon a developing rule of customary international law with respect to shareholder claims, opted instead to refer exclusively to the municipal law of corporations, under which a wrong inflicted upon a corporation generally does not give rise to an enforceable right in the hands of its shareholders. Transposing this body of law without serious analysis to the international plane, the Court determined that as long as the corporation continued in existence and Canada retained its capacity to exercise diplomatic protection on behalf of its corporate national, Belgium had no *jus standi* to bring a claim against Spain based upon losses suffered by Belgian shareholders. "[W]here it is a question of an unlawful act committed against a company representing foreign capital," concluded the Court, "the general rule of international law authorizes the national State of the company alone to make a claim."<sup>55</sup>

This "rule" already has been criticized, and rightly so, as establishing "an unworkable standard."<sup>56</sup> The major concern of this comment, however, has been to expose the process by which the Court arrived at its rule, not to criticize the rule itself. This process, revealing a rigid conceptualism which the American legal realists have sought to dispel for the past half-century, hardly promises a jurisprudence in keeping with the realities of

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, at 66.

<sup>54</sup> *Ibid.* at 84. Despite the quoted passage, he nevertheless supported the outcome of the Judgment, albeit grudgingly. For an excellent critique of his opinion showing the hobbling effect of the artificial distinction between *lex lata* and *lex ferenda*, see Higgins, note 4 above, at 340-341. "It need not be emphasized that this sharp distinction between *lex lata* and *lex ferenda*, while natural to an international lawyer of the classical school, would not commend itself to those who adopt a policy-science approach to international law. For such lawyers, the ambiguity of the trend of past decisions would indicate that considerable weight should be given to policy factors in the formulation of the law in this area." *Ibid.* at 341-342. See text accompanying note 23 above.

<sup>55</sup> [1970] I.C.J. Rep. at 46.

<sup>56</sup> Metzger, below, at 541.

the contemporary international legal order. The Court, which suffered a severe loss of reputation following its unfortunate decision in the highly political *South West Africa Cases*,<sup>57</sup> has done little to redeem itself by the lack of judicial craftsmanship evident in its Judgment in *Barcelona*.

The retrogressive approach to cases of first impression revealed in the Court's Judgment also bodes ill for those persons who had hoped that the Court would adopt a more progressive manner in the immediate future.<sup>58</sup> As Jenks, in an excellent discourse on the proof of custom in international adjudication, has pointed out, any

adjudication which culminates in the failure of an international court or tribunal to recognise the authority of what has been generally regarded as well-established law may tend to discredit both the law and the process of international adjudication.<sup>59</sup>

This dubious distinction the Court in *Barcelona* appears to have achieved.

RICHARD B. LILLICH

#### NATIONALITY OF CORPORATE INVESTMENT UNDER INVESTMENT GUARANTY SCHEMES—THE RELEVANCE OF BARCELONA TRACTION

Private foreign investment in developing countries takes place because it is in the interest of the capital-exporting entities (almost all of which are large corporate investors who seek raw materials or markets or both), and the capital-importing country, which wants the earnings and perhaps the wider economic development which accompanies the investment. These mutualities of interest are, of course, attended by conflicting interests as well. The investor wants maximum "stability" for what was probably a prudent investment when made and has been quite profitable in ensuing years. The host developing country wants maximum freedom of action to "improve" its own earnings from the investment from time to time, and eventually, if circumstances seem to it propitious, to take over the investment with a minimum of financial and political cost.

Many people, with no great perceived stake in the outcome, would no doubt, if asked, be inclined to say to the contestants, "Go it bear—Go it wife." And indeed, that was more the attitude of governments in the past than is generally realized. The records of the Department of State and the British Foreign Office, for example, and of their exegetes are replete with admonitions that these agencies would not serve as "collection agents" if investments in Timbuctoo, Guatemala, or Madagascar went sour for any reason. The investors, after all, invested with their eyes open for the large

<sup>57</sup> *South West Africa Cases*, [1966] I.C.J. Rep. 6.

<sup>58</sup> "The judicial function surely includes developing and applying international law to hitherto untested situations in order to obtain socially desirable and enlightened results. International law can never develop beyond the rudimentary state if the Court feels that the distinction between *lex lata* and *lex ferenda* forever prevents it from applying international law in a progressive manner in hitherto untested situations." Higgins, note 4 above at 341.

<sup>59</sup> Jenks, note 17 above, at 225.

profits which were supposed to compensate for the various adverse phenomena—flood, fire, arson, confiscation, what have you, which might occur. And in the days of Hudson's Bay and East India companies, the investors took quite good care of themselves in all respects.

With the increasing domestic economic and political strength of large aggregates of capital and their owners and managers, however, which occurred roughly between 1840 and 1900, and the corresponding diminution in their semi-governmental powers, this hands-off policy of foreign offices became eroded if not overturned. At least some kinds of nastiness by the host country (takings, expropriations, confiscations, depending on the desired semantic overtones) became the official concern of the capital-exporting country as well as of its citizen who was injured by the act of the host country.

No great problem was presented, if the citizen was a natural person, in determining which country could represent the person claiming such injury. The nationality conferred by birth or consanguinity or naturalization of the person was, in earlier ages of lesser mobility, usually enough to identify without more the appropriate factual mutual reliance and involvement of nation and citizen to warrant recognition by all countries of the standing of the country granting nationality to "espouse" its citizen's claim.

Despite the development of the "genuine link" concept in the *Nottebohm* case<sup>1</sup> which pierced the nationality veil in a case where the involvement of Nottebohm was wholly elsewhere than his Liechtenstein nationality (acquired for the purpose of attempting to cloak his assets), this method of deciding which country could espouse a person's claim has not posed many, or serious, problems in recent years. The overwhelming number of "natural person" cases continue to be dealt with quite satisfactorily on the basis of the older concepts of nationality and, in the case of dual citizenship, of effective nationality.

But what about the corporation, which could so easily be incorporated in one country, yet be owned largely by citizens of one or more foreign countries? Should the "formal" citizenship of the place of incorporation or "seat" of the company govern, or the "real" citizenship, where the owners of more than 50% of the shares resided, if indeed that many resided in any one place?

It is really not surprising that even the central questions presented by the corporate claimant as the instigator of a government's claim against another have remained unresolved in international tribunals until now. As the International Court of Justice stated in the *Barcelona Traction* case (Second Phase):

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear sur-

<sup>1</sup> [1955] I.C.J.Rep. 4.

prising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the right of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.<sup>2</sup>

Accordingly, it was natural that until *Barcelona Traction*, there had been international contention but no decision on whether shareholders of a corporation could receive diplomatic protection from their government in a formal claims proceeding, absent a special international agreement, when the corporation in which they held dominant shares was incorporated under the laws of another country. As late as 1962, the leading international law casebook in use in American law schools, Bishop's second edition, carried as its exemplar of the state of the law on the subject the description of the antagonistic positions taken by the United States and Great Britain in the *Romano-Americana Claim*,<sup>3</sup> which were never resolved in principle until *Barcelona*. Only the country of "nationality" of the corporation itself, regardless of the nationality of shareholders, *Barcelona* held, had *locus standi*.

*Barcelona*, of course, has intrinsic importance of its own. Countries continue to assert general claims after injury to their corporate nationals. Their inability to do so for their dominant shareholders, when the country of the corporation's nationality is uninterested in presenting a claim, and special circumstances (such as the corporation's having ceased to exist) are not present, no doubt casts some additional weight in the scale leaning toward even greater freedom of action of the host country of the investment.

In the modern age, however, insurance has become an important device for reducing risks to manageable, cost-accounting proportions and, correspondingly, for reducing the ideological decibel level which can accompany private foreign investment. For that reason, what claims nations may or may not be able to espouse after a damaging event which has not been insured against, should be put in a somewhat wider perspective.

It is of some interest, then, especially in view of *Barcelona*, to examine how nations have behaved in insuring their citizens' investments in developing countries. Since most capital-exporting countries have adopted programs for insuring private foreign investments, at least those made in developing countries, a look at how they have determined "eligibility" to receive their insurance will indicate where they have drawn differentiating lines when they are putting their own money at risk. Incidentally, this

<sup>2</sup> [1970] I.C.J.Rep. 3, par. 89; 64 A.J.I.L. 653, 686 (1970).

<sup>3</sup> Bishop, at p. 728; see also 5 Hackworth, *International Law* 702-705, 840-844 (1943).

kind of activity—putting one's own money at risk—tends to concentrate the mind more wonderfully than merely seeking damages as party plaintiffs.

There are presently some eleven countries that have adopted investment guaranty schemes.<sup>4</sup> The table attached at the end of this comment summarizes the "nationality eligibility" aspects of these schemes. The United States deals with the nationality question through a combination of agreement, statute, and regulation. As a general rule, the United States enters into bilateral agreements with host governments for the establishment of the investment guaranty program.<sup>5</sup> It is through the specific provisions of these agreements, rather than by virtue of any established principles of international law, such as those enunciated in the *Barcelona Traction* decision, that the United States, as subrogee after payment to the insured investor, asserts its claims against the host government, which has agreed (in the bilateral "umbrella" agreement) to such subrogation in the case of each investment it approves. The bilateral agreement does not contain any provisions restricting the scope of the agreement to investments made by nationals of the United States. Indeed, this is consistent with the statutory definition of an "eligible investor," which, albeit under very restricted circumstances, includes entities which are not United States nationals. Section 238 (c)<sup>6</sup> of the Foreign Assistance Act provides:

the term "eligible investor" means: (1) United States citizens; (2) corporations, partnerships or other associations, created under the laws of the United States or any State or territory thereof and substantially beneficially owned by United States citizens; and (3) foreign corporations, partnerships, or other associations wholly owned by one or more such United States citizens, corporations, partnerships, or associations; *Provided, however*, that the eligibility of such foreign corporation shall be determined without regard to any shares, in aggregate less than 5 per centum of the total of issued and subscribed share capital, required by law to be held by other than the United States owners; *Provided further*, that in the case of any loan investment a final determination of eligibility may be made at the time the insurance or guaranty is issued; in all other cases, the investor must be eligible at the time a claim arises as well as at the time the insurance and guaranty is issued.

For a foreign corporation to be eligible for investment insurance, the regulations of the Agency for International Development require that, in addition to being wholly owned by a United States citizen or corporation, partnership, or other association created under United States or State law,

<sup>4</sup> Australia, Canada, Denmark, Federal Republic of Germany, Japan, The Netherlands, Norway, Portugal, Sweden, Switzerland, United States. I am indebted to a graduate paper by a student, Stanley B. Kay, for much of the ensuing factual material.

<sup>5</sup> A.I.D., Specific Risk Guaranty Handbook, p. 4 (1966); *idem*, Extended Risk Guaranties of Loans for Private Projects (Other than Housing Projects): Policy Paper, p. 8 (1964). For many years this was a statutory requirement. While the statute was relaxed in 1961, in fact new countries have come into the program through a written agreement with the United States.

<sup>6</sup> 22 U.S.C. Sec. 2198 (c).

and effectively controlled by U.S. citizens, the foreign corporation must either (a) be "substantially beneficially owned" by United States citizens, or (b) have assets over 50% of which would be distributed to United States citizens upon liquidation.<sup>7</sup> "Substantially beneficially owned" is defined by the regulations to mean that over 50% of the issued and outstanding corporate stock of each class is held by United States citizens.<sup>8</sup> This applies as well to an American corporation investor; it must be at least 51% American citizen-owned before it can secure an investment guaranty. The regulations also provide that ownership of the foreign corporation by United States investors may exist indirectly. A foreign corporation is eligible if wholly owned by another foreign corporation, wherever incorporated, if that corporation is itself wholly owned by a United States investor.<sup>9</sup>

It can thus be seen from United States legislation and regulations concerning an "eligible investor" that an investment which a U.S. company holds through its wholly-owned subsidiary incorporated in a third country can be covered under the United States program. On the other hand, an investment by a United States-incorporated company controlled by a foreign company cannot be so covered unless it can be shown that the investing company is nonetheless majority-owned by American citizens through their ownership of the foreign holding company. Thus, the United States, which does not in general espouse claims of American corporations without a substantial American ownership, will not guarantee an investment by such a corporation unless it has more than a substantial American ownership, at least 51% being required. It does not, in sum, follow the *Barcelona Traction* holding. Nor will it ensure a foreign corporate investment, save in the case of total ownership of a foreign corporation (less a maximum of 5% legal qualifying shares), in which case the foreign corporation is itself the eligible investor.

As the table shows, there is no uniformity among capital-exporting countries in respect of their willingness to insure investments by their domestically incorporated companies which are foreign-owned in large part, or by foreign-incorporated entities which are partly local citizen-owned. Indeed, the only basic common element appears to be a willingness to insure an investment by a domestic corporation which is more than 50% locally owned; in short, the basic American rule.

The increasing use of multinational consortia of investors, with the particular corporate nationality that of a non-insuring country or one clearly ineligible under the laws of any insuring country, has posed the problem of insuring *shareholders'* interests directly. These consortia have been heavily used in many giant mineral extractive ventures, such as those for nickel in the Dominican Republic and New Caledonia, nickel in the Caribbean and Guinea, iron ore in Mauritania and Liberia, and the numerous oil ventures in the Middle East. If each country's nationals invest

<sup>7</sup> AID/PRR Policy 1.1 (Oct. 2, 1968), p. 3.

<sup>8</sup> AID/PRR Policy, above.

<sup>9</sup> *Ibid.*

directly in the operating company, then it is a relatively simple matter for each country to insure its investors' shares in the multinational consortium. If, however, the investors create a holding company, in which shares are held by the members of the consortium, and which owns and controls the substantive investment, the same problems as for other types of intermediary holding companies arise. Until 1969, Section 238 (c) of the Foreign Assistance Act would have allowed the United States to insure investments made only by those foreign holding companies which were 100% United States-controlled (95% in those situations in which 5% of the shares are required to be held by other than United States owners). Indeed, even where the investment vehicle is a company incorporated in the United States in which the non-American consortium members have only a minority interest, the general policy of the United States program has been to limit general coverage to the proportionate beneficial interest of the American investors and to seek to have the other members of the consortium obtain coverage under the investment guaranty programs of their own countries wherever possible.<sup>10</sup>

In order to obtain more flexibility in providing coverage to multinational investments under the United States program, Congress amended the Foreign Assistance Act in 1969 by adding Section 234 (a) (2), which provides that:

Recognizing that major private investments in less developed friendly countries or areas are often made by enterprises in which there is multinational participation, the Corporation may make such arrangements with foreign governments (including agencies, instrumentalities, or political subdivisions thereof) or with multilateral organizations for sharing liabilities assumed under investment insurance for such investments and may in connection therewith issue insurance to investors not otherwise eligible hereunder: *Provided, however*, That liabilities assumed by the Corporation under the authority of this subsection shall be consistent with the purposes of this title and that the maximum share of liabilities so assumed shall not exceed the proportionate participation by eligible investors in the total project financing.<sup>11</sup>

Under this provision, two basic approaches would be permissible. The first is through participation in arrangements in which two or more insuring government agencies agree to share the risk under a policy issued to the holding company by one of them. Under this approach, it is possible that the United States would issue the insurance on behalf of all governments participating in the risk-sharing agreements. The second would involve the United States Government's issuing separate coverage directly to the holding company when there is a risk-sharing arrangement. In either variation, however, coverage would effectively be limited to only the American investor's proportionate share of the investment, even though the holding company is not an "eligible investor" as defined above.

<sup>10</sup> AID/PRR Policy, above.

<sup>11</sup> 22 U.S.C., Sec. 2194 (a) (2). See also, House Subcommittee on Foreign Operations, Hearings on Foreign Assistance and Related Agencies Appropriations for 1970, Part 2, pp. 1826-1827.

Thus the United States is still limited to insuring the investments of its own nationals, although not in as rigid a form as heretofore. The advantage of the provision is that it permits the United States to enter into risk-sharing agreements with multilateral organizations or other nations in order to spread the burden of risk. Moreover, difficult problems will continue to be encountered if the United States should act on behalf of all interested entities; for each project there would be the need to reconcile the various requirements of the other parties to the risk-sharing agreement in order that one insurance policy covering the liabilities of all parties could be issued. The difficulties in this respect will be especially acute when the other parties to the risk-sharing agreement are other governments which are held by their own national legislation to particular requirements in insuring investments. The second approach is also not without difficulty, since it is possible that one member of a multinational consortium might be a national of a country that has no investment insurance program. Thus the extent of the liberalization of the United States program remains in doubt; how useful the new provision will prove to be remains conjectural at this date.

Again, the only common element in the various national insurance schemes so far as multinational consortia are concerned is that countries are willing to insure only their own national investor's share of the investment.

Some of the problems of eligibility in terms of nationality for the national investment insurance schemes discussed above could be solved by a multilateral investment insurance scheme. Unless each of the countries of which the participants in the consortium are nationals conducts its own insurance program or is prepared to insure the investment of non-nationals, the full amount of the investment could not be protected in the absence of a multilateral scheme. And even if each consortium member had the opportunity to purchase national insurance, a desirable uniformity of protection and procedure would be lacking.

There are two proposals currently under consideration: an I.B.R.D. scheme and a European Economic Community Scheme. Details of the latter not being yet available, we will examine briefly the proposed I.B.R.D. scheme.

At the request of the Development Assistance Group of the O.E.E.C. in 1961, the I.B.R.D. undertook an initial survey for a multilateral guaranty scheme.<sup>12</sup> Subsequently, the I.B.R.D. staff and Executive Directors prepared a draft of "Articles of Agreement of the International Investment Insurance Agency," which became available in 1966. Following submission of the draft to governments and discussions in the Bank's Executive Board, a second draft set of Articles was prepared in 1968. Since negotiations with interested governments on the second draft are still progressing, the following discussion will deal only with certain issues of eligibility under a

<sup>12</sup> IBRD, *Multilateral Investment Insurance: A Staff Report* (1962).



multilateral investment insurance scheme, without attempting to predict the ultimate shape of the draft provisions.<sup>13</sup>

It must be understood that the organization now contemplated would be nothing more than an agent for the member countries in arranging the necessary insurance protection for any particular investment. This is made clear in the 1968 draft by Article IV, Section 1, which provides that:

The Agency shall conduct its operations pursuant to these Articles as the agent of and for the account of its members as hereinafter provided.

This principle is further reinforced by Article IV, Section 11, which provides that:

All payments made to the Agency shall be held and administered by the Agency as fiduciary and shall be used only in accordance with the provisions of this agreement.

This agency principle is firmly established in the draft agreement in order to make it quite clear that the ultimate liability for a claim under an insured investment will not lie with all members of the organization, but only with those members who have agreed to support or "sponsor" a particular investor or group of investors. The details for the administration of this principle are set forth in the other sections of Article IV, such as Section 5, which provides that losses incurred under insurance issued by the agency shall be shared by "sponsoring countries" as follows:

- (1) Twenty-five percent shall be borne by the sponsoring country which shall have sponsored the insurance in respect of which the loss has occurred;
- (2) The other seventy-five percent shall be shared by all other sponsoring countries, each in the proportion to the amount of insurance that each sponsoring country has sponsored bears to the total amount of such insurance.

This principle of "sponsorship" suggests that any multilateral agency formed along these lines would not be entirely free to disregard the nationality of investors who applied for insurance. At a minimum, a sponsoring country would want—as a matter of policy—to support the investments of its own nationals, even though it might not be legally required to do so under the articles of agreement. Thereafter, however, the more relevant consideration would be the scope of sponsorship by a country of a national of another country. Originally it was felt by the I.B.R.D. staff that insurance protection would be limited to investments made by nationals of participating countries,<sup>14</sup> and the first draft agreement in 1966

<sup>13</sup> For a discussion of other issues, see IBRD Staff Report, above; Schwarzenberger, *Foreign Investments and International Law* 170-181 (Praeger, 1969); Comments on 1966 draft by International Chamber of Commerce to Economic and Social Council, May 2, 1967 (U.N. Doc. E/C.2/653).

<sup>14</sup> IBRD, Staff Report, note 12 above, p. 13.

so provided. However, perhaps in an effort to encourage the broader use of the agency, the 1968 draft agreement has been rewritten to permit members to sponsor an investment made by *any* investor, whatever his nationality, and even if he should be a national of a non-member. Section 3 of Article III of the 1968 draft provides that:

(a) A member may sponsor for insurance an investment, or any part thereof, made or to be made by an investor of any nationality, provided that another member does not object on the ground that the investor is its national. The Agency shall also notify other States which are members of the Bank (I.B.R.D.). If any such State objects to the proposed sponsorship on the grounds that the investor is its national, the Agency shall consult with that State before taking any action on the application for insurance or on the sponsorship.

While attempting to broaden the scope of an eligible investor in this provision, the Bank's drafting committee was careful to limit the veto power for sponsorship to member countries. However, a substantial minority of the committee felt that a non-member should also have a veto power in cases in which an investor is its national. There is always the possibility of conflict between an investor's plans for another country and his own government's policy concerning balance of payments or the like; such a possibility of conflict is no less real for a non-member than for a member of the agency. Nonetheless, it was probably felt that the benefits of a veto should be reserved to those nations which were willing to assume certain burdens, both financial (by supporting the operations of the agency) and legal (by improving their investment laws), that would be attendant upon becoming a member of the agency. As a compromise, the draft agreement provided that the agency was to "consult" with a non-member who objected before taking any action on the application.

In contrast with the detailed United States rules, there is no further attempt to define an eligible investor. Nevertheless, it would still be necessary to establish the nationality of an investor in order that a member could decide whether to sponsor its investment or whether it should veto sponsorship by another member. The 1966 draft version provided that the agency could make its own determination of nationality. The 1968 version, however, has deleted this provision, probably as a result of the administrative burden of investigation that it would place on the agency. Thus, the burden of establishing the nationality of an investor will be on the sponsoring members. It is uncertain at this time whether a member would use the nationality criteria established for its own national investment insurance schemes or whether new criteria would be devised. In the interests of simplicity and the avoidance of confusion, however, it might be better to utilize the criteria established for its own national scheme. As to the sponsorship of investors of other countries, new criteria for nationality would probably have to be devised, and there would have to be general agreement on these criteria by all members in order to avoid a difference in the scope of inquiry by each sponsoring member.

The troublesome question of nationality of investors is bound to be with us for a very long time to come—for so long as the world is composed of nation-states. It would be a mistake, however, even were it possible, to attempt to establish general international legal criteria which would purport to govern states, in the absence of their specific consent, in respect of any aspect of those investments which they decide to guarantee in advance through insurance schemes. Thus far, the capital-exporting countries appear to be moving quite eclectically toward wider eligibility criteria, but the common denominator remains the interest of the local citizen or of a local corporation of which a majority is locally owned.

If this very wide contemporary experience is useful at all in considering the desirable general contemporary standards of the eligibility of a state to espouse a corporate claim, it suggests that *Barcelona Traction* establishes an unworkable standard. As we have seen, mere local incorporation is far too slender and neutral a connection to motivate capital-exporting countries to expend the extraordinary time, energy, and international political capital needed in pressing an international claim. The respondent developing country likewise cannot be expected to accept such a minor connection as constituting the "genuine link" necessary to confer standing to present an international claim when capital-exporting countries, in putting their own money at risk, are unwilling to do so on the basis of so slight a connection.

Rather, the common denominator of the insurance schemes—local incorporation plus 51% local ownership—would appear in corporate cases to represent the current reality of the "genuine link" of the *Nottebohm* case. And in international economic affairs, as much as, or more than in international political and security affairs, it pays to stay close to reality.

STANLEY D. METZGER

## ANNEX

## SUMMARY OF "NATIONALITY ELIGIBILITY" ASPECTS OF INVESTMENT GUARANTEE SCHEMES

	1. GENERAL DEFINITION OF "NATIONALITY ELIGIBILITY"	2. CASE OF INTERMEDIARY HOLDING COMPANY BETWEEN INVESTOR AND INVESTMENT	3. CASE OF FOREIGN CON- TROLLED INVESTOR	4. CASE OF MULTI-NATIONAL INVESTMENT CONSORTIA
AUSTRALIA	persons carrying on business in Australia	<i>eligible</i> if investor is able to receive and pursue his rights; each case considered on merits; no coverage for de- vices to evade host country regulations	<i>eligible</i> , except if foreign ownership is over 75% when investment would have to pro- duce very worthwhile con- tribution in the host country and substantial export benefits for Australia	<i>Australian share only</i>
CANADA	persons carrying on business or other activities in Canada	<i>eligible</i> if Canadian investor owns over 50% of shares with voting rights	<i>eligible</i> if Canadian investor is truly carrying on a business activity in Canada, i.e., ownership is not a prere- quisite	<i>Canadian share only</i>
DENMARK	undertakings domiciled in Denmark	<i>ineligible</i>	<i>eligible</i> in principle	(Danish share only, <i>eligible</i> as long as not held through an intermediary in a third country)
GERMANY	companies domiciled or re- siding in Federal Republic of Germany	<i>ineligible</i>	<i>eligible</i> , but losses arising as a consequence of foreign con- trol (over 50% shareholding) are not covered	(German share only, <i>eligible</i> as long as not held through an intermediary in a third country)
JAPAN	Japanese nationals or firms established under Japanese law	( <i>ineligible</i> )	?	?
NETHERLANDS	Netherlands nationals, corpor- ate bodies established in the Netherlands and constituted in accordance with Nether- lands Law	?	<i>ineligible</i> , if in the opinion of the Minister of Finance the enterprises are not Dutch in character	?

## SUMMARY OF "NATIONALITY ELIGIBILITY" ASPECTS OF INVESTMENT GUARANTEE SCHEMES—Continued

		position uncertain; none encountered	ineligible if 50% or more foreign owned	Norwegian share possibly
NORWAY	companies of Norwegian domicile and over 50% owned by Norwegian citizens			
PORTUGAL	enterprises operating in Portugal's overseas provinces	?	?	?
SWEDEN	persons or corporations active in business in Sweden	coverage might be possible; none encountered	eligible	Swedish investor's share
SWITZERLAND	persons of Swiss nationality and domicile; companies with preponderant Swiss interests and head office in Switzerland; exceptionally persons or companies fulfilling respectively only one of the pairs of conditions if there exists a strong relationship with the Swiss economy	eligible	eligible only i) if Swiss interests are preponderant in the foreign parent company or ii) possibly in cases of reciprocity by third country, i.e. that country's agency insuring Swiss investments held through companies established there	?
UNITED STATES	U.S. citizens; corporations, partnerships or associations created under laws of U.S. and substantially beneficially owned by U.S. citizens; foreign corporations wholly owned by U.S. citizens (see col. 5 and para. 32 attached for further detail and exceptions)	eligible if wholly-owned by U.S. citizens (see col. 5 and para. 32 attached for further detail and exceptions)	ineligible except if foreign parent company is in turn majority owned by U.S. citizens	previously coverage limited U.S. investor's share in projects not held through intermediary holding companies; 1969 legislation provides for coverage of investments held through multinational holding companies including coverage for non-U.S. investors where there are risk-sharing arrangements

Source: Organization for Economic Cooperation and Development, Development Assistance Committee, Materials for Meeting of Experts on Investment Guarantees, 11-12th, June, 1970.

\* Not printed here.

THE REPORTS OF THE DEATH OF ARTICLE 2(4)  
ARE GREATLY EXAGGERATED

Dr. Thomas Franck, pathologist for the ills of the international body politic, has pronounced the death of the heart of the United Nations Charter, and proceeded to tell us who killed it.<sup>1</sup> In my view, the death certificate is premature and the indictment for legicide must be redrawn to charge lesser though aggravated degrees of assault. Article 2(4) lives and, while its condition is grave indeed, its maladies are not necessarily terminal. There is yet time to prescribe, transplant, salvage, to keep alive at all cost the principal norm of international law in our time.<sup>2</sup>

It is difficult to quarrel with Dr. Franck's diagnosis of the ills of the Charter, congenital, hereditary, acquired, and induced: the mistaken original assumption of Big-Power unanimity; the changing character of war; the loopholes for "self-defense" and "regional" action; the lack of impartial means to find and characterize facts; the disposition of nations to take law into their own hands and distort and mangle it to their own purpose. Distracted and distraught by these ills, one can indeed fall into the conclusion that Article 2(4) is virtually dead, but that, I believe, would mistake the lives and the ways of the law.

My principal difference with Dr. Franck's diagnosis is that it judges the vitality of the law by looking only at its failures. The purpose of Article 2(4) was to establish a norm of national behavior and to help deter violation of it. Despite common misimpressions, Article 2(4) has indeed been a norm of behavior and has deterred violations. In inter-state as in individual penology, deterrence often cannot be measured or even proved, but students of politics agree that traditional war between nations has become less frequent and less likely. The sense that war is not done has taken hold, and nations more readily find that their interests do not in fact require the use of force after all. Expectations of international violence no longer underlie every political calculation of every nation, and war plans lie buried deep in national files. Even where force is used, the fact that it is unlawful cannot be left out of account and limits the scope, the weapons, the duration, the purposes for which force is used. Of the "some one hundred separate outbreaks of hostilities" to which Dr. Franck refers, less than fingers-full became "war" or successful conquest, and hundreds of other instances of conflict of interest and tension have not produced even an international shot: cold war has remained cold, threats to the peace have remained threats, issues have remained only issues, for peaceful settlement or non-settlement (as in Cyprus, Kashmir, Berlin).

Many will refuse credit to Article 2(4), attributing the lack of traditional war to other factors—to nuclear weapons and the changing charac-

<sup>1</sup> "Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force By States," 64 A.J.I.L. 809 (1970).

<sup>2</sup> With some of what I say here I deal at length in: *How Nations Behave: Law and Foreign Policy* (1968), especially in Chaps. X and XI.

ter of war, to greater territorial stability, to other changes in national interests reducing national temptation to use force. If it were so, Article 2(4) would not be the less a norm: law often reflects dispositions to behavior as much as it shapes them. Like others, Dr. Franck concludes that, by the time the Charter came, "new forms of attack were making obsolete all prior notions of war and peace strategy." If it were so, one might yet conclude that that development reflected and supported Article 2(4) and made it viable. In fact, nothing, alas, has rendered war obsolete—between India and Pakistan, India and China, Turkey and Greece, Honduras and El Salvador, Egypt and Israel. The occasions and the causes of war remain. What has become obsolete is the notion that nations are as free to indulge it as ever, and the death of that notion is accepted in the Charter.

The supposed transforming impact of nuclear weapons is also misconceived. For a time the United States had a virtual monopoly and its nuclear weapons might have induced rather than deterred aggressive tendencies. For many years now, the United States and the U.S.S.R. have had an effective duopoly: nuclear war between them is indeed happily unlikely, but many believe that, in their balance of terror, nuclear weapons cannot in fact be used and are effectively neutralized. The overwhelming military superiority of either super-Power over any other nation might encourage rather than deter war, and each has been amply tempted. The nuclear weapons of the super-Powers surely do not deter war by lesser Powers—as in the Middle East.

The fissures of the Charter are worrisome but they, too, are not as wide in international life as they loom in academic imagination. Pre-emptive war as "anticipatory self-defense" has been hypothesized by many professors but asserted by few governments: President Kennedy may have talked about "offensive weapons" in the Cuban missile crisis but he did not claim to be acting in self-defense under Article 51. A few nations have falsely claimed self-defense against actual attack, but there are effective limits to unwarranted claims, in what nations dare assert and what others will believe: no one accepted that North Korea acted in self-defense in 1950, and she was not induced to attack by the expectation that she would be believed. India violated the Charter at Goa but few accepted her rationalizations, and neither act nor justification significantly modified the norm. (Viet-Nam is a very different story, of course, and the applicable law depends on the characterization of the war or wars there in progress; unhappily, as Dr. Franck stresses, that characterization has not been impartially made.) Troops were sent to Lebanon or Jordan upon invitation, not against the political independence and territorial integrity of the host country; if Article 51 was at all relevant, it was invoked, not to justify the use of force contrary to Article 2(4), but only to support collective, defensive deployments by *bona fide* invitation, as in NATO. If some governments have theorized that abiding colonialism is a legitimate target for armed attack from outside, there are few such targets left; and, in fact, few have claimed the right of unilateral force against colonialism,

only of collective U.N. action (which has its own justifications and limitations). "Self-defense against colonial domination" invoked by those suffering that domination is rhetoric, not international law, and the law of the Charter, surely, does not forbid a people to liberate itself from colonial yoke.

The regional loophole, too, is not as wide as might seem, dangerous but not fatal. There have been few instances of groups claiming the right to do together what the Charter forbids them singly, and little reason to expect that it will happen frequently in future. Some will say that to suggest that the United States and the Soviet Union have "both asserted the right to establish regions of super-Power paramountcy to which Article 2(4) of the U.N. Charter does not apply," is to overlook differences of degree (if not of kind) on which all law—and all politics—depend. But even if one equates the O.A.S. with the Warsaw Pact, the Dominican Republic (or Cuba) with Czechoslovakia, surely donning the mantle of regionalism does not dispose of Article 2(4). Short of voluntary, recognized federation eliminating constituent identities and rendering all that goes on "internal," "regional organizations," to whatever degree integrated or dominated, acquire no license for all actions by all means for all purposes. Whatever a regional grouping can do in *bona fide* collective security against armed attack, whatever pressures short of military force it can impose on members that disturb regional peace or relations, no regional organization may collectively use force or take any other action not "consistent with the Purposes and Principles of the United Nations." (Article 52(1).) Whether or not the Warsaw Pact has as good a claim as the O.A.S. to be a regional organization, in 1968 in Czechoslovakia its members abetted the Soviet Union in an indisputable violation of the Charter. Nothing in Articles 52–53 remotely affords the Brezhnev Doctrine a scintilla of legitimacy, and its own proponents have not seriously pursued that construction. There is reason to hope that the Soviet Union will not lightly repeat Czechoslovakia (especially if the victim fights back), with or without a "regional" umbrella. And while I have no legal brief for U.S. actions in regard to Cuba, Guatemala, or the Dominican Republic, neither the United States nor the Organization of American States has claimed the right to invade Cuba or the Dominican Republic, and few believe that the O.A.S. or even the United States alone would use force against the political independence or territorial integrity of any country in the Hemisphere, even in the event of sharp local deviation, if it was not in fact abetted from the outside. (Compare Chile, 1970.)

As Dr. Franck tells us, however, war has not been eliminated but has been channeled into more or less blatant intervention in internal wars and affairs, often by more than one Power, often by major Powers. In various internal wars one group or side, and sometimes both (or all), have sought outside support. Old nations and new nations have seen their interest in inviting, responding to, or tolerating such intervention. The irregular triangle of big Powers—United States, Russia, China—has made competition in intervention a dominant political determinant. International



society has no principle for choosing sides in internal wars and has not seen the same interest in excluding external intervention.

Assuming—as many do—that Article 2(4) intended to forbid these interventions, clearly it has not prevented, deterred, or terminated a number of them although, again, one cannot say confidently that it has not deterred many others. To me, if Article 2(4) signaled the effective end of conventional war though not of intervention, even, indeed, if it induced this alternative form of organized violence, it would signify a substantial advance in international order: the temptation to military intervention in internal affairs is largely an affliction of the few big Powers and even for them military intervention to promote or maintain internal wars is not always and everywhere possible; intervention by invitation on one side is not so great an aggression against sovereignty and independence; internal wars are generally limited in area and in scope of military operation and therefore less terrible in their destructiveness.

It makes other real differences: The United States cannot itself invade Cuba; it can connive with Cuban exiles at the Bay of Pigs, but it must do so without providing air cover. The United States could obtain a plausible invitation from someone in the Dominican Republic but not in Cuba. It can send Marines to the Dominican Republic, but only for limited times and purposes, and the political consequences make the next time less likely. If it finds justification in ratification by the Organization of American States, it can do so only for acts which will in fact receive that ratification, and subject to its conditions. It can do less, or nothing, in Chile or Peru. For its part, the Soviet Union, unable to arrange, even to fabricate, an invitation by Czechoslovakia, has to invade, not intervene, and bear even within its family the full onus of blatant violation. The occasional small-Power intervention is also limited and hampered: Syria can send masked tanks, but not its air force, to help Palestine guerrillas against Jordan.

Dr. Franck's dramatic title makes its point, and his cry of alarm is warranted and necessary. But one must not allow it to be seized by the "super-realists" to prove that the effort to control international violence by law has again failed and the Charter is now as irrelevant as the Kellogg-Briand Pact. For me, if Article 2(4) were indeed dead, I should have to conclude that it rules—not mocks—us from the grave.<sup>3</sup> In fact, despite common misimpressions (from which it suffers in common with other international law) Article 2(4) lives and can live. No government, no responsible official of government, has been prepared or has wished to pronounce it dead. Article 2(4) was written by practical men who knew all about national interest. They believed the norms they legislated to be in their nations' interest, and nothing that has happened in the past twenty-five years suggests that it is not. There is reason to pray and strive for the change in individual and national perceptions which Dr. Franck invokes, but the need is not to condemn Article 2(4) to death

<sup>3</sup> Compare 64 A.J.I.L. at 809 (1970).

and pray for its resurrection in the end of days when men and nations will not learn war any more. The need is for citizens, policy-makers, national societies, transnational and international bodies to be reminded that this law is indeed in the national interest of all nations; that a decision to initiate force always involves a preference for one national interest over another; that in the cost-accounting of national interest a decision to go to war grossly depreciates the tangible cost to the citizen—in life, in welfare, in aspiration—and usually prefers the immediate and short-sighted to the longer, deeper national interest.

LOUIS HENKIN

THE DOCTRINE OF SELF-EXECUTING TREATIES AND GATT:  
A NOTABLE GERMAN JUDGMENT

A comparatively recent judgment of the Tax Court of Hamburg<sup>1</sup> involved, *inter alia*, the question whether Article III of GATT, prescribing national treatment for municipal taxes or charges on imports from countries of the contracting parties, is self-executing or executory. The case arose with respect to the import of apples from Chile. Imports of goods of that kind at the time of the importation were subject to a turnover equalization (border) tax, and plaintiff claimed that the imposition of that tax constituted a violation of Article III of GATT. Without passing on the merits of that contention, the court held that plaintiff could not challenge the validity of a German statute on the ground of its inconsistency with GATT, and in particular, Article III of that instrument, because GATT lacked self-executing character.

The judgment merits wide attention because of the carefulness of the court's reasoning, especially in view of the fact that two American State courts have reached opposite conclusions on the very issue before the German tribunal. The two American cases both involved the validity of municipal ordinances prescribing a "Buy American" policy, which were challenged as inconsistent with GATT. A division of the Supreme Court of New York denied the self-executing character of Article III of GATT,<sup>2</sup> while an appellate court of California<sup>3</sup> came to the opposite result.

The German decision held that the executory or self-executing character of treaties was to be determined on the basis of the intent of the contracting parties, as deduced from the language and the character of the treaty as well as from other relevant materials. In the case of GATT the court reasoned that its nature as a world-wide agreement on commercial policies was such that the contracting parties could not have intended that it be

<sup>1</sup> Tax Court of Hamburg, Judgment of Oct. 29, 1969 (IVa 353/66), 16 Aussenwirtschaftsdienst des Betriebs Beraters 93 (1970). For a translation, see p. 627 below.

<sup>2</sup> American Institute for Imported Steel, Inc. v. County of Erie, 58 Misc. 2d 1059, 297 N.Y.S. 2d 602 (Sup. Ct., Erie County, 1968); digested in 64 A.J.I.L. 412 (1970).

<sup>3</sup> Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 C.A. 2d 803, 25 Cal. Rptr. 798 (1962). See the discussion by Jackson, World Trade and the Law of GATT 106-110 (1970).

self-executing. The court found additional support for its holding in the specific provision of No. 1 a of the Protocol of Torquay of 1951<sup>4</sup> providing for provisional application of Part II of GATT to the fullest extent not inconsistent with the existing domestic legislation of the acceding nations.

The judgment of the German court is particularly interesting because it shows that the problem of the self-executing or non-self-executing nature of treaties also arises in countries where advice and consent to ratification must be given in the form of a statute passed by the whole legislature in the ordinary fashion. The court held that the approbation (or ratification) law does not in itself attribute direct applicability to the treaty provisions, but that self-executing character means direct applicability of the treaty *ex proprio vigore* in the national courts of parties.

The court contrasted the character of Article III of GATT with that of Article 95 of the Treaty of Rome, despite the fact that the latter was patterned after the former. The opinion correctly points out that the Treaty of Rome created an independent and novel community law and that the creation by some of its articles of direct rights and duties for the nationals of the member states was an effect distinct from the self-executing character of provisions in ordinary international agreements.<sup>5</sup>

While the holding of the German judgment was confined to the executory or self-executing nature of the national treatment provision of Article III of GATT, its reasoning might be thought likewise to apply to the most-favored-nation clause of Article I of GATT. It must be noted, however, that the Torquay Protocol does not qualify the provisional application of GATT by the acceding nations with the saving formula applicable to the provisional application of Part II, including Article III, of that instrument. Moreover, there is American authority to the effect that "treaties which contain the so-called 'most-favored nation' clause are uniformly held to be self-executing."<sup>6</sup> Judge Lieb, the author of this judicial pronouncement, based his holding on a memorandum of July 19, 1928, by Mr. Hackworth, Solicitor of the Department of State, to Solicitor General Mitchell. The case which prompted that holding involved the construction and application of Article 15 of the Chicago Convention on International Civil Aviation.<sup>7</sup> The lower court construed this article as an absolute and unconditional most-favored-nation and national treatment clause but was reversed on that point by the appellate court.

The cases illustrate the difficulty of applying to multilateral treaties the doctrine that the self-executing nature of international agreements is to be

<sup>4</sup> 3 U.S. Treaties 615 (1952).

<sup>5</sup> See Riesenfeld and Buxbaum, Note on "N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos c. Administration Fiscale Néerlandaise: A Pioneering Decision of the Court of Justice of the European Communities," 58 A.J.I.L. 152 (1964).

<sup>6</sup> *Aerovias Interamer. de Panama v. Board of County Com'rs.*, 197 Fed. Supp. 230, at 247 (S.D. Fla., 1961); digested in 56 A.J.I.L. 214 (1962). The opinion was reversed on appeal in *Board of County Com'rs v. Aerolineas Peruanas, S.A.*, 307 F.2d 802 (5th Cir., 1962) (digested in 57 A.J.I.L. 438 (1963)), apparently, however, on different grounds.

<sup>7</sup> 61 U.S. Stat., Part 2, 1181.

determined from the expressed intent of the parties. This doctrine was enunciated by the Supreme Court in two successive famous cases<sup>8</sup> involving a bilateral treaty, the Treaty of Amity, Settlement and Limits of 1819 between the United States and Spain, particularly Article 8 thereof.<sup>9</sup> This article dealt with the recognition by the United States of Spanish land grants made prior to 1818.<sup>10</sup> The Court, per Chief Justice Marshall, held in the earlier case that the article in question was not self-executing because "the terms of the stipulation import a contract."<sup>11</sup> In the second case he arrived at the opposite result on the basis that the history of the negotiations, the purpose of Article 8, and the Spanish text thereof all compelled the conclusion that the parties intended it to be self-executing.<sup>12</sup> It should be noted that the article in question involved an undertaking solely by the United States, and that Article VI of the Constitution of the United States permits treaties, if properly concluded, to be self-executing. Hence both parties could aim at such a result, even if Spain had had a constitutional law providing otherwise. But what of multilateral treaties with states whose constitutions, written or unwritten, require formal transformation by statute? Does it make sense to search for the intent of the parties, if some of the parties could not have had such an intent with respect to their own sphere? The United Kingdom is believed to be the standard example of such a party.<sup>13</sup> Although the doctrine looking to the intent of the parties is widely supported by practice and theory,<sup>14</sup> it seems much more reasonable to consider the self-executing or executory nature of international conventions a matter depending primarily upon the constitutional law of each nation rather than upon a dubious intent of the parties. Consequently in the United States a treaty ought to be deemed self-executing if it: (a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision.

STEFAN A. RIESENFELD

<sup>8</sup> *Foster v. Neilson*, 27 U.S. 253 (1829), and *United States v. Percheman*, 32 U.S. 51 (1833).

<sup>9</sup> *Treaties and Conventions between the United States of America and Other Powers* 785 (rev. ed., 1873).

<sup>10</sup> The same article was also construed in *United States v. Arredondo*, 31 U.S. 691 (1832), a case in which Mr. Justice Baldwin, speaking for the majority of the Court, at least by way of dictum, anticipated the application subsequently given thereto.

<sup>11</sup> 27 U.S. 253, at 314.

<sup>12</sup> 32 U.S. 51, at 88.

<sup>13</sup> See the discussion of the whole issue by Ungoed-Thomas J. in *Cheney v. Conn* (Inspector of Taxes), [1968] 1 W.L.R. 242 (Ch. Div., 1967).

<sup>14</sup> See Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, Versuch einer allgemeinen Theorie des self-executing treaty auf rechtsvergleichender Grundlage (1970); Waelbroeck, *Traité internationaux et juridictions internes dans les pays du Marché commun*, at 161 (1969); Evans, "Self-Executing Treaties in the United States," 30 *Brit. Yr. Bk. Int. Law* 178 (1930); Freund, "Einige Bemerkungen zu unmittelbar anwendbaren Verträgen," 20 *Österr. Ztschr. f. öffentl. Recht* 105, at 120 (1970); Winkler, "Zur Frage der unmittelbaren Anwendbarkeit von Staatsverträgen," 83 *Juristenbl.* 8 at 11, 12 (1961).

## NOTES AND COMMENTS

### WAS "BIAFRA" AT ANY TIME A STATE IN INTERNATIONAL LAW?

The Nigerian civil war came to an end on Monday, January 12, 1970, when the Biafran Army Chief<sup>1</sup> surrendered to the Nigerian Federal Government in the following terms: "I Major General Philip Effiong, Officer administering the government of the Republic of Biafra now wish to make the following declaration: . . . That the Republic of Biafra ceases to exist."<sup>2</sup> Implicit in this declaration is the notion that Biafra at one point existed as a republic; but did it ever exist as a state in international law? The term "state" has no exact definition, but the essential characteristics of a state in international law are settled. In 1948 Professor Jessup, then the United States Representative to the Security Council, said in advocating the admission of Israel to the United Nations:

We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.<sup>3</sup>

Jessup's statement is simply a reformulation of Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American countries) which provides:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>4</sup>

As to qualification (b) it is not clear whether a fixed territory is essential to the existence of a state. Lauterpacht, in dealing with this problem, states as follows:

The possession of territory is, notwithstanding some theoretical controversy which has gathered round the subject, a regular requirement of statehood. Without it there can be no stable and active government.<sup>5</sup>

On the other hand, the fact that the frontiers of an entity have not yet been definitely decided does not necessarily constitute an impediment to

<sup>1</sup> On the eve of Biafra's surrender, Odumegwu Ojukwu, the Biafran leader, who led secession, fled the country, leaving his aide to manage the affairs of state.

<sup>2</sup> Nigerian Consulate, New York, Jan. 15, 1970, *The Nigerian Round-Up*, at 3; *New York Times*, Jan. 16, 1970, p. 13, cols. 1-2.

<sup>3</sup> U.N. Security Council, 3rd Year, Official Records, 383d meeting 9-12 (1948).

<sup>4</sup> Convention on Rights and Duties of States, Dec. 26, 1933, 165 U.N. Treaty Series 19, at 25 (1936); 28 A.J.I.L. Supp. 75 (1934).

<sup>5</sup> Lauterpacht, *Recognition in International Law* 30 (1948).

the existence of statehood. In the case of *Deutsche Continental Gas-Gesellschaft v. Polish State*, the German-Polish Mixed Arbitral Tribunal said:

In order to say that a State exists and can be recognised as such . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory. There are numerous examples of cases in which States have existed without their statehood being called into doubt . . . at a time when the frontier between them was not accurately traced.<sup>6</sup>

For example, Israel was admitted as a Member of the United Nations in May, 1949, notwithstanding the fact that its boundaries were not then defined with precision. Recent events show that Israel's boundaries are still not finally determined. It could also be inferred from Israel's situation that a permanent population is not necessarily essential to the existence of a state, since the population of a nascent state cannot be regarded as permanent if her boundaries are still undefined.

Starke singles out qualification (d) as the most important, and interprets this requirement to mean that "a state must have recognized capacity to maintain external relations with other states."<sup>7</sup> It would appear that there is no other way of acquiring this "recognized capacity" than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state's being formally recognized by other states. In other words, recognition forms an integral part of that factual situation which must manifest itself before an entity can claim to have attained statehood in international law. The difficulty raised by this last clause of the Montevideo Declaration may be illustrated by the position of Rhodesia. Rhodesia has a permanent population, a defined territory and a government, although in theory Great Britain is still deemed to be representing it *in loco parentis*. In view of Great Britain's refusal to concede the validity of the unilateral declaration of independence, has Rhodesia the capacity to enter into relations with other states? The answer seems to be in the negative because no state has come forward to recognize it. In 1965 the British Embassy in Washington informed the Department of State that Mr. Henry J. C. Hooper was no longer attached to the British Embassy:

Mr. Hooper sought to remain in the United States as an agent of the Department of External Services, Ministry of Information, Government of Rhodesia. However, since the United States considered Southern Rhodesia to be a territory over which the United Kingdom

<sup>6</sup> 5 Annual Digest of Public International Law Cases 11, at 15 (Case No. 5) (1929-30).

<sup>7</sup> It is interesting to note that Sec. 4 of the Restatement, Second, Foreign Relations Law of the United States, requires not mere capacity to enter into international relations, but actual participation in international relations. This section provides that "state . . . means an entity that . . . engages in foreign relations" (emphasis added).

had full and exclusive authority and in no way recognized the rebel regime which had unilaterally declared its independence, Mr. Hooper could not be granted the status of its diplomatic representative.<sup>8</sup>

The position of Biafra was different from that of Rhodesia. Although Biafra had a government, it was very difficult to say that it had a permanent population or a defined territory. These were the very things that the civil war had to decide. But, unlike Rhodesia, Biafra was recognized by few African states. Whenever part of an existing state breaks away to form another independent state, recognition is always controversial; perhaps that was why no country came forward to recognize Biafra until eleven months after secession.<sup>9</sup> That Biafra did not get recognition soon after secession has been ascribed to three main factors:

the assumption by the Federal Government of the political initiative in the crisis following the creation of states. The Federal Government's firmness in the West which resulted in Chief Awolowo's<sup>10</sup> membership of the Federal Executive Council; and the rapid and effective institution of the economic blockade of the East. With these three moves the Federal Government rapidly showed its determination to oppose secession, a determination which led to the beginning of the war in July 1967.<sup>11</sup>

The first country to recognize Biafra was Tanzania. In a press conference at the State House in Dar-es-Salaam, on April 13, 1968, Mr. Chediell Mgonja, Tanzania's Minister of State for Foreign Affairs, announced that Tanzania had decided to recognize Biafra as "an independent sovereign entity and a member of the community of nations."<sup>12</sup> The Minister then explained that with 30,000 of their number murdered in two major pogroms, the fears of the Easterners were genuine and deep-seated and that these fears were at the root of the fanaticism with which the Biafrans had set up their own state and fought for it. The only way these fears could be eased was by recognition of their existence. After citing other examples of states splitting up (the Mali Federation, the United Arab Republic, and India before partition), he said that the Biafrans had suffered the same fate of rejection within their state that the Jews of Germany experienced. He concluded by saying that Tanzania felt obliged to recognize the setback to African unity which had occurred, since "only by this act of recognition can Tanzania remain true to her conviction that the purpose of Society is the service to man."<sup>13</sup>

<sup>8</sup> Letter from U.S. Representative to the United Nations to the President of the Security Council, Feb. 28, 1966, 54 Department of State Bulletin 588 (1966).

<sup>9</sup> Secession was declared on May 30, 1967 (6 Int. Legal Materials 879-680 (1967)), and the first recognition was given by Tanzania on April 13, 1968; see below.

<sup>10</sup> Chief Awolowo, first Premier of Western Nigeria, is currently the leader of the Yorubas in Nigeria, Vice Chairman of the Federal Executive Council and Federal Commissioner for Finance.

<sup>11</sup> Front-page comment, *West Africa*, May 25, 1968.

<sup>12</sup> *New Nigerian*, April 15, 1968, p. 1; 15 *Africa Digest* 48 (June, 1968). See also *New York Times*, April 14, 1968, p. 5, col. 1.

<sup>13</sup> *New Nigerian*, *loc. cit.*; also *West Africa*, March 25, 1967, p. 395.

Nigeria responded by withdrawing her diplomatic representatives from Dar-es-Salaam and by stating that the Tanzanian decision was contrary to the Charter of the O. A. U. and its principle of respect for the territorial integrity of member countries.<sup>14</sup>

On May 8, 1968, Gabon also announced its recognition of Biafra. In a statement issued after a meeting in Libreville, the Gabon Cabinet declared:

When one thinks that hundreds of thousands of innocent civilians—women, old men and children—are condemned in an absolutely illegal struggle to pay with their lives for the right of existence recognized to every human being, the Gabon people and Government could not without hypocrisy take refuge behind the principle of so called non-interference in the internal affairs of another state.<sup>15</sup>

Gabon's recognition was followed by that of Ivory Coast on May 14, 1968. An announcement from Abidjan stated that Ivory Coast had recognized Biafra as a sovereign and independent state.<sup>16</sup>

On May 20, Zambia became the fourth country to recognize Biafra as an independent state. In a statement in Lusaka, the Zambian Government said:

The indiscriminate massacre of innocent civilian population has filled us with horror. . . . The heritage of bitterness stemming from this horrifying war would make it impossible to create any basis for the political unity of Biafra and Nigeria.<sup>17</sup>

The only other country that recognized Biafra during her short life was Haiti.<sup>18</sup>

On July 31, 1968, France apparently moved towards recognition of Biafra. After a Cabinet meeting, the Secretary for Information, M. Delle Theule, read a statement saying:

Independently of its desire to participate to the best of its ability in the humanitarian effort under way, the Government notes that the bloodshed and suffering endured by the peoples of Biafra for more than a year show their will to affirm themselves as a people. Faithful to this principle, the French Government believes that, as a result, the present conflict should be resolved on the basis of the right of peoples to self-determination and implies the undertaking of appropriate international procedures.<sup>19</sup>

Observers later speculated that the reference to "appropriate international procedures" meant that France might give Biafra formal recognition, but France never did so.

Apart from France and Haiti, no other non-African state openly supported Biafra. During the United States presidential campaign of 1968,

<sup>14</sup> 15 Africa Digest 48 (June, 1968).

<sup>15</sup> West Africa, May 18, 1968, p. 593. See also New York Times, May 9, 1968, p. 5, col. 5.

<sup>16</sup> *Ibid.*, May 16, 1968, p. 17, col. 7.

<sup>17</sup> West Africa, May 25, 1968, p. 662; see also New York Times, May 21, 1968, p. 3, col. 7.

<sup>18</sup> Time, Jan. 26, 1970, p. 21.

<sup>19</sup> New York Times, Aug. 1, 1968, p. 3, col. 7; 15 African Digest 92 (October, 1968).



Mr. Nixon urged Washington to "speak out against this senseless tragedy and act to prevent the destruction of a whole people by starvation." Ojukwu hoped that Nixon might alter United States policy and recognize Biafra. However, President Nixon did not extend the hoped-for recognition.<sup>20</sup>

It must be noted that:

(1) Although five countries recognized Biafra, none of the recognizing states established formal diplomatic relations with it. Of course, the formal establishment of diplomatic relations is not a necessary corollary of recognition. Hence Schwarzenberger remarks:

Even if the existence of a State as an international person is recognized by another State, this does not mean that a State is bound to have dealings with any specific head of government of a recognized State. If it does so, it maintains diplomatic relations with that State; if not, it suspends them. . . .<sup>21</sup>

(2) The five grants of recognition, which all appeared to be *de jure* in nature, were not prefaced by *de facto* recognition.

(3) No country (including those that recognized Biafra) formally granted the status of belligerency to either side in the Nigerian Civil War. The reason would appear to be that the warfare was in the main on land, and foreign states were not sufficiently affected by it to induce them to take this course. The interests and rights of other states are more likely to be affected in a civil war which is wholly or largely maritime or involves the control of ports and adjacent waters by the secessionists than they are when the rebellion takes place mainly on land, as was true in the Nigerian situation.

(4) Apart from humanitarian considerations clearly brought out in the grants of recognition by the four African countries, no other reasons were given by the recognizing states. But the African correspondent of *The Times* (London) has given three possible reasons for the recognition of Biafra by Tanzania:

. . . President Nyerere has chosen recognition either as a means of forcing the federal government into peace negotiations; that he is deliberately picking a quarrel with the Organization of African Unity; or that he is acting according to suggestions from the Chinese.

The last is not as fantastic as it sounds. There is heavy Chinese involvement in Tanzania, and although Peking has not yet taken any overt interest in the Nigerian conflict, the Russians have been giving unequivocal support to the federal government. President Nyerere's move is therefore interpreted in some quarters as an attempt to embarrass Moscow and, incidentally, Britain.<sup>22</sup>

(5) The Organization of African Unity took a strong stand in favor of Nigeria and established a Consultative Committee of six heads of state to

<sup>20</sup> *Time*, Jan. 26, 1970, p. 21.

<sup>21</sup> Schwarzenberger, *A Manual of International Law* 33 (3rd ed., 1952); quoted in 2 Whiteman, *Digest of International Law* 665 (1963).

<sup>22</sup> *The Times* (London), April 17, 1968, p. 9, col. 3.

look into the Nigerian situation. At the Committee's meeting in Lagos, the capital of Nigeria, Emperor Haile Selassie of Ethiopia said:

The Organization of African Unity is both in word and deed committed to the principle of unity and territorial integrity of its member states. And when this Mission was established by our organization, its cardinal objective was none other than exploring and discussing ways and means together with and the help of the Federal Government, whereby Nigerian national integrity is to be preserved and innocent Nigerian blood saved from flowing needlessly. The national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved. It is our firm belief that the national unity of individual African states is an essential ingredient for the realization of the larger and greater objective of African Unity.<sup>23</sup>

It is interesting to note that, despite this strong statement in favor of Nigeria, the O.A.U. did not at any of its subsequent meetings consider the grants of recognition accorded Biafra by the four African states.

(6) The United Nations did not at any time consider the Nigerian civil war or the statehood of Biafra.

#### *The Effect of the Five Recognitions Granted to Biafra*

What was the effect of the five grants of recognition to Biafra? There has been much discussion concerning the essential conditions that entitle a new state to recognition. The *Institut de Droit International* in its resolution of April 24, 1936, laid down the following criteria:

The recognition of a new state is the free act by which one or several states take note of the existence of a human society, politically organized on a fixed territory, independent of any other existing state, capable of observing the prescriptions of international law and thus indicating their intention to consider it a member of the international community.<sup>24</sup>

Although these criteria are comprehensive and reasonable, it must be noted that in practice they are not the *sine qua non* for recognition. In the absence of a supranational<sup>25</sup> entity exercising supreme authority, the act of recognition is still by and large political in nature and the prerogative

<sup>23</sup> Report on the O.A.U. Consultative Mission to Nigeria, at 9.

<sup>24</sup> 1936 *Annuaire de l'Institut de Droit International* 300-301; quoted by P. M. Brown, "Recognition of Israel," 42 *A.J.I.L.* 620-621 (1948).

<sup>25</sup> Various legal scholars have argued that this rule of individual recognition through the free choice of states should be replaced by collective recognition through an international organization such as the United Nations. See Quincy Wright, "Some Thoughts about Recognition," 44 *A.J.I.L.* 548 (1950). Kelsen, in *The Law of the United Nations* 947 (1951), holds the view that the admission to the United Nations of a community not yet recognized by a Member means that the United Nations has, through the General Assembly and the Security Council, recognized this community as a state, since, according to Art. 4 of the Charter, only states can be admitted to membership. For the opposite view, see 2 Whiteman, *Digest of International Law* 46 (1963), where De Visscher's *Theory and Reality in Public International Law* 229-230 (1957) is quoted: "Further, the admission of a State by the organs of the United Nations does not imply its recognition by the States members individually, any more than it entails any obligation on these members to recognize its government or to main-

of an independent sovereign state. Mr. Warren Austin, the American Representative in the Security Council, stated in reply to strong criticisms by the Syrian Representative of the hasty recognition of the Provisional Government of Israel by the United States:

I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a State.

Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass on the legality or the validity of that act of my country.<sup>26</sup>

It is, however, submitted that this is an overstatement. As the act of recognition produces legal consequences<sup>27</sup> in the sense that it endows an entity with rights and duties under international law,<sup>28</sup> the legality or otherwise of such acts of recognition must necessarily be judged in accordance with international law. Oppenheim-Lauterpacht states:

Governments do not deem themselves free to grant or refuse recognition to new states in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principles.<sup>29</sup>

It is therefore legitimate to examine the legal nature of the recognition which was accorded to Biafra. In doing this, we shall examine the problem under the two principal theories as to the nature, function, and effect of recognition: the declaratory theory and the constitutive theory.

According to the declaratory theory, statehood or the authority of a new government exists as such prior to, and independently of, recognition. Brierly remarks:

[Recognition] does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state.<sup>30</sup>

The act of recognition is thus a formal acknowledgment of an established situation.<sup>31</sup> Lauterpacht expressed the view that when a political com-

---

tain diplomatic relations with it. . . . Neither Article 4 nor Article 78 of the Charter is any authority to the contrary. The scope of these provisions is limited to institutional relations regulated by the Charter; in the absence of any explicit provision, they cannot be extended to cover the individual and strictly political relations of the States members."

<sup>26</sup> Ambassador Austin (U.S.A.), U.N. Security Council, 3d Year, Official Records, 294th meeting at 16 (1948); see also Bishop, *International Law, Cases & Materials* 292 (2nd ed., 1962); Brierly, *The Law of Nations* 140 (6th ed., 1963).

<sup>27</sup> J. E. S. Fawcett, *The Law of Nations* 41 (1968).

<sup>28</sup> Schwarzenberger, *Manual of International Law* 73 (5th ed., 1967).

<sup>29</sup> 1 Oppenheim, *International Law* 127 (8th ed., H. Lauterpacht, 1955).

<sup>30</sup> Brierly, *op. cit.* note 26 above, at 139.

<sup>31</sup> Starke, *An Introduction to International Law* 123-124 (5th ed., 1963).

munity has fulfilled the conditions for statehood prescribed by international law, states are under a duty to recognize the community as a state and that this duty obliges states to base their recognition policy upon the requirements of international law, rather than upon their own national interests.<sup>32</sup> It follows from this view that the validity of any declaration of recognition depends on whether or not the entity has fulfilled the requirements of statehood in international law. Schwarzenberger states that "The purpose of recognition is to endow the new entity with capacity, *vis-à-vis* the recognising State, to be a bearer of rights and duties under international law and participate in international relations on the footing of international law."<sup>33</sup> If an entity does not fulfill all the factual conditions of statehood as required by international law, a declaration of recognition by a state is invalid, and any consequential participation by the new entity in international relations cannot be on the footing of international law. A clear example of an illegal and thus invalid recognition is where the act of recognition is premature and thus an unwarranted interference in the affairs of another state.<sup>34</sup> In this connection, Brierly has laid down these guiding principles:

It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.<sup>35</sup>

In an attempt to solve this important problem, Lauterpacht offers the following suggestions:

in the case of communities aspiring to independent statehood subsequent to secession from the parent State, the sovereignty of the mother country is a legally relevant factor so long as it is not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion. It is a self-deception to assume that a difficult problem has been solved by such statements as the one that the Latin American Republics existed as States as soon as they became independent of the mother country. For the question of actual independence is not one capable of any easy or automatic answer. A temporary success resulting in such independence would not, so long as there exists a reasonable prospect of the mother country reasserting her authority, justify in law the recognition of statehood. The same applies to the assertion that the American Confederacy during the Civil War was, as it claimed to be, a State because it "existed"! <sup>36</sup> . . .

Judged by these rough but by no means infallible tests, the recognition of Biafra by Tanzania, Gabon, Ivory Coast, Haiti, and Zambia would

<sup>32</sup> Lauterpacht, *op. cit.* note 5 above, at 6. This view is well summarized in Friedmann, Lissitzyn, and Pugh, *op. cit.* note 8 above, at 165.

<sup>33</sup> Schwarzenberger, *op. cit.* note 28 above, at 73.

<sup>34</sup> Briggs, "Recognition of States," 43 A.J.I.L. 113-121 (1949).

<sup>35</sup> Brierly, *op. cit.* note 26 above, at 138.

<sup>36</sup> Lauterpacht, *op. cit.* note 5 above, at 45-46.

appear to be unjustifiable and illegal in that at the time of recognition "a real struggle" was still proceeding,<sup>37</sup> and it was not "abundantly clear that the lawful government has lost all hope or abandoned all effort to assert its dominion."<sup>38</sup> In other words, the recognition given to Biafra was, in the circumstances, premature, thus "constituting a tortious act against the lawful government [of Nigeria] and thus a breach of international law."<sup>39</sup>

According to the constitutive theory, it is the act of recognition alone which creates statehood. This theory has some inherent difficulties. First, it is capable of creating an international monster in that "the status of a state recognized by state A, but not recognized by state B, and therefore apparently both 'an international person' and 'not an international person' at the same time would be a legal curiosity."<sup>40</sup> The second difficulty is more substantial. How many recognitions will be sufficient to constitute an entity a state in international law? There are at present over 120 independent states in the world. Should all these states recognize an entity before it becomes a state? Or will fifty percent or more of the number be sufficient? It may even appear that certain weight may have to be given to the recognition by the big Powers, such as the United States, the Soviet Union, Great Britain, China and France. As a result of these formidable difficulties, it would be difficult under this theory to conclude that recognition by only five small states was sufficient to constitute Biafra an independent nation.

As it has been shown above, it is very difficult to justify the existence of Biafra as a state under either theory, as it would appear that it received only *premature recognition* "which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid."<sup>41</sup> It is conceded that there are no clearly established customary or conventional rules of international law governing premature recognition; but, as shown above, it seems that the preponderance of juristic opinion is that premature recognition is wrong and illegal in international law. This juristic opinion cannot be lightly dismissed in view of Article 38(d) of the Statute of the International Court of Justice, which enjoins the Court to apply as a secondary source of law "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In the circumstances, it is difficult to establish that Biafra attained statehood in international law.

DAVID A. IJALAYE \*

<sup>37</sup> Brierly, *op. cit.* note 26 above, at 138.

<sup>38</sup> Lauterpacht, *op. cit.* note 5 above, at 46.

<sup>39</sup> Higgins, *The Development of International Law Through the Political Organs of the United Nations* 138 (1963). See also 1 Hyde, *International Law* 153 (2nd ed., 1945): "The according of recognition to a country still in the throes of warfare against the parent State . . . constitutes participation in the conflict. It makes the cause of independence a common one between the aspirant for it and the outside State. Participation must be regarded as intervention, and therefore essentially antagonistic to that State."

<sup>40</sup> Brierly, *op. cit.* note 26 above, at 135. <sup>41</sup> Lauterpacht, *op. cit.* note 5 above, at 9.

\* LL.B. (Hull); LL.M. (London); Lecturer in Law, University of Ife, Nigeria.

## RESOLUTION OF THE BAHRAIN DISPUTE

The powers and prerogatives of a United Nations Secretary General are not so certainly established that an occasion ought to pass unapplauded on which the exercise of the Secretary General's good offices contributes to the settlement of a deep-rooted international dispute. Even where the good offices mission consists mainly of ascertaining and pronouncing a state of national sentiment which is not really in doubt but which the parties to a dispute have publicly agreed to use as the basis for settlement, the occasion may constitute an institutional precedent worthy of at least honorable mention. So it is with the recent settlement of the long-standing controversy between Iran and the United Kingdom over the status of Bahrain, a small group of islands lying in the Persian Gulf about midway between Saudi Arabia and the Qatar peninsula.

At its roots the dispute involved a challenge by Iran to the legitimacy under international law of the British Protectorate over Bahrain. The challenge focused upon a series of agreements entered into by the British Government with the sheikhs of Bahrain beginning in 1820, upon which the legal basis of the protectorate ultimately rested. Iran (Persia) for many years claimed that, except during a period of Portuguese occupation of the islands from 1507 to 1622, Bahrain historically formed an integral part of Persia, a contention which Great Britain maintained was without historical support. The parties have differed, too, in their perception of the facts and legal effects of hostilities in 1783 between Persian troops and Utubi Arabs, whose ruling family, the Al-Khalifahs, are the ancestors of the present sheikhs of Bahrain. It appears that the Persian troops were defeated and driven from the islands, a circumstance which the British treated as ending Persia's only modern period of rule over Bahrain and establishing the independence of the sheikhdom. The position of Iran was that the fighting constituted no more than a local rebellion, in no way diminishing Persia's sovereignty or establishing the sheikhs' right to enter into international agreements in defiance of the rightful sovereign, Persia. To Iran, only the British protectorate itself prevented the exercise of this sovereignty.<sup>1</sup>

Whatever may be the merits of the respective claims, the controversy simmered for over a century and then in recent years has been caught up

<sup>1</sup> The positions of the two governments were set forth in detail on several occasions. See, for instance, the letters addressed to the Secretary General of the League of Nations by the then Persian Government on Aug. 2, 1928 (Official Records of the League of Nations, September, 1928, pp. 1360-1363), and by the British Government on Feb. 18, 1929 (*ibid.*, May, 1929, pp. 790-793). For an account of the status of Bahrain, see Khadduri, "Iran's Claim to the Sovereignty of Bahrain," 45 A.J.I.L. 631-647 (1951).

Iran's claim became important as an internal political matter. In November, 1957, a bill making Bahrain the fourteenth Province of Iran, giving Bahrain the right to return a deputy, was introduced into the Majlis, Iran's national assembly. See the Report of the Personal Representative of the Secretary General in Charge of the Good Offices Mission, Bahrain (referred to hereinafter as the "Bahrain Report" and "Mr. Winspeare's Report"), U.N. Doc. S/9772 (April 30, 1970), at p. 5.

in a growing Persian Gulf rivalry between Iran and her Arab neighbors.<sup>2</sup> With the eventual withdrawal of British forces from the Gulf becoming inevitable, Bahrain for numerous reasons could hardly have missed being a bone of contention between the littoral rivals, especially Iran and Saudi Arabia. Consider merely these few factors: First, the islands have served prominently as headquarters for the British position in the Gulf. It is from Bahrain that the British Political Resident has co-ordinated the activities of British advisers in Bahrain, Qatar, Abu Dhabi, Dubai and the Consul General in Muscat and Oman.<sup>3</sup> Second, notwithstanding Iran's historical claim, Bahrain lies some 150 miles across the Gulf from Iran, a far greater distance than from nearby Qatar and Saudi Arabia. While Bahrain's history as a trading and *entrepôt* center has produced a number of descendants of non-Arab transients among its population of approximately 200,000, the majority of Bahraini are of Arab stock.<sup>4</sup> Third, oil was discovered in Bahrain in the early 1930s. Although its reserves are of nothing like the magnitude known to exist in other Gulf states, a refinery built just before World War II, having a capacity of 250,000 barrels a day, processes crude oil piped undersea from Saudi Arabia.<sup>5</sup>

Not surprisingly, therefore, the turning point in the Bahrain dispute came with the announcement early in 1968 of the British Government's decision to withdraw its forces from the Gulf. Whether in the process the British Government was able to offer Iran some inducement to relinquish its claim to Bahrain is, of course, only for speculation. However, there seems no reason to doubt that Iran and the United Kingdom had arrived at some understanding between themselves before they brought the Secretary General into the picture.<sup>6</sup>

The first public signal of the eventual accord came on January 4, 1969, when the Shah of Iran, speaking at a press conference in New Delhi, for the first time publicly renounced the use of force as a means of reuniting his country with Bahrain and offered to accept the will of the people

<sup>2</sup> One of the ways, subtle but revealing, in which this rivalry manifests itself is the effort being made by Arab states, and those whose interests lie with them, to substitute the term "Arabian Gulf" for the traditional designation, "Persian Gulf." The Bahrain Report calls it the Persian Gulf and it is so referred to herein. However, one increasingly sees "Arabian Gulf" (as well as "The Gulf," a term Iran considers to be a pro-Arab substitute for the historic name) used in the literature of, for example, a number of oil companies active in the Middle East.

Several recent magazine articles survey the rivalry in depth and in perspective. The Economist, Oct. 31, 1970, at pp. 48 *et seq.*, contains a special section on Iran. *Inter Play* for September, 1970, has three comments on the Persian Gulf scenario: Nasmyth, "If the British Leave the Gulf . . ." (at p. 4); Cottrell, "A New Persian Hegemony?" (at p. 9); and Dammann, "Saudi Arabia's Dilemma" (at p. 16).

<sup>3</sup> See Cottrell, *loc. cit.* at p. 9.

<sup>4</sup> See the Bahrain Report, at p. 6.

<sup>5</sup> *Ibid.* at p. 7.

<sup>6</sup> Alvin J. Cottrell, Director of Research at the Center for Strategic and International Studies at Georgetown University, suggests in a recent article, note 2 above, that the Bahrain settlement may have involved British co-operation in resolving in Iran's favor claims by Iran to certain islands, located inside the Gulf at the mouth of the strategic Strait of Hormuz, which are also claimed by British-protected sheikdoms.

of Bahrain as to its future status. This commitment was coupled with two warnings: one, that the British evacuation had to be genuine, not a pretense for continued British control of Bahrain under some new arrangement; two, that Iran would not tolerate Britain's turning over Bahrain to "other people at Iran's expense."<sup>7</sup> These warnings may have been intended less for the United Kingdom, which one must expect had already assured the Shah on these accounts, than for the Shah's own subjects. The Bahrain dispute was not taken lightly in Iran, and the Shah's offer to leave the future status of Bahrain to the will of the Bahraini people could not have seemed likely to advance Iran's claim. The Shah's own political insight on the outcome of self-determination for Bahrain seems clearly implicit in the following excerpt from his remarks:

[F]irst of all, it is against our principle[s] to use force in order to reattach this land to ours, and secondly, what would be the use of getting, securing, a land when the people of that territory or that country would be against you? . . . [I]t would be occupation. In occupation you have got to watch for the safety of your occupation troops. All the time, soldiers must patrol streets, being exposed to shots of snipers or grenade throwing people. . . . So, it is against our principles and philosophy and I think it is not even intelligent to try to occupy a land against the will of its people.<sup>8</sup>

The Shah's remarks were interpreted as a public renunciation of Iran's claim. Officially, however, this awaited the formal determination of the wishes of the Bahraini people. It is in this context that the good offices of the Secretary General became a graceful means for resolving the Bahrain dispute.

Discussions were held among the two governments' respective U.N. Permanent Representatives and the Secretary General, in the course of which the latter agreed to exercise his good offices, provided the two parties could mutually agree upon terms of reference.<sup>9</sup> This accomplished,<sup>10</sup> on March 9, 1970, the Government of Iran formally requested the Secretary General "to exercise your good offices with a view to ascertaining the true wishes of the people of Bahrain with respect to the status of the islands by appointing a Personal Representative to carry out the mission."<sup>11</sup>

<sup>7</sup> The text of the interview given by the Shah has been made available by the Iranian Mission to the U.N. The only report of the interview the writer has come across in a Western newspaper is a summary which appeared in the Late London Edition of *The Times*, Jan. 7, 1969, at p. 4.

<sup>8</sup> Text supplied by the Iranian Mission, note 7 above.

<sup>9</sup> See Note by the Secretary General Announcing the Good Offices Mission, Bahrain, U.N.Doc. S/9726 (March 28, 1970), at p. 2.

<sup>10</sup> The terms of reference as agreed by the parties were:

"Having regard to the problem created by the differing views of the parties concerned about the status of Bahrain and the need to find a solution to the problem in order to create an atmosphere of tranquillity, stability and friendliness throughout the area, the Secretary-General of the United Nations is requested by the parties concerned to send a Personal Representative to ascertain the wishes of the people of Bahrain." See the Bahrain Report, at p. 3.

<sup>11</sup> U.N.Doc. S/9726, at p. 2.



In due course, the proposal was formally accepted by the United Kingdom and by the Secretary General who, on March 20th, announced the mission and his designation of Vittorio Winspeare Guicciardi, Under Secretary General and Director General of the United Nations Office at Geneva, as his Personal Representative.<sup>12</sup> The parties left to the Secretary General the precise method to be employed in fulfilling the mission's purpose, agreeing to bear between them all of its costs. They also took the unusual step of agreeing in advance to accept the Secretary General's findings, provided that they were endorsed by the Security Council.<sup>13</sup>

The good offices mission was carried out without fanfare and without evoking serious discord. There were no disturbances in Bahrain or elsewhere, and Mr. Winspeare and his staff were able to spend three fruitful weeks in Bahrain consulting with virtually all Bahraini who wished to be heard either in a representative or an individual capacity. In late April Mr. Winspeare's Report was circulated to members of the Security Council, and on May 11th, less than two months after formal establishment of the mission, its findings were unanimously endorsed by the Council.<sup>14</sup> As expected, Mr. Winspeare concluded that "the overwhelming majority of the people of Bahrain wish to gain recognition of their identity in a fully independent and sovereign State free to decide for itself its relations with other States."<sup>15</sup> Following the Council's endorsement of the Report's findings, Iran formally renounced her claim to Bahrain.<sup>16</sup>

Coming as it does on the eve of the termination of British hegemony in the Gulf, the immediate effect of the settlement of the Bahrain dispute is to remove the question mark long drawn over the islands' future by the Iranian claim, as well as to remove a source of irritation from Iran's relations with the United Kingdom and Saudi Arabia. From the standpoint of the development of the office of the Secretary General as a peace-keeping institution, however, the success of the Bahrain mission is worthy of tribute in its own right, especially since the Bahrain dispute bears a striking resemblance to others still unsettled and potentially dangerous. As a precedent, then, the way in which the mission was conducted is noteworthy, as are a few reservations expressed during the Security Council debate.

### *The Good Offices Mission*

The Secretary General instructed Mr. Winspeare "to seek such information, make such inquiries and hold such consultations with the people of Bahrain, leaders of organizations, societies, institutions and groups, ordinary citizens and other persons as in [your] judgment might be useful

<sup>12</sup> *Ibid.* at p. 3.

<sup>13</sup> *Ibid.*

<sup>14</sup> The draft resolution appears as U.N.Doc. S/RES/278 (May 11, 1970). The Security Council debate appears as U.N.Doc. S/PV/1536 (May 11, 1970).

<sup>15</sup> Bahrain Report, at p. 13.

<sup>16</sup> See Introduction to the Report of the Secretary General on the Work of the Organization, U.N.Doc. A/8001/Add. 1 (Sept. 14, 1970), at par. 13.

in fulfilling [your] assignment.”<sup>17</sup> To this end Mr. Winspeare was given a list of organizations and institutions in Bahrain from which he could select “those bodies providing the best and fullest cross-section of opinion among the people of Bahrain.”

The mission was able to take advantage of Bahrain’s small population and the fact that nearly all Bahraini live on three islands, the largest of which—Bahrain Island—contains the capital of Manama and is connected to the other two by, respectively, a bridge and a causeway. All important towns and centers and nearly all the outlying villages were within ten miles of the mission’s offices in Manama, and good communications ensured easy access to and from most populated areas.

Upon his arrival and again a week later, Mr. Winspeare announced through the local news media the nature and scope of his mission, drawing attention to the terms of reference by which it was to be guided and adding his assurances of ready and free access to the mission to all who wished “to express their views on the question at issue freely, in private and in confidence.” Consultations with representatives of groups began by appointment on the afternoon of Mr. Winspeare’s arrival. However, the majority of individuals came after publication of the reminder when nearly a week was set aside to receive them. The original list of organizations and institutions which had been made available to the Secretary General was expanded to include a number of additional “clubs” and professional groups, to the extent that in his Report Mr. Winspeare observed that to the best of his knowledge the final list included the names of all associations and organized groups in Bahrain.

Mr. Winspeare decided not to be selective but to receive representatives of all organizations listed, since the representatives themselves, as well as the organizations they represented, appeared to offer a good cross-section in age, activity, status and geographical distribution. He conducted all consultations personally, assisted by the mission’s interpreter and the rest of his staff of five. In doubtful cases, proof of Bahraini nationality was required. Names, however, were recorded only when voluntarily offered. All were asked to give their age, profession, and place of residence.

To fill the few gaps remaining in the coverage of the inhabited parts of Bahrain, Mr. Winspeare visited several villages, in each one meeting with the *mukhtar* (village head), or his representative, and assembled members of the community. He also visited certain organizations whose representatives had already been to see him, to establish to his own satisfaction that the views presented were those of the membership as a whole.

As noted earlier, although the majority of Bahraini are of Arab stock, Bahrain has long had a significant number of non-Arab transients (Iranians, Indians, Pakistanis, Africans and others) many of whose descendants have been assimilated. Integration, including intermarriage, was made

<sup>17</sup> Bahrain Report, at p. 3. The description which follows of the Bahrain mission and its findings is drawn primarily from the Bahrain Report. A brief summary of the mission’s work appeared in the New York Times, May 3, 1970.

easy in the case of Bahrainis of Iranian extraction by their common faith in Islam.

Despite the diversity of the population, almost all replies received by Mr. Winspeare by every method of inquiry had these common denominators:

First, they gave credit to the Governments concerned for asking the Secretary-General to use his good offices and were explicit in hoping that the cloud of the Iranian claim would be removed once and for all. This was never accompanied by the slightest bitterness or hostility towards Iran. On the contrary the wording of the terms of reference was used spontaneously to express the wish of all for tranquillity, stability and friendliness in the area. Once the question of the claim had been settled closer relations with other States in the Gulf, including of course Iran, were expected to follow.

Secondly, the Bahrainis . . . were virtually unanimous in wanting a fully independent sovereign State. The great majority added that this should be an Arab State.<sup>18</sup>

Marginal to these common characteristics, a variety of viewpoints were expressed, none of which, Mr. Winspeare concluded, could be said to constitute a trend. Some voices were heard in favor of a special relationship with Iran—failing acceptance of the Iranian claim—as a means of guaranteeing the independence of Bahrain and for its protection. Others wished for the same reason that the existing special relationship with the United Kingdom should continue. Isolated individuals expressed support for union or association with Iran, and among the few written communications received there were instances of similar opinions.

Mr. Winspeare found no sectarian differences on the point at issue, and only a slight difference in emphasis between the views of urban and rural Bahrainis (the urban population seeming more keenly aware of the Iranian claim and consequently more explicit in wishing a settlement, the representatives of rural communities concentrating almost exclusively on their own Arab identity and the "Arabism" of Bahrain). A more pronounced awareness of distinctively Bahraini identity was found among the better educated. Among the professions, the important trading community showed particular interest in the removal of the obstacle represented by the Iranian claim as a means of improving external relations, not least with Iran. Age was evidently of no significance, although a large majority of the population is under the age of thirty. Ethnically, the most noticeable difference was that, among Bahrainis of Iranian descent, there were a number whose wish for an "independent, sovereign State" was qualified by the deliberate omission of "Arab."

#### *U.N. Fact-Finding and the Role of the Secretary General*

The good offices mission is a somewhat out-of-the-ordinary example of fact-finding, an institution which, insofar as it relates to the peaceful

<sup>18</sup> Bahrain Report, at p. 11.

settlement of international disputes, developed in modern times from the Hague Conventions of 1899 and 1907.

Among U.N. organs, the General Assembly has established by far the largest number of fact-finding bodies. Two of these—the Panel for Inquiry and Conciliation and the Peace Observation Commission—were set up on a permanent basis.<sup>19</sup> The Security Council has also established fact-finding bodies on a number of occasions, as have other U.N. organs and international organizations.<sup>20</sup>

Most prominently in connection with the situation in Cyprus, but at other times as well, the Secretary General has appointed his own fact-finding missions. One somewhat similar to the Bahrain mission was established at the time of the dispute concerning the wishes of the people of Sabah (North Borneo) and Sarawak in 1963, prior to the establishment of the Federation of Malaysia.<sup>21</sup>

The Secretary General's authority to appoint fact-finding missions is not explicitly recited in the Charter. However, Article 99 confers upon him a right to bring to the attention of the Security Council "any matter which in his opinion may threaten the maintenance of international peace and security." By necessary implication, it is argued, this right carries with it broad discretion to conduct inquiries and to engage in informal diplomatic activity with respect to such matters.<sup>22</sup> If the Bahrain mission may be said to afford a precedent under Article 99, the office of the Secretary General has scored a quiet triumph of considerable proportion.

During the debate which followed the Security Council's adoption of the draft resolution endorsing the Bahrain Report, several Council members sought to ascribe the Secretary General's action to Article 33, paragraph 1, of the Charter. This provision entitles the parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security to use *any* peaceful means of *their choice* to resolve it. If the Bahrain mission constitutes solely an Article 33 operation, its success as a precedent seems more limited.

The Soviet Union took the opportunity to sound its familiar fugue that the Charter requires that *all* decisions on matters connected with action by the United Nations relating to the maintenance of international peace

<sup>19</sup> The Panel for Inquiry and Conciliation was established on April 29, 1949, under Res. 268 D (III), entitled Study of Methods for the Promotion of International Cooperation in the Political Field, based upon the Report of the *Ad Hoc* Political Committee. The Peace Observation Commission was established on Nov. 3, 1950, under the Uniting for Peace Res. 377 B (V). See Report of the Secretary General on Methods of Fact-Finding, 20 U.N.G.A.O.R. Annexes, Agenda Items Nos. 90 and 94, U.N.Doc. A/5694 (1965), paras. 156 and 158.

<sup>20</sup> See Kerley, "The Powers of Investigation of the United Nations Security Council," 55 A.J.I.L. 892 (1961); and Plunkett, "U.N. Fact-Finding as a Means of Settling Disputes," 9 Va. J. Int. Law 154 (1969).

<sup>21</sup> See Report of the Secretary General on Methods of Fact-Finding, note 19 above, at paras. 313-328.

<sup>22</sup> See, for example, Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld 335 (1962); and Schwebel, "The Origins and Development of Article 99 of the Charter," 28 Brit. Yr. Bk. Int. Law 371 (1951).

and security—including action by the Secretary General—must be taken by the Security Council. In a quick response to the announcement of the Bahrain mission, the Soviet Union objected, *inter alia*, to the assertion by the Secretary General that actions such as his have become customary in United Nations practice. This could not serve to justify them, in the Soviet view, since such “illegal practice was forced upon the United Nations in the past by certain Powers contrary to and in violation of the Charter.”<sup>23</sup>

It is interesting to recall at length the Secretary General's reply:

... From time to time, as in the present case affecting Bahrain, Member States of the United Nations approach the Secretary-General directly asking for the exercise of his good offices on a delicate matter. They explain that they do so because they feel that a difference between them may be capable of an amicable solution if dealt with at an early stage quietly and diplomatically and, therefore, it would be inadvisable to take the particular matter before the Security Council or to consult its members individually on it. They express the wish to have the matter worked out through the good offices of the Secretary-General on a completely confidential basis. In all such cases the Secretary-General, naturally, examines the proposals carefully. If these proposals are fully consistent with the principles and purposes of the United Nations Charter, and if they in no way impinge upon the authority of the Security Council or any other organ of the United Nations, he unavoidably feels obligated to afford the Member States the assistance in the manner requested. To do otherwise, would be to thwart a commendable effort by these Member States to abide by a cardinal principle of the Organization, namely, the peaceful settlement of disputes.

In the case in question, the good offices mission is engaged only in a fact-finding exercise. The facts found will, in due course, be presented to the Security Council in the form of a report from the Secretary-General. Any substantive action would be taken at that time and only by the Security Council.<sup>24</sup>

The Secretary General's explanation of his rôle in the Bahrain dispute was echoed during the Security Council debate by several delegates. Two of these, for different reasons, were anxious to establish the uniqueness of the Bahrain mission. Ambassador Kosciusko-Morizet of France explained his affirmative vote by saying that the Bahrain mission was appropriate in the circumstances because the parties to the dispute, pursuant to Article 33, paragraph 1, found it to their mutual interest to settle it that way. In the view of the French Government, the agreement of Iran and the United Kingdom, not Mr. Winspeare's findings or their endorsement by the Security Council, determined Bahrain's future status.<sup>25</sup>

<sup>23</sup> Letter dated April 3, 1970, from the Permanent Representative of the U.S.S.R. to the United Nations addressed to the President of the Security Council, U.N.Doc. S/9737 (April 4, 1970).

<sup>24</sup> Letter dated April 6, 1970, from the Secretary General to the President of the Security Council, U.N.Doc. S/9738 (April 6, 1970). The Secretary General had previously set forth his position in a letter to the Security Council which appears as U.N.Doc. S/9055 (March 7, 1969).

<sup>25</sup> U.N.Doc. S/PV/1536, at pp. 67-70.

Ambassador de Pinies of Spain, presumably with Gibraltar in mind, took a different tack. He was concerned that the British position in Bahrain, which he characterized as that of a *protecting* Power, be distinguished from one involving only an *administering* Power. Whether one regarded Bahrain as a sovereign state with which the United Kingdom had special treaty relations or as an integral part of Iran, the Spanish Ambassador contended, the dispute did not involve a case of decolonization, since Bahrain was not a non-self-governing territory to which Article XI of the Charter should apply.<sup>26</sup>

### Conclusion

Whether the Secretary General's rôle in the settlement of the Bahrain dispute may prove to have been major or secondary, the success of the mission undoubtedly affords what the Secretary General has called "a striking example" of how the good offices of the Secretary General can be used for the peaceful settlement of international disputes. Somewhere, one might even hope, there exists another controversy settlement of which has been made more probable by the precedent established in the Bahrain dispute.

EDWARD GORDON

### TRANSFER OR RECOGNITION OF SOVEREIGNTY—SOME EARLY PROBLEMS IN CONNECTION WITH DEPENDENT TERRITORIES

When the Low Countries declared their independence in 1581, the first important problem of recognition arose.<sup>1</sup> Although France and England concluded treaties with The Netherlands,<sup>2</sup> they did not accept them as sovereign states. This could be seen especially in the treatment of their ambassadors, who were not received on an equal footing and were not given the title of "Excellency."<sup>3</sup> Spain recognized the States General as "*Pais, Provinces & Etats libres, sur lesquels ils ne prétendent rien*" in the Armistice of 1609.<sup>4</sup> Spain had proposed to include a clause in the Armistice stating that she would negotiate with The Netherlands as "*des peuples libres*," but saving all her rights until a peace treaty would be concluded. The Netherlands did not accept this. When The Netherlands complained later that the Archdukes of Brabant claimed the title "Count of Holland,"

<sup>26</sup> *Ibid.* at pp. 33–36.

<sup>1</sup> The declaration of independence is to be found, for instance, in Reibstein, *Völkerrecht, Eine Geschichte seiner Ideen in Lehre und Praxis*, Bd. 1, 1958, pp. 369 *et seq.*

<sup>2</sup> For instance, the alliance against Spain concluded in 1596, *Recueil des Traitez de Paix etc. faits par les Rois de France*, Vol. 5, 1693 (no pages, chapter "Avec la Hollande").

<sup>3</sup> Comp. F. C. Moser, *Kleine Schriften zur Erläuterung des Staats- und Völkerrechts*, Vol. 2, 1752, pp. 246 *et seq.*, 251: "Les Hollandais . . . ne voulant pas, que leur Députez y parussent autrement que comme des Ambassadeurs d'une Republique Souveraine, égaux à ceux des autres Souverains."

<sup>4</sup> *Op. cit.* note 2 above.

it was declared that the Armistice left the rights of each side untouched.<sup>5</sup> It was not before 1648 that Spain recognized their sovereignty.<sup>6</sup> The Emperor decided in 1646 that the ambassadors of The Netherlands should not be called "Excellency" as long as Spain did not grant them this title,<sup>7</sup> presupposing, it seems, that the sovereignty of The Netherlands could only be transferred to them by Spain.

The same problem arose more sharply in connection with the formal recognition of the Swiss Confederacy in the articles of the Peace of Westphalia. While the quality of the Swiss cantons as subjects of international law was not in doubt even much earlier,<sup>8</sup> the necessity of formal recognition was felt, since the Reichskammergericht in 1631 held that it had jurisdiction over the City of Basle.<sup>9</sup> It was not clear at first if the recognition meant only exemption from the sovereignty of the Empire, which could be withdrawn, or the recognition of sovereignty.<sup>10</sup> The view that the Swiss were fully sovereign prevailed,<sup>11</sup> but writers queried whether this sovereignty was transferred from the Empire.<sup>12</sup> If sovereignty was derived from the Empire, it could be argued that some link still existed. J. J. Moser found that view unacceptable because the confederation had attained sovereignty by itself.<sup>13</sup> It is interesting to see that nowadays a similar question troubled some of the countries which became independent on the basis of a British statute. The necessity of breaking every possible

<sup>5</sup> Comp. *Histoire des Traitez de Paix et autres Negociations du dix-septième Siecle*, Vol. 2, 1725, pp. 60, 63.

<sup>6</sup> Art. I of the treaty of Jan. 30, 1648, states: "Premierement declare ledit Seigneur Roi & reconnait que lesdites Seigneurs Etats Generaux des Pays-Bas Unis . . . sont libres & Souverains Etats . . . sur lesquels le dit Seigneur Roy ne pretend rien." Schmauß, *Corpus Juris Gentium Academicum* . . . Vol. 1, 1730, p. 615.

<sup>7</sup> F. C. Moser, *loc. cit.*, pp. 256 *et seq.*

<sup>8</sup> The Confederacy had concluded treaties with many European Powers; for the treaties with France comp. *Recueil*, note 2 above. For the quality of subjects of international law held by the states of the Holy Roman Empire, Knubben, *Die Subjekte des Völkerrechts*, p. 63 (1928).

<sup>9</sup> J. J. Moser, *Die gerettete völlige Souverainete der löblichen Schweitzerischen Eydgenossenschaft*, 1731, (with official correspondence).

The Reichskammergericht was the highest court of the Holy Roman Empire, having jurisdiction *inter alia* to review acts of the Princes to determine their conformity with imperial laws.

<sup>10</sup> The wording of Art. VI of the Treaty of Osnabrück and §61 of the Treaty of Münster was that the Swiss cantons are "in possessione vel quasi plenae libertatis et exemptionis ab Imperio." Zeumer, *Quellersammlung zur Geschichte der Deutschen Reichsverfassung in Mittelalter und Neuzeit*, pp. 415, 437 (2nd ed., 1913). For the possible interpretations, J. J. Moser, *loc. cit.*, pp. 22 *et seq.*

<sup>11</sup> J. J. Moser, *loc. cit.*, p. 28; Vattel, *Le Droit des Gens*, Vol. 1, §202 (Edition Paris, 1838, p. 219).

<sup>12</sup> J. J. Moser, *loc. cit.*, p. 49, where it is stated that Schurzfleisch was of this opinion.

<sup>13</sup> *Loc. cit.*, p. 49; "... da wir . . . gehört . . . daß die Eydgenossen ihre Souveraineté niemand als sich selbst haben wollen zu dancken haben und daß sie von dem Reich nichts weiters verlangt, als sie dafür zu erkennen, wer sie schon so lange Zeit seyn."

link by violating provisions of this statute or of the constitution based thereon was felt by India and Ghana.<sup>14</sup>

If it is correct that the Swiss Confederacy had acquired sovereignty by itself, it might have been possible for third states to recognize that sovereignty before the mother country had done so. But even around and after 1648, state practice did not go so far. When Portugal declared her independence from Spain in 1641, treaties were concluded with her but she was not treated as fully sovereign.<sup>15</sup> When Portugal tried to send ambassadors to the Westphalian Peace Conference, she was unable to obtain passports for them, being permitted to attach only representatives to the ambassadors of France, Sweden and The Netherlands. Even after the treaty with Spain in 1668, there were doubts about the sovereignty of Portugal because Spain had not formally renounced her rights to that country.<sup>16</sup>

It is well known, of course, that in connection with the French recognition of the United States, the possibility of third states recognizing a *de facto* independent country before the former sovereign had done so was fully argued between Britain and France.<sup>17</sup> Both views received support in the literature. The German author, von Steck, held it unlawful to recognize a seceded province before the mother country had done so, since the independence could only be validated and legalized through the recognition and renunciation of the mother country.<sup>18</sup> He therefore considered the recognition of the United States by France to be illegal.<sup>19</sup> J. J. Moser, on the other hand, took the position that third states could grant recognition before the mother country extended it.<sup>20</sup> Around 1820 the literature of international law had accepted the view of J. J. Moser, provided effective independence was achieved by the dependency.<sup>21</sup> Al-

<sup>14</sup> Comp. Fawcett, *The British Commonwealth in International Law* 92 *et seq.* (1963), and Wheare, *The Constitutional Structure of the Commonwealth* 89 *et seq.* (1960).

<sup>15</sup> Treaties with France, The Netherlands, Sweden and England of 1641 and 1642 will be found in *Collecção dos Tratados, Convenções, Contratos* (issued by Portugal), Vol. 1 (1856), pp. 16, 24, 50, 82; *Histoire des Traitez de Paix et autres Negotiations du dix-septieme Siècle etc.*, Vol. 2 (1725), pp. 573 *et seq.*

<sup>16</sup> *Loc. cit.*, pp. 575 *et seq.*: "Il paraît que ce Traité ne mettait point le Royaume de Portugal en une sureté entière de son état, puisque le Roi d'Espagne n'y renonçait point formellement aux droits & prétentions qu'il avait sur cette couronne, ainsi qu'on a accoutumé de faire en ces rencontres."

<sup>17</sup> Charles de Martens, *Causes célèbres du droit des gens*, Vol. 3 (2<sup>e</sup> éd., 1859).

<sup>18</sup> J. C. W. von Steck, "Versuch von Erkennung der Unabhängigkeit einer Nation und eines Staates," in *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse*, pp. 49-53 (1783).

<sup>19</sup> *Loc. cit.*, pp. 54 *et seq.*; in connection with von Steck compare Alexandrovicz, "The Theory of Recognition in fieri," 34 *Brit. Yr. Bk. Int. Law* 176, 180 *et seq.* (1958).

<sup>20</sup> J. J. Moser, *Beyträge zu dem neuesten Europäischen Völkerrecht in Fridens-Zeiten* (1778), I. Buch, I §4, p. 16 *et seq.*

<sup>21</sup> Schmalz, *Das europäische Völkerrecht*, p. 37 *et seq.* (1817); G. F. de Martens, *Précis du Droit des Gens* §80 (3rd ed., 1820) (p. 221 *et seq.* of the edition of 1864); Klüber, *Europäisches Völkerrecht*, Vol. 1, §23, p. 49 *et seq.* (1821); Saalfeld, *Handbuch des positiven Völkerrechts*, p. 63 *et seq.* (1833).



though Great Britain never conceded that the United States had reached full sovereignty before she had renounced her rights,<sup>22</sup> she accepted and practiced the new rule in recognizing some of the South American states in 1825, three years after the United States had done so but long before Spain had given up her sovereignty.<sup>23</sup>

JOCHEN A. FROWEIN \*

#### THE UNITED NATIONS TRAVEL AND IDENTITY DOCUMENT FOR NAMIBIANS

The issuance of travel documents is one of the functions entrusted under international law to national governments. As a rule these governments are in *de facto* authority over the country or territory they claim to represent. This *de facto* authority is highly relevant, because it guarantees to other countries that the holders of these travel documents may be deported to the country of the issuing authority without question.

#### *Passports Issued by Governments-in-Exile*

There have, however, been exceptions to this rule. During the second World War, governments-in-exile of continental European countries issued and extended passports for those of their nationals who applied for them. These passports were considered as valid travel documents by the Members of the United Nations Group as established on January 1, 1942.

This arrangement had two important features. The *de jure* authority of these governments was considered sufficient for the recognition of their passports, notwithstanding the fact that in the absence of *de facto* authority the immediate returnability of the bearers was impossible. In other words, the faith of the Allied belligerents that they would win the war and restore authority to the overrun nations was sufficient to cover the commitments undertaken by the issuer of the travel documents. The other feature of this arrangement was that it prevented nationals of the occupied countries who were abroad from being treated as if they were stateless.

During the inter-war years the need for special travel documents arose out of a different set of circumstances. In the aftermath of the first World War, a significant group of persons found themselves stranded abroad, when their countries had come under the control of governments whose authority they refused to recognize and under whose jurisdiction they preferred not to live. For them the international community created a type of travel document, commonly known as the Nansen passport.<sup>1</sup> The

<sup>22</sup> Comp. 3 Moore, *International Adjudications*, Modern Series, 2, 244, 251 *et seq.*

<sup>23</sup> 1 Smith, *Great Britain and the Law of Nations* 151 *et seq.* (1932).

\* Professor of Law, University of Bielefeld; Dr. jur., M.C.L., Ann Arbor, Michigan.

<sup>1</sup> For further information, see Holborn, "The Legal Status of Political Refugees, 1920-1938," 32 A.J.I.L. 680 (1938); Weis, "The International Protection of Refugees," 48 *ibid.* 193 (1954); *idem*, "The International Status of Refugees and Stateless Persons," 83 *Journal du Droit International* 4 (1956); A Study of Statelessness, U.N. Doc. E/1112 and Add. 1 (Sales No. 1949. XIV. 2).

original "arrangements" agreed to in 1922 did not specifically accord the right of return to the state which had issued the passport, apparently because it was still expected that the political situation would change and would enable the refugee to return to his homeland. As time went by, this hope proved to be illusory. In 1926 new "arrangements" were agreed to which included a recommendation that return visas should be affixed to the travel document. Finally, the return clause became obligatory under the Convention relating to the International Status of Refugees concluded on October 28, 1933.<sup>2</sup> However, as the obligations undertaken increased, the number of ratifying states decreased: in 1922 there were 53, in 1926 there were 20, and in 1933 only 8.<sup>3</sup>

Unlike the World War II arrangements, the Nansen passport, as it existed after 1926, did not assume a suspended right of return to the bearer's home country but rather his intention not to return to the country of his nationality under any then foreseeable circumstances. Progressively the Nansen passport came to be considered a temporary document, to be used until the bearer was able to acquire another nationality, which nearly always was the case after a longer or shorter period.

#### *Travel Documents for Refugees—Convention Documents*

Similar arrangements were established after the second World War under the Agreement relating to the issue of a Travel Document to Refugees concluded in London on October 15, 1946,<sup>4</sup> the Geneva Convention Relating to the Status of Refugees of July 28, 1951,<sup>5</sup> and the subsequent protocol of 1967.<sup>6</sup> The travel document issued under the London Agreement contained an "automatic return clause," permitting the holder to return to the issuing country during the period of the document's validity, usually one or two years. The Convention of 1951 sought to revise, consolidate, and expand on the previous arrangements and conventions relating to refugees. As the convention virtually supersedes the London Agreement, the documents presently in use are usually called Convention documents.

Travel documents issued in conformity with the Convention of 1951 are not United Nations documents, though the convention was concluded under United Nations auspices and the United Nations through the High Commissioner for Refugees continues to be involved in the matter. They are issued by states parties to the convention and place the bearer under the jurisdiction of the issuing state. The bearer in his relation to other states is the responsibility of the state which issues the travel document, although this responsibility may be limited in time by that state.

#### *UNTEA Documents*

There exists one case in which the issuing authority of travel documents was not a state but an international organization. The United Nations

<sup>2</sup> 13 L. N. Treaty Series 237.

<sup>3</sup> 89 *ibid.* 47; 159 *ibid.* 199.

<sup>4</sup> 11 U.N. Treaty Series 84.

<sup>5</sup> 189 *ibid.* 150; 63 A.J.I.L. 389 (1969).

<sup>6</sup> 606 U.N. Treaty Series 267; 63 A.J.I.L. 385 (1969).

exercised executive functions in the Territory of West New Guinea (West Irian) between September 21, 1962, and March 31, 1963, through a U.N. Administrator appointed by the Secretary General. Among the functions entrusted by Indonesia and The Netherlands to the United Nations Temporary Executive Authority (UNTEA) was "the authority at its discretion to issue travel documents to Papuans (West Irianese) applying therefor without prejudice to their right to apply for Indonesian passports instead." In addition the Governments of Indonesia and The Netherlands agreed that they would, at the request of the Secretary General, "furnish consular assistance and protection abroad to Papuans (West Irianese) carrying these travel documents . . . it being for the person concerned to determine to which consular authority he should apply."<sup>7</sup>

On September 21, 1962, the Secretary General sent a circular letter to all Member Governments, in which, referring to the above agreement, he requested them to confirm that they would recognize these travel documents and accept them as valid, subject to compliance with national visa regulations, and would issue the necessary instructions to the competent immigration and consular authorities to this effect. In reply to this letter, a number of governments, including those of Burma, Japan, Thailand, Tunisia, India, Norway, and the U.S.S.R., signified that they would accept these documents as valid documents. In his annual report to the General Assembly for 1962-1963 the Secretary General recorded that a number of these travel documents were issued and used for travel purposes.<sup>8</sup>

It should be noted that while these documents were issued by an international organization, the United Nations represented the *de facto* and *de jure* authority over the Territory concerned for the period indicated and could be expected to guarantee the right of return of the bearers, if required. The UNTEA was in fact simply exercising the functions of a government, recognized by all parties concerned. While it was breaking new ground in the matter of international administration, its passport policy followed the conventional state practice.

#### *U.N. Laissez-Passer*

Another type of travel document emanating from an international organization is the "*laissez-passer*" issued by the United Nations under the authority of Article VII, sections 24 to 28 of the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on February 13, 1946.<sup>9</sup> These documents are, however, carried only by officials of the United Nations and of the Specialized Agencies, and the right of return (to the Headquarters of the Organization) is implicitly covered by the provisions of the Headquarters agreements.

These precedents are set out because they contain various elements in-

<sup>7</sup> 437 U.N. Treaty Series 273.

<sup>8</sup> U.N. General Assembly, 18th Sess., Official Records, Supp. No. 1, at 37 (A/5501) (1963).

<sup>9</sup> General Assembly Res. 22 A (I), in Resolutions adopted by the General Assembly (First Pt., 1st Sess.), U.N. Doc. A/64, at 27 (1946); 43 A.J.I.L. Supp. 1 (1949).

corporated in the procedures for the issuing of United Nations travel documents to Namibians. In a number of respects, however, the position of the Namibians was dissimilar from that of the bearers of the travel documents mentioned above. The resulting problems, by comparison, proved to be far more complex and more difficult to solve.

### *Travel Documents for Namibians*

Under the provisions of General Assembly Resolution 2145 (XXI) of October 27, 1966,<sup>10</sup> South Africa's mandate was revoked, and Namibia was placed under the direct administration of the United Nations until it would achieve its independence. In implementation of this resolution the General Assembly on May 19, 1967, by Resolution 2248 (S-V)<sup>11</sup> established the United Nations Council for Namibia to administer the Territory until independence. This same resolution set out the functions to be exercised by the Council "in the Territory." Subsequently, when it became apparent that the Council would not be in a position to enter Namibia, the General Assembly on December 16, 1967, by Resolution 2325 (XXII)<sup>12</sup> requested the Council "to fulfil by every available means the mandate entrusted to it by the General Assembly." This was further defined in Resolution 2372 (XXII) of June 12, 1968,<sup>13</sup> which enjoined the Council to perform "as a matter of priority" a number of functions, all of which concerned the problems of refugees from Namibia in different parts of the world. Among those was "the question of issuing to Namibians travel documents enabling them to travel abroad."

Thus the Council was faced by the problem that it had to operate as a kind of UNTEA *in partibus* or as the second World War governments-in-exile, without the benefit of the powerful and understanding allies which those governments had enjoyed.

Meanwhile, as soon as the Council had been established, letters were received at U.N. Headquarters from persons claiming to be citizens of Namibia and applying for United Nations passports for travel purposes. In their applications they adduced several grounds for their requests. Most of them felt that, now that Namibia had become the ward of the United Nations, they should receive travel documents from their own "government," the Council for Namibia, and not from any other authority. Some of them complained that they had encountered difficulties in obtaining travel documents from host countries under the Convention of 1951, while others felt that by accepting the Convention document they placed themselves in the same category as other refugees, although legally, in view of the international status of the Territory, their position was different.<sup>14</sup>

<sup>10</sup> U.N. General Assembly, 21st Sess., Official Records, Supp. No. 16, at 2 (A/6316) (1967); 61 A.J.I.L. 649 (1967).

<sup>11</sup> U.N. General Assembly, 5th Spec. Sess., Supp. No. 1, at 1 (A/6657) (1967).

<sup>12</sup> *Ibid.*, 22nd Sess., Supp. No. 16, at 3 (A/6716) (1967).

<sup>13</sup> *Ibid.*, Supp. No. 16 A, at 1 (A/6716/Add. 1) (1968).

<sup>14</sup> Most Namibians who had obtained travel documents were holders of Convention documents. Some had been issued special passports or papers by the host govern-

On October 27, 1967, the Acting Commissioner for Namibia<sup>15</sup> submitted a note to the U.N. Council for Namibia concerning these applications. Assuming that the Council desired to proceed with the implementation of Resolution 2248 (S-V) to the extent possible—an assumption subsequently confirmed by the provisions of Resolution 2325 of December 16, 1967—he stated that there would appear to be sufficient precedent for the Council to consider making arrangements for the issue of travel documents to nationals of Namibia. The Commissioner further suggested that he be authorized to do so, as one of the “executive and administrative tasks” which the Council might entrust to the Commissioner under Part II, paragraph 3, of Resolution 2248.<sup>16</sup>

On the basis of this new note, the Council established an *Ad Hoc* Committee on the question of travel documents, which on July 3, 1968, submitted a report containing a set of draft regulations for the issue of “Travel and Identity Documents” for Namibians, as well as a draft specimen of the document. In this report a number of “policy decisions” were set out. They were based on the premise that in order to be effective, the document would have to be generally recognized by Member States and would have to contain an assurance that bearers will be readmitted to their former country of residence (or some other country) during the period of validity of the document.

After this report was adopted by the Council, the Secretary General, at the request of the Council, on December 12, 1968, addressed a *note verbale* to the Permanent Representatives of the Member States of the United Nations in which, after explaining the matter, he requested each government

to recognize and accept as valid the travel and identity documents issued by the Council to Namibians abroad, subject to its usual visa requirements and to extend its full co-operation to the Council in this regard and afford all the necessary assistance normally accorded to the bearers of such documents.<sup>17</sup>

Up to the present time more than fifty governments have positively replied to the Secretary General's *note verbale*. Most of these are located in Africa, Asia and Latin America, but their number also includes the United States, the U.S.S.R. and Belgium. Negative replies were received from France, the United Kingdom, Italy, Cuba and Malawi. Several governments, in particular those of the Scandinavian countries, indicated that they were awaiting the elaboration of the scheme before making a decision.<sup>18</sup>

Thus it may be concluded that the document has received a fair amount of recognition. On the other hand, the complementary requirement—the

ments. One female Namibian had obtained a national passport through marriage to a foreign national.

<sup>15</sup> Mr. C. A. Stavropoulos, who also held the post of Legal Counsel of the U.N.

<sup>16</sup> U.N. Doc. A/AC.131/4 (1967).

<sup>17</sup> U.N. Doc. A/AC.131/10 (1969).

<sup>18</sup> The replies of governments are reproduced in U.N. Doc. A/AC.131/10 and Add. 1-6 (1969-1971). An analytical index of the replies may be found in the Fifth Report of the Council to the General Assembly, U.N. General Assembly, 25th Sess., Official Records, Supp. No. 24, at 51 (A/8024) (1970).

assurance of the right of return—has proved to be more complex. The Council from the beginning recognized that in order to approach this problem most effectively, it should concentrate its efforts on seeking agreement from those countries where the largest number of Namibians resided. It therefore initiated consultations with representatives of these governments at Headquarters as early as August, 1968. Negotiations were continued by a visiting mission of the Council in certain African capitals and also during the ministerial meeting of the Organization of African Unity in February, 1969. Progress, however, proved to be slow, among other reasons, because in most of these countries other departments of government besides those of foreign affairs were involved. Proposals were met by counter-proposals and amendments, but in the early part of 1970 sufficient progress appeared to have been achieved to warrant the sending of a second mission which might be able to bring negotiations to a final conclusion.

Thus in July, 1970, after further discussions in a number of African capitals, the first two agreements were signed by the Acting Commissioner, one on July 10 with the Government of Zambia, the other on July 17 with the Government of Uganda. Full agreement was also reached with the Governments of Kenya and Ethiopia, whose signature of the agreements is expected shortly.

The agreement with Zambia has served as the basic working paper for all discussions. (The agreement with Uganda and unsigned agreements with Kenya and Ethiopia are similar but not identical.) Its most important provisions<sup>19</sup> are as follows:

2. In the exercise of its sovereign rights the Government of the Republic of Zambia agrees to grant the right of return to the following categories of Namibians who receive the travel and identity documents of the Council:

- (a) Namibians residing in Zambia;
- (b) Namibians enjoying first asylum in Zambia;
- (c) Such other Namibians as the Government may determine.

3. The right of return will be inscribed and certified by the Government of the Republic of Zambia in the travel and identity documents issued by the United Nations Council for Namibia for the period of up to two years following the date of issue of the documents and this period may be extended.

4. Applications for travel and identity documents shall be submitted to the Government of the Republic of Zambia which shall examine such applications. A representative of the United Nations Council for Namibia shall be consulted, in accordance with the provisions of paragraph 5 below, and a representative of the Organization of African Unity may be consulted as appropriate. Representatives of the people of Namibia shall be requested to provide relevant information as required. In the event of the Government of the Republic of Zambia informing the United Nations Council for Namibia that it agrees to grant the right of return, the document shall be issued by the Council. It is understood that, as a rule, the right of

<sup>19</sup> For full text see *ibid.* at 13.

return shall be granted to individuals falling within the categories mentioned in paragraphs 2(a) to (c) above, unless compelling reasons of national security or public order otherwise require.

5. In its examination of applications for travel and identity documents, the Government of Zambia shall consult the United Nations Council for Namibia in every case, except when:

- (a) The Government decides not to grant the right of return on grounds of national security or public order. Any determination made by the Government on such grounds shall be final;
- (b) Circumstances are such that the application requires immediate consideration, not permitting time for consultation, and the Government is satisfied, on the basis of the information available to it, with the *bona fides* of the applicant and is prepared to grant the right of return.

6. The provisions of paragraphs 4 and 5 shall not preclude the United Nations Council for Namibia from issuing travel documents, in cases where the right of return is not granted by the Government of the Republic of Zambia, provided that the Council secures for the applicant the right of return to a country other than Zambia or finds a country which would accept him without a return clause.

7. The present arrangements which are made in the interest of Namibians are subject to review on the request of the Government of the Republic of Zambia or of the United Nations Council for Namibia after a period of two years from the date of the present exchange of letters, or as may be decided by the parties, and may be amended by agreement between the parties.

The Council on the other hand has made certain commitments:

9. The Council for Namibia, recognizing that the Government of the Republic of Zambia should not be required, because of the country's geographical location, to bear to a disproportionate degree the problem arising from the entry of Namibians into Zambia, undertakes to make every effort to ensure that other Member States of the United Nations share in the granting of asylum and right of residence to Namibians.

10. Furthermore, the Council for Namibia, recognizing that more important than the question of travel documents is the problem of the future welfare of Namibians who sought asylum in other countries, undertakes to give this problem serious attention.

As will be seen from these provisions, the sovereign rights of the contracting states are fully safeguarded, in that the right of return will not be granted automatically or as a matter of course and that its refusal by the contracting state cannot be contested by the Council for Namibia. This does not necessarily mean that in practice the contracting state will use its powers in a restrictive or capricious manner or that it will not be amenable to persuasion; how this will develop remains to be seen.

It should be noted that the Council is committed to promote a more equitable distribution of the Namibian refugees, and that the travel document scheme is expected to be conducive to this aim. The travel document is thus not only considered as a means of facilitating travel for study and other purposes, but also for migration.

In expectation of the conclusion of these agreements the General Assembly for a number of years made budgetary provisions for the establishment of a Regional Office of the Council for Namibia in East Africa. After the conclusion of the first two agreements, it was decided to open this office in Lusaka in November, 1970. There, on December 30, 1970, the representative of the Commissioner handed the first travel documents to Namibians who had received scholarships for study in certain European countries. In these documents the right of return was inscribed by the Government of Zambia, valid for two years. Thus, the scheme has become operative.<sup>20</sup> It is expected that several other governments which have waited to signify their recognition will now do so in the near future. This would, of course, greatly increase the usefulness of the document. Meanwhile, the Council is to pursue negotiations with other countries where Namibians reside with a view to concluding agreements similar to those signed by Zambia and Uganda.

J. F. ENGERS \*

#### A SOMETIME WORLD OF MEN: LEGAL RIGHTS IN THE ROSS DEPENDENCY

The time has come to reconsider New Zealand's claim to the Ross Dependency and United States interests in the area. The dramatic attempt of a 67-year-old U.S.A.F. Colonel, Max Conrad, to cross the Antarctic in a light aircraft showed the dangers of Antarctic tourism. Yet it has not stopped Air New Zealand and Lindblad Tours of New York from pressing their plans for regular summer tourist trips to the Ross Dependency, while the tenth anniversary of the signature of the Antarctic Treaty<sup>1</sup> passed almost unnoticed on December 1, 1969. In the Arctic the successful voyage of the S. S. *Manhattan* through the Northwest Passage to newly discovered Alaskan oilfields at Prudhoe Bay in Alaska,<sup>2</sup> and the prospecting of Pan Arctic Oils at Melville Island<sup>3</sup> have made the question of sovereignty over Arctic ice formations acute. In Greenland, under conditions approaching those of the Antarctic in climatic severity, companies are requesting prospecting rights for oil, regardless of the fact that the means to extract such oil have not yet been developed<sup>4</sup> and plans are proceeding to mine uranium. In the Arctic, as in space, most people, in the long run, fall short

<sup>20</sup> U.N. Doc. A/AC.131/21 (1971).

\* Principal Officer, Office of the Commissioner for Namibia, United Nations. This article was written in a personal capacity.

<sup>1</sup> 54 A.J.I.L. 476 (1960); 402 U.N. Treaty Series 71. The present note is an amplification of a point raised in my article "The White Desert," 19 Int. and Comp. Law Q. 229, 237-239 (1970).

<sup>2</sup> "Canada's Arctic Archipelago: Icy Sovereignty Question," Auckland Star, Oct. 8, 1969.

<sup>3</sup> First Report, Standing Committee on Indian Affairs and Northern Development, House of Commons, Canada, 2d. Sess. (1969) 7.

<sup>4</sup> H. Barnes, "Chance of Wealth for Greenland," Auckland Star, Oct. 27, 1969.



of the mark in technological prognostication.<sup>6</sup> Forty years ago an expert held that a transit route through the Northwest Passage was incredible.<sup>6</sup>

Apart from tourism, another immediately available resource of the Ross Dependency area is krill, a small crustacean found in the sea in huge quantities.<sup>7</sup> For some time experiments have been conducted to find effective trawling methods for krill which would enable Soviet and Japanese Antarctic whaling fleets to continue their expeditions. The Antarctic is a new continent waiting to be tamed.<sup>8</sup> Once such large-scale economic activities commence in the Ross Dependency, the question of sovereignty will immediately arise.

Article IV of the Antarctic Treaty froze claims, but did not settle them; they were swept "under a convenient rug."<sup>9</sup> The treaty was not intended to "change or alter anything,"<sup>10</sup> but to "preserve the status quo."<sup>11</sup> Article IV states what it does not mean, but does not state what it does mean.<sup>12</sup> Despite the article, claim-staking still goes on,<sup>13</sup> and that is why the two hundred United States and fourteen New Zealand personnel winter over. The United States has spend for than 200,000,000 dollars on Antarctica since 1961, yet, according to Article IV, this investment does not affect the status of its claim, for "no acts or activities taking place while the present Treaty is in force shall constitute a basis for . . . supporting . . . a claim to territorial sovereignty in Antarctica."

It has been pointed out that Article IV (1) (a) which mentions "rights . . . or claims to territorial sovereignty" apparently includes not only the claims already made, but also the rights asserted by the United States (and

<sup>6</sup> H. G. Stever and R. G. Schmitt on the space program, in L. P. Bloomfield (ed.), *Outer Space* (1968).

<sup>6</sup> L. Breitfuss, "Territorial Division of the Arctic," 8(1) *Dalhousie Review* 456, 469 (1929).

<sup>7</sup> Y. C. Gilberg, "Krill, Its Occurrence and Possible Commercial Value," *Commercial Fishing* 23 (Dec. 1968).

<sup>8</sup> W. Herbert, *A World of Men* 231 (1968).

<sup>9</sup> C. H. Grattan, *The Southwest Pacific since 1900*, p. 662 (1963). Art. IV states:

"1. Nothing contained in the present Treaty shall be interpreted as:

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

"2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

<sup>10</sup> U.S. Department of State, *The Conference on Antarctica* 31 (Pub. 7060, 1960).

<sup>11</sup> *Ibid.* 26.

<sup>12</sup> "The Antarctic Treaty," Hearings before the Senate Foreign Relations Committee, Exec. B, 86th Cong., 2d Sess. 13 (1960).

<sup>13</sup> J. Henderson, *One Foot at the Pole* 59 (1962).

the U.S.S.R.).<sup>14</sup> This constitutes a novel right to territory in international law, a type of floating charge.

Is it possible, within the framework of the treaty, to settle claims to the Ross Dependency? It has been suggested that there does not appear to be anything in Article IV to prevent two contracting parties from asserting a joint claim.<sup>15</sup> Textual analysis of the article supports a wider view. Article IV (2) only refers to the effect of the treaty itself on claims, and specifically preserves rights or claims made before the treaty came into force. This provision may conveniently be subdivided into three parts: The first part states that acts shall not constitute a basis for asserting, supporting, or denying territorial claims. As this part refers to such acts taking place after the coming into force of the treaty, it does not affect bases for a claim arising before the coming into force of the treaty in 1961. Similarly, the creation of rights of sovereignty could not be effected after the treaty came into force, but once more this does not affect rights of sovereignty previously created. The third subdivision forbids new claims or enlargement of existing claims, but does not rule out old claims or the diminishment of existing claims. The treaty thus neither affects claims made before 1961 nor prevents the reformulation of such claims in a manner which does not enlarge them. In 1962 the United Kingdom detached the British Antarctic Territory from the Falkland Islands Dependencies, asserting that the action was consistent with the treaty.<sup>16</sup>

Would a United States-New Zealand condominium over the Ross Dependency come within the exception to Article IV discussed above? It would seem that the New Zealand claim comes within the exception, having been formulated in 1923.<sup>17</sup> The complicated question of the transfer of the claim from the United Kingdom to New Zealand might be dealt with by invoking the *inter se* doctrine, under which transfers of territory between members of the British Commonwealth were not cognizable by international law at the time the transfer was effected. The doctrine may be traced to the Imperial Conference of 1926. A Constitutional convention was then established by which treaties should not be regarded as applying automatically to the relations of the members of the Commonwealth *inter se*. It has been suggested that the doctrine has not been applied since the second World War.<sup>18</sup> It might also be pointed out that, at that time, New Zealand was not a state, and therefore the form of transfer cannot be examined in international law.

The position of the United States in the Dependency is far from clear. On the one hand, it encouraged its nationals to deposit and drop claim

<sup>14</sup> A. C. Castles, "The International Status of the Australian Antarctic Territory," in D. P. O'Connell (ed.), *International Law in Australia* 364 (1965).

<sup>15</sup> J. Hanessian, "The Antarctic Treaty, 1959," 9 *Int. and Comp. Law Q.* 436, 470 (1960).

<sup>16</sup> "British Antarctic Territory," 8(6) *Commonwealth Survey* 265 (1962).

<sup>17</sup> 1923 *N.Z. Gaz.* 2211.

<sup>18</sup> R. B. Stewart, *Treaty Relations of the British Commonwealth of Nations*, Ch. 11 (1939); J. E. S. Fawcett, *The British Commonwealth in International Law* 172 (1963).

notices. A specific form was drafted for that purpose, stating that "I hereby claim this territory in the name of the United States."<sup>19</sup> On the other hand, those same nationals were forbidden to make any public announcement to that effect. If these acts are not regarded as "claims" within Article IV, they would constitute the novel form of territorial right previously mentioned. Article IV (I) (a) refers to "rights" or "claims" to territorial sovereignty. Insofar as such acts are claims made before 1961, they are outside the ambit of Article IV (2), as previously suggested. If the acts constitute not "claims" but "rights," they are also, insofar as done before 1961, still effective as "rights." However, Article IV (2) operates to stop attempts to turn pre-1961 "rights" into "new claims."

The interpretation of Article IV is of more than academic interest. New Zealand claims what may be termed *imperium* over the Dependency. The United States Department of State does not consider Antarctica, as a whole, to be under the sovereignty of any government.<sup>20</sup> "After all," as one naval officer suggested, "we don't own the continent. Nobody does."<sup>21</sup> But, as Conrad's flight shows, the United States does assert the right to regulate and forbid private flights in and to the Dependency. Such rights asserted before 1961 are preserved by Article IV. A formal amalgamation of United States rights and New Zealand sovereignty, coupled with some diminishment of both, would not contravene Article IV.

I have suggested that the Dependency is already in fact an undeclared condominium.<sup>22</sup> The area is in fact jointly controlled by the United States and New Zealand. Efforts directed at keeping women out have failed,<sup>23</sup> and a controversy is now being carried on in regard to tourism.<sup>24</sup> The general manager of Air New Zealand considers that a transit building is necessary on Outer Williams Field, if tourist planes are to land there.<sup>25</sup> As the field is on sea ice, complex questions of ice sovereignty will arise, not to mention limits of tort liability of air carriers for personal injury. All these developments will inevitably require the application of a local law and therefore a local legal régime. I therefore suggest a condominium between New Zealand and the United States over the Ross Dependency. New Zealand's sovereignty and the rights of the United States would thus be amalgamated.

In 1958 Dr. Gould suggested a joint United States-New Zealand claim to the Dependency.<sup>26</sup> In 1960 Senator Engle pointed out that agreement might be reached between New Zealand and the United States regarding McMurdo and Marble Point.<sup>27</sup> The present suggestion is a modification of

<sup>19</sup> 2 Whiteman 1249 (1963).

<sup>20</sup> *Martin v. C.I.R.*, 50 T.C. No. 9; 63 A.J.I.L. 141 (1969).

<sup>21</sup> Rear Admiral Abbott quoted by D. Ballantyne, "When Hardy Souls go South," *Auckland Star*, Dec. 18, 1967.

<sup>22</sup> Auburn, note 1 above, at 256.

<sup>23</sup> D. Braxton, *The Abominable Snow-Women* (1969).

<sup>24</sup> "Navy, Scientists Cool on Antarctic Tourism Plan," *Auckland Star*, Feb. 5, 1970.

<sup>25</sup> "Tourist Flights to Antarctic put Back Year," *N. Z. Herald*, Dec. 23, 1969.

<sup>26</sup> L. M. Gould, *The Polar Regions in Their Relation to Human Affairs* 31 (1958).

<sup>27</sup> Cong. Rec. (Sen.) (Aug. 8, 1960) 15982.

Dr. Gould's concept, rendered necessary by the treaty. Such a condominium need not necessarily entail a solution of all legal questions at issue, an example being Canton and Enderbury Islands. Argentina and Chile recognize each other's indisputable rights to the American Antarctic,<sup>28</sup> although their claims overlap. Svalbard (Spitsbergen) demonstrates that sovereignty may be conceded to one state with a grant of most extensive rights to other interested parties. The present régime of the Ross Dependency, or lack of it, can only lead to controversy as activities multiply in the Dependency.

F. M. AUBURN \*

SEMINAR ON THE RÔLE OF THE UNITED NATIONS IN THE DEVELOPMENT  
OF INTERNATIONAL LAW

Under the auspices of the Law Faculty, Patna University, a seminar was held at Patna, November 2-6, 1970, to celebrate the 25th anniversary of the United Nations. Professor R. C. Hingorani, Dean and Head, Patna University Law Faculty, was the Director of the seminar.

Mr. Nityanand Kanungo, Governor of Bihar, inaugurating the seminar, said that "the study of international law had become most important, in the context of changing patterns of international behaviour. Change was the law of nature and also necessary." He stressed the need for making vigorous efforts for the progress of humanity with the object of establishing peace and justice. Dr. K. K. Datta, Vice Chancellor of Patna University, pointed out that the contribution of India towards universalism had been great from time immemorial. He observed that all the social and political reformers of India had emphasized universalism, love, liberty and harmony. He emphasized the need for a critical study of the rôle of the United Nations.

Among those who participated in the seminar were: Professor R. C. Hingorani (Patna University), Professor S. K. Agrawala (Poona University), Professor Narendra Singh (University of Jabalpur), Dr. G. C. Kasliwal (Indore University), Mr. Raghavan (Nagpur University), Mr. Umesh Kumar (Lucknow University), Mr. G. M. Misra (Bhagalpur), Mr. K. B. Singh (Nepal), Mr. Subhash C. Jain (Indian Law Institute, New Delhi), Professor H. C. Dholakia (Baroda), Dr. S. K. Ghosh (Utkal University) and Mr. S. S. Singh (Rewa). Others who contributed papers to the seminar but were unable to attend it personally included Dr. Paras Diwan (Panjab University), Mr. N. Radharakrishnan (University of Madras) and Mr. M. Rangaswamy (Bangalore).

The five-day seminar discussed the rôle of the United Nations in the development of international law in the following fields: space law; human rights; decolonization; peaceful uses of seabed; and use of force in the

<sup>28</sup> O. Pinochet de la Barra, *La Antartica Chilena* 139 (1948).

\* Lecturer in Law, University of Auckland.

settlement of international disputes. Dr. S. K. Agrawala was the Chairman for the first session on human rights and Mr. Subhash C. Jain was the rapporteur. Professor Dholakia was the Chairman for the session on decolonization and Mr. Umesh Kumar was the rapporteur. The Chairmen for the other sessions were Dr. G. C. Kasliwal and Professor Narendra Singh, and rapporteurs were Mr. G. M. Misra and Mr. K. B. Singh.

The rôle of the United Nations in all the areas under consideration was critically analyzed. The legal effect of General Assembly resolutions was central to the theme and therefore was discussed in greater detail. There was a general feeling that the question of human rights belonged to the international domain and that Article 2(7) of the United Nations Charter could not come in the way of the United Nations. A plea was also made by one of the participants to suitably amend the Indian Constitution to bring it in harmony with the Universal Declaration of Human Rights. There was some difference of opinion as to whether the United Nations itself could use force in decolonization, but the inherent rights of the states themselves to do so was recognized. A strong plea was made to keep outer space and the seabed and ocean floor free of military uses.

Despite differences of opinion on various matters of detail, at the end of the seminar the participants agreed on a declaration called the "Patna Declaration" to express their solidarity with the United Nations in the task of progressive development and codification of international law. The Declaration is as follows:

#### *Patna Declaration*

We, Teachers of International Law from various Institutions in India and Nepal, participating in the Seminar on the role of the United Nations in the Development of International Law at Patna, declare:—

That we recognize that the United Nations is doing useful work in the codification of International Law;

That we request the General Assembly to further intensify its efforts in the progressive development of International Law and its codification;

That the resolution of the General Assembly passed by more than three-fourths majority of membership be treated as enunciating a principle of International Law;

That colonies have an inherent right to independence;

That the colonial people have an inherent right to use of force to attain independence;

That we recognize the right of colonial people to seek external assistance to attain independence;

That we affirm the General Assembly resolution of 12 October 1970 in considering colonialism as an international crime;

That sanctions be used by the United Nations and its specialized agencies by withholding economic assistance to the delinquent State and by non-appointment of its nationals in the United Nations and/or its specialized agencies and boycott of its goods;

That we affirm the two International Covenants on Civil, Political, Social and Economic Rights as commended by the General Assembly in 1966 and request the States to ratify them at an early date;

That we affirm that outer space be used for the benefit of entire mankind and for peaceful purposes only;

That satellite stations be not used for military purposes and that espionage through satellites is contrary to international law;

That the Legal Sub-Committee of the Committee for the Peaceful Uses of Outer Space be requested to expedite the drafting of treaty on the extent and quantum of liability of launching State for damage occasioned by space activities;

That the Legal Sub-Committee be further requested to undertake studies to delimit the boundary between air space and outer space;

That we affirm that the sea-bed beyond national jurisdiction, being the common heritage of all mankind, be used for peaceful purposes only; and that no weapons of mass destruction be stored therein;

That we affirm that "armed force shall not be used, except in common interest. . . .";

That we affirm that States "shall settle their international disputes by peaceful means" and they shall refrain from "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

SUBHASH C. JAIN \*

#### NEW STUDENT JOURNALS OF INTERNATIONAL LAW

Two new student journals of international law have recently come to the attention of this JOURNAL: *The California Western International Law Journal* and the *Georgia Journal of International and Comparative Law*. The first number of each publication appeared late in 1970. The *California Western International Law Journal* is to be published annually, while the *Georgia Journal of International and Comparative Law* will appear twice a year.

The planning and publication of the first issue of the *California Western International Law Journal* were initiated in 1969 by the International Law Society of the California Western School of Law, United States International University, in San Diego. The Faculty Adviser for the *Journal* is Professor S. Houston Lay, with whose assistance and encouragement the publication was started. The *Journal* is designed to present the observations and comments of recognized legal scholars, practicing lawyers, law students and international authorities on subjects of current significance in international law and international business transactions.

Volume 1, No. 1 (Fall, 1970), contains articles on legal liability resulting from space activities, by H. Cushman Dow; the European Atomic Energy Agency and supranationalism, by Delbert D. Smith; New Zealand's coastal jurisdiction, by William F. Foster; and the legal status of Articles 1-3 of the Continental Shelf Convention according to the *North Sea* cases, by Myron H. Nordquist. There are notes and comments by student editors and several book reviews.

\* Indian Law Institute, New Delhi.

The Board of Editors of the *Journal* is drawn from the senior class of the law school. For the current year Charles E. Rumbaugh is Editor-in-Chief.

The subscription price of the *Journal* is \$3.00 an issue. For foreign subscriptions, postage is added to the price. Subscriptions should be addressed to *California Western International Law Journal*, 3902 Lomaland Drive, San Diego, California 92106.

The *Georgia Journal of International and Comparative Law* was planned and organized last year with the assistance of Professor Pasco M. Bowman II, then Faculty Adviser to the *Journal*, and of Associate Dean John F. T. Murray. The present Editor-in-Chief is Gary F. Eubanks.

The first volume (1970) contains, in addition to a foreword by the Editor-in-Chief, one by Lindsey Cowen, Dean of the University of Georgia School of Law, and one by Judge Hardy C. Dillard of the International Court of Justice. Articles deal with recent developments and future prospects of the Common Market, by Michael Waelbroeck; international law from a functional perspective, by Michael Barkun; the territorial principle in penal law, by Patrick J. Fitzgerald; comparative legal history of robbery and brigandage, by Bernard S. Jackson; and the law of outer space, by Robert E. Clute. There are two student contributions under "Notes and Commentary" and several book reviews.

The subscription price of the *Journal* for 1970 is \$2.50, and thereafter \$5.00 a year. Foreign subscription is \$3.00 for 1970, and \$6.00 thereafter. Subscriptions should be addressed to the *Georgia Journal of International and Comparative Law*, University of Georgia Law School, Athens, Georgia 30601.

The student International Law Societies of California Western School of Law and of the University of Georgia School of Law are to be congratulated on the inauguration of their journals, which add to the breadth and variety of the literature in the field.

ELEANOR H. FINCH

#### THE SOCIETY'S EIGHTH ANNUAL REGIONAL MEETING AT SYRACUSE (1971)

Since Professor Lillich first pioneered public interest in international law affairs in upstate New York some nine years ago, regional meetings of the American Society of International Law have become a tradition in Syracuse. The Eighth Syracuse Regional Meeting of the Society was held in the Ernest I. White Hall of Syracuse University's College of Law on April 10, 1971. The general topic was "The United Nations and the Resources of the Deep-Ocean Floor." Professor L. F. E. Goldie, Director of Legal Studies, Syracuse University College of Law, was Chairman of the meeting and Mr. Alan Weinraub, President of the Syracuse International Law Society, was Chairman of the Organizing Committee, which included Messrs. Barbieri, Levine and Lury. In addition to carrying out administrative tasks, these committee members did stalwart work in providing transport for the out-of-town participants.

The Syracuse University International Law Society was host at a very congenial dinner party for the participants and their wives on Friday evening, April 9, 1971.

On Saturday morning, April 10, Assistant Dean Richard B. Buckley opened the meeting and gave the welcoming address on behalf of Dean Robert Miller of the College of Law. Professor Goldie then gave the first paper, entitled "Historical Outline and United Nations Developments—An International Conspectus of the Regimes of the Deep Ocean Floor." This gave a general introductory survey of the topic for the day's deliberations and touched on its central problems.

After an interval for discussion and a coffee break, Professor H. Gary Knight, Director of the Marine Resources Law Graduate Program at Louisiana State University, spoke on "The Common Heritage of Mankind as Applied to the Seabed—A Definition." Professor Zdenka Slouka, of the Institute for the Study of Science in Human Affairs, Columbia University, then gave an important survey and analysis of "The Politics of the Four 1969 General Assembly Resolutions on the Seabed." The morning session was concluded by a panel on "The United Nations and Regimes for the Deep Ocean Floor," of which Professor Slouka was Chairman, and the members were Professors Goldie and James K. Weeks of Syracuse University, and Professor Knight of Louisiana State University.

Dr. Gerard Mangone, Senior Fellow, Woodrow Wilson International Center for Scholars, as Chairman of the Panel on "Alternative Regimes for the Deep-Ocean Floor—A Conspectus," opened the afternoon session. The other members of the panel were Michael Hardy, Esq., and Dr. Fernando Labastida, both of the Legal Services of the United Nations Secretariat, and Professor Slouka. The discussion on the panel and from the floor of the meeting was especially spirited during this session.

Following a short mid-afternoon break, the second afternoon session was opened by Commander William Palmer, International Law Section, Office of the Navy Judge Advocate General, who delivered a paper on "United States Policy and the Deep Ocean Floor." His presentation was followed by a paper by Dr. S. Carlson, a Senior Staff member of the Center for Strategic and International Studies, who spoke on "Strategic Considerations in Developing Deep-Ocean Regimes." The meeting's deliberations closed with a panel discussion of the United States Draft of a United Nations Convention on the International Seabed Area, of August 3, 1970. It consisted of Dr. Carlson, Chairman, Commander Palmer, and Professors Bischel, Peter E. Herzog and Goldie of Syracuse University College of Law as members. The meeting closed with a cocktail party in the Grant Lounge of Ernest I. White Hall. This provided the audience, participants, faculty members and students with the opportunity of animatedly continuing the day's discussion on an informal basis.

All the leading papers are to be published, together with suitably edited extracts from the taped recording of panel commentaries, in a special Inter-



national Law Symposium issue of the *Syracuse Law Review*. The present plan is to have that issue available by September-October, 1971.

L. F. E. GOLDIE \*

#### 65TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its 65th annual meeting from April 29 to May 1, 1971, at the Statler-Hilton Hotel in Washington, D. C. The registered attendance at the meeting was over 650. The program, which was arranged by John Norton Moore, Chairman of the Committee on the Annual Meeting, was more extensive than in previous years and comprised seven sessions of several discussion panels each.

On Thursday, April 29, at 10:30 a. m. Chinese participation in the United Nations was the subject of discussion under the chairmanship of Dean Rusk, former Secretary of State and now of the University of Georgia Law School. Professor Jerome A. Cohen of Harvard Law School spoke on "Changing Realities and the Imperatives of New Policy," while Professor Richard M. Goodman of the University of Alabama Law School discussed "The Imperatives of a Negotiated Settlement," with relation to Communist China's participation in the United Nations. Commentators were Professor Lung-Chu Chen of Yale Law School, Professor William P. Bundy of Massachusetts Institute of Technology, and Dr. S. H. Tan, Adviser to the Embassy of the Republic of China to the United States.

On Thursday afternoon at 2:15 p. m. the subjects of discussion were "Self-Determination and Settlement of the Arab-Israeli Conflict" and "New Developments in the Law of International Aviation: The Control of Aerial Hijacking." Ambassador Charles W. Yost, former U. S. Representative at the United Nations and now of Columbia University, was chairman of the panel on the Arab-Israeli conflict. Speakers on this panel were Professor M. Cherif Bassiouni of De Paul University College of Law and Professor Leslie C. Green of the University of Alberta, Canada. Commentators were Rouhollah K. Ramazani, of the University of Virginia and W. Michael Reisman of Yale Law School.

Professor Edward McWhinney of McGill University was chairman of the panel on aerial hijacking, which was jointly sponsored with the Canadian Society of International Law. The principal speakers were Mr. K. E. Malmborg, Jr., Assistant Legal Adviser of the Department of State, who discussed the several international conventions bearing on the subject, and Professor Oliver J. Lissitzyn of Columbia University School of Law, who discussed the limitations of the recent Convention for the Suppression of Unlawful Seizure of Aircraft as an instrument for the prevention of hijacking. Comments were offered by Professor Andreas F. Lowenfeld of New York University School of Law and Professor Alona E. Evans of Wellesley College.

\* Charles H. Stockton Professor of International Law, Naval War College, Newport, R. I. (1970-71).

On the same afternoon a round-table discussion was held on the topic: "The Social Scientist Looks at the International Law of Conflict Management." Professor Inis L. Claude, Jr., of the University of Virginia presided. The participants were Professors Richard A. Falk of Princeton University, Michael Barkun of Syracuse University, Linda B. Miller of Wellesley College and Louis Henkin of Columbia University School of Law.

On Thursday evening at 8:30 p. m. panel discussions were held on "Conflicting Approaches to the Control and Exploitation of the Oceans" and on "The Future of South West Africa (Namibia)." Professor Myres S. McDougal of Yale Law School presided over the panel on the control and exploitation of the oceans, which was jointly sponsored with the American Branch of the International Law Association. Mr. John R. Stevenson, The Legal Adviser of the Department of State, and Mr. Cecil J. Olmstead, President of the American Branch of the International Law Association, were the principal speakers on the panel. Commentators were J. Alan Beesley, Legal Adviser, Department of External Affairs of Canada, Bernard H. Oxman, Assistant Legal Adviser, Department of State, L. F. E. Goldie, Charles H. Stockton Professor of International Law at the U. S. Naval War College, and Leigh S. Ratiner, Chairman, Defense Advisory Group on the Law of the Sea, in the Department of Defense.

Dean Francis O. Wilcox of the Johns Hopkins University School of Advanced International Studies presided over the discussion of the future of South West Africa. Mr. Ernest A. Gross of the New York Bar and Mr. Clifford J. Hynning of the District of Columbia Bar were the principal speakers, while comments were made by Mr. J. Adriaan Eksteen, of the Embassy of the Republic of South Africa to the United States, and Mr. Allard K. Lowenstein, former member of Congress.

On Thursday evening, there was also held a round table on "The Rôle of Congress in the Making of Foreign Policy" over which Mr. William D. Rogers of the District of Columbia Bar presided. The participants were Senator Jacob Javits of New York, Representative Paul Findley of Illinois, Mr. George W. Ball, former Under Secretary of State and now in private law practice, and Mr. McGeorge Bundy, President of the Ford Foundation.

On Friday, April 30, 1971, at 9:15 a. m. a panel discussed international trade and United States foreign trade policy. The chairman of the panel was Professor John H. Jackson of the University of Michigan Law School, and the principal speakers were Mr. Bruce E. Clubb, a member of the U. S. Tariff Commission, and Mr. John B. Rehm of the District of Columbia Bar, who directed his remarks to the question: How Protectionist Are Our Import-Restriction Laws? The commentators on this subject were Messrs. Eugene L. Stewart and Monroe Leigh of the District of Columbia Bar, Ronald McKinnon of the Brookings Institution, and Professor Warren Schwartz of the University of Virginia School of Law.

A second panel on Friday morning considered "Procedures for Protection of Civilians and Prisoners of War in Armed Conflicts: Southeast Asian Examples." Mr. John Carey of the New York Bar presided. Professor Howard S. Levie of St. Louis University School of Law discussed

procedures for the protection of prisoners of war in Viet-Nam. Professor Gidon Gottlieb of New York University School of Law discussed national measures to protect non-combatants by incorporating recent international rules into the instructions for the U. S. Armed Forces. Commentators on the subject were Mr. Jon Van Dyke, Visiting Fellow, Center for the Study of Democratic Institutions, Mr. Frank Sieverts, Assistant to the Under Secretary of State for Prisoner of War Matters, and Mr. Peter Trooboff of the District of Columbia Bar.

The Friday morning session also included a discussion group, jointly sponsored with the U. S. Institute of Human Rights, on the teaching of the international aspects of human rights, under the chairmanship of Professor Louis Henkin of Columbia University School of Law. The participants in the group were Dr. Egon Schwelb of Yale University Law School, and Professors Thomas Buergenthal of the School of Law, State University of New York at Buffalo, A. Luini del Russo of Howard Law School, and Vernon Van Dyke of the University of Iowa.

On Friday afternoon at 2:15 p. m. the future of the International Court of Justice was discussed. Ambassador Edvard Hambro, President of the U. N. General Assembly, presided. The Honorable Philip C. Jessup, former judge of the Court, spoke on "Do New Problems Need New Courts?" The commentators were Dr. Hisashi Owada of the Ministry of Foreign Affairs of Japan, Mr. John Freeland, Legal Adviser of the United Kingdom Mission to the United Nations, and Professors Salo Engel of the University of Tennessee and Leo Gross of the Fletcher School of Law and Diplomacy, Tufts University.

Two round-table discussions were also held on Friday afternoon, one on the subject of "New Proposals for Increasing the Role of International Law in Government Decision-Making" and the other on "The Dilemma of Foreign Investment in South Africa." Professor Roger D. Fisher of Harvard Law School presided over the discussion of international law in government decision-making, in which the participants were Professor Louis B. Sohn, Counselor on International Law of the Department of State, Mr. Winston Lord of the Staff of the National Security Council, Professor Hans A. Linde of the University of Oregon School of Law, Mr. Theodore C. Sorensen of the New York Bar and Representative Jonathan B. Bingham of New York.

The round table on foreign investment in South Africa was jointly sponsored with the Association of Student International Law Societies and presided over by Mr. Douglas Wachholz, President of the Association. The participants in the discussion were Messrs. Joel Carlson and Pierce Newton-King, attorneys of Johannesburg, South Africa, Mr. Robert S. Smith, Deputy Assistant Secretary of State for African Affairs, Representative Charles C. Diggs, Jr. of Michigan, and Messrs. John N. Brander of Georgetown University and Julius Duru of the University of Denver.

The annual dinner on Friday evening, which was attended by approximately 450 members and guests, was presided over by Professor John Norton Moore, Chairman of the Committee on the Annual Meeting. Presi-

dent Harold D. Lasswell delivered an address on the subject of "International Lawyers and Scientists as Agents and Counter Agents of World Public Order." Mr. John N. Irwin II, Under Secretary of State, spoke on the proposed reorganization of United States foreign aid agencies.

On Saturday, May 1, at 12:30 p. m. a joint luncheon was held with the Section on International and Comparative Law of the American Bar Association. Mr. Ewell E. Murphy, Jr., Chairman of the A.B.A. Section, presided. Dr. Hambro spoke on some of the crucial problems facing the United Nations in the future.

Following the luncheon there was a round table, jointly sponsored with the German Society for International Law, on the question of more adequate protection of private claims, with particular reference to the cases of *Aris Gloves v. United States*, in the Federal courts, and the *Barcelona Traction* case between Belgium and Spain in the International Court of Justice. Professor Richard B. Lillich of the University of Virginia Law School presided over a panel consisting of Professor Ignaz Seidl-Hohenveldern of the University of Cologne, Mr. Lucius Cafilisch of the Woodrow Wilson International Center for Scholars, Smithsonian Institution, Mr. Brian Flemming of the Bar of Nova Scotia, and Professors Burns H. Weston, University of Iowa College of Law, Gordon A. Christenson, State University of New York, and Martin Domke, New York University School of Law.

The Philip C. Jessup International Law Moot Court Competition held its final round on Saturday afternoon. Associate Justice Byron White of the U. S. Supreme Court presided as chief justice, the other justices being Mr. Najeeb E. Halaby, President of Pan American World Airways, and Charles S. Rhyne, President of the World Peace through Law Center. In the final argument of the case involving aerial hijacking, the student team from the University of Texas was declared winner, and the team from the University of California (Davis) runner-up. Mr. David P. Seikel of the University of Texas was declared the best oralist in the competition, and Vanderbilt University won the award for the submission of the best written memorials.

At the business meeting of the Society on Saturday morning, May 1, Dr. Harold D. Lasswell was re-elected President of the Society and Judge Jessup honorary president for the coming year. Mr. Stephen Schwebel was re-elected Executive Vice President of the Society. Professors Richard A. Falk and John N. Hazard and Mr. William D. Rogers were elected Vice Presidents. Dr. Leo Gross was elected an Honorary Vice President, and the incumbent Honorary Vice Presidents were re-elected. Members of the Executive Council to serve until 1974 were elected as follows: Arthur R. Albrecht, California; Richard B. Bilder, Wisconsin; L. M. Bloomfield, Quebec; Mitchell Brock, New York; William T. Coleman, Pennsylvania; Rita Hauser, New York; John Norton Moore, Virginia; and Ewell E. Murphy, Texas.

Ambassador Edvard Hambro of Norway was elected an honorary member of the Society. The Certificate of Merit of the Society was awarded

to Dr. Rosalyn Higgins of the Royal Institute of International Affairs for the first two volumes of her publication entitled *United Nations Peacekeeping 1946-1947: Documents and Commentary*. The Committee on Annual Awards, upon whose recommendation the award was made, also gave honorable mention to Professors Wesley L. Gould and Michael Barkun for their book entitled *International Law and the Social Sciences*.

The Report of the *Ad Hoc* Committee on the Governance of the Society recommending amendments to Articles IV and VI of the Society's Constitution, which had been circulated to the members prior to the meeting on May 1, was discussed at some length and, upon the motion of the committee chairman, Professor Baxter, the proposed amendments were adopted as follows:

Amend the present third and fourth paragraphs of Article IV of the Constitution to read:

Candidates for all offices to be filled by the Society at each annual election shall be placed in nomination either by a petition signed by not less than twenty members of the Society and submitted at least ninety days in advance of the annual meeting or on the report, submitted at least one hundred and eighty days in advance of the annual meeting, of a Nominating Committee, which shall consist of the five members receiving the highest number of ballots at the business session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or on the floor.

For all offices as to which there is no nomination by petition, election shall be by a single ballot cast by or on behalf of the Secretary of the Society at the business session of the annual meeting. In the event that there is a nomination by petition for any office, that office shall be filled at the annual meeting by a majority vote of the members of the Society voting either in person or by a postal ballot mailed to the members of the Society at least sixty days before the annual meeting. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society.

Amend the second sentence of the second paragraph of Article VI of the Constitution to read:

Eight members shall be elected by the Society each year according to the same procedure prescribed for the nomination and election of officers of the Society under Article IV of this Constitution. The service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they are elected.

The Report of the Committee on Publications of the Department of State and the United Nations was presented by its chairman, Mr. John Carey, upon whose motion the following resolution was adopted:

RESOLUTION ON THE PUBLICATION OF FOREIGN RELATIONS OF THE  
UNITED STATES

*The American Society of International Law* at its 65th Annual Meeting in Washington, D. C., May 1, 1971,

*Convinced* of the need for public availability of the official documentary records of the diplomacy of the United States while these records are of sufficient nearness to currency to be of value in understanding present problems relating to international relations,

*Concerned* at the increasing time lag in the publication of *Foreign Relations* volumes containing these records, now twenty-five years behind currency, and at the failure of the government to take effective measures to remedy this situation,

*Concerned* also that the high scholarly standards in the preparation of these volumes be maintained,

*Resolves* to call upon the Department of State and other agencies of the government involved in the preparation of these volumes and in their clearance for publication to take effective measures to check the increasing time lag and to start a return to publication nearer to currency; and further

*Resolves* to call upon the Department of State to see to it that in any departmental personnel reorganization the established professional scholarly character of the staff compiling the *Foreign Relations* volumes will be preserved.

The Executive Council at its meeting on May 1 re-elected Judge Edward Dumbauld Secretary and Mr. Franz Oppenheimer Treasurer of the Society. It also reappointed Mrs. Marilou Righini Editor of *International Legal Materials*. The following were elected members of the Executive Committee: Richard A. Falk, John N. Hazard, Monroe Leigh, Saul Mendlovitz, John Norton Moore, William D. Rogers and Oscar Schachter. The President, Executive Vice President and the Treasurer of the Society are members *ex officio*.

The Executive Council re-elected Professor Richard R. Baxter of Harvard Law School Editor-in-Chief of the JOURNAL. In view of Professor Baxter's appointment for the coming year as Counselor on International Law in the Department of State, Professor Brunson MacChesney of Northwestern University School of Law will be acting Editor-in-Chief beginning July 1.

In accordance with the changes in the elective terms of the editors, approved by the Board of Editors and adopted by the Council on the recommendation of the *Ad Hoc* Committee on Governance (see summary of final report of the committee sent to all members of the Society), the members of the Board of Editors of the JOURNAL were re-elected for varying terms according to their previous length of service, as follows:

To serve until 1972: Professors William W. Bishop, Jr., John N. Hazard, Brunson MacChesney, and Myres S. McDougal, and Messrs. Alwyn V. Freeman and Richard Young.

To serve until 1973: Professors Baxter, Covey T. Oliver, Louis B. Sohn and Eric Stein; and Messrs. James N. Hyde and Oscar Schachter.

To serve until 1974: Professors Alona E. Evans, Richard A. Falk, Louis Henkin and Stefan A. Riesenfeld, and Mr. Schwebe]

To serve until 1975: Mr. John Carey and Professors Wolfgang Friedmann and Richard B. Lillich.

The present honorary editors of the JOURNAL were re-elected.

The new regulations regarding the editors provide for twenty-four editors instead of the previous twenty-two. Professor Oliver J. Lissitzyn indicated his desire not to be considered for re-election and his withdrawal was reluctantly accepted. The three vacancies on the Board will be filled at a later date after further consideration by the Board of Editors.

ELEANOR H. FINCH

### CORRESPONDENCE

The Editors of the JOURNAL welcome scholarly communications and will print those considered to be of general interest to its readers.

#### ON THE STATUS OF UNITED STATES TREATY LAW

In a Note on "Point Four and Codification" published in this JOURNAL in 1959,<sup>1</sup> I pointed out that, as far as information about United States treaty law was concerned, the United States was an underdeveloped country, and while we were aiding other countries with regard to codification of their law, much remained to be desired and to be done here in this respect.

Unfortunately, the situation has not improved since then. On the contrary. In 1959 there was still hope that an extremely well-done and useful State Department publication (*U. S. Treaty Developments*) which then was merely suspended, would be resumed—a hope which now must be given up, as nothing has "developed" with regard to it in the eighteen years since it ceased to appear.

In marked contrast to the data concerning two sources of the "supreme law of the land" (Article 6(2) of the Constitution), the Federal Constitution and Federal legislation, information about the third source, Federal treaties, is very incomplete, and up-to-date information thereon is completely missing. In view of the present position of the United States in the world and the tremendous increase in the number and importance of treaties concluded by her, the lack of information is all the more remarkable and regrettable. According to the Department of State, "nearly two-thirds of the total number of treaties and agreements entered into by the United States between 1776 and 1968" date from the year 1950 on.<sup>2</sup>

The *texts* of treaties are published and accessible, if one has access to a good library which has the *U. S. Statutes at Large* (Stat.), the *U. S. Treaties and Other International Agreements* (U.S.T.) and the *Treaties and Other International Acts Series* (T.I.A.S.). Smaller collections may have the Malloy-Redmond-Trenwith compilations and now the Bevans col-

<sup>1</sup> 53 A.J.I.L. 889-892 (1959).

<sup>2</sup> C. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949*, Vol. I, p. iii (Dept. of State Pub. 8407, Washington, 1968).

lection entitled *Treaties and Other International Agreements of the United States of America 1776-1949*, which is in the process of publication.<sup>3</sup> The proposed 15 volumes of this collection together with the 54 volumes of the *U. S. Treaties* contain the texts of all the treaties which have become binding upon the United States since 1776. With each passing year the number of the volumes of *U. S. Treaties* increases while the Bevans edition becomes more and more dated.<sup>4</sup>

If the situation with regard to the easy accessibility of the texts of treaties is hardly satisfactory, conditions are even worse so far as information on the *status* of those treaties is concerned. It is true that we now have the annual publication, *Treaties in Force*, which at least tells us which treaties are in force as of January 1 of each year. But the very useful *U. S. Treaty Developments* and Hunter Miller's excellent *Treaties and Other International Acts of the United States of America* have been discontinued, and there is at present no single publication which concentrates on the treaties in force, reproduces their texts, and reports at the same time on the developments concerning those treaties and on the actual practice (legislative, administrative, and judicial) in the form of concise summaries of the practice in connection with the treaty provisions concerned.

This writer proposed to prepare such a publication and, at his request, Senator H. S. Baker, Jr. (R. Tenn.), and Congressman J. J. Duncan (R. Tenn.) introduced identical bills in their respective Houses as follows:

#### A BILL

To provide for publication of a United States Treaty Code Annotated

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That section 73 of the Printing Act of January 12, 1895 as amended, is amended by inserting after the paragraph relating to the printing of the United States Treaties and Other International Agreements (44 U.S.C. 196a) the following new paragraph:

"The Public Printer shall, at such time as the Joint Committee on Printing shall direct, print, bind, and deliver to the Superintendent of Documents a number of copies of the United States Treaty Code Annotated, and of annual supplements thereto, not exceeding the number of copies of the Statutes at Large required for distribution in the manner provided by law. The cost of such printing and binding shall be charged to the Congressional allotment for printing and binding. Copy for the United States Treaty Code Annotated, and annual

<sup>3</sup> Multilateral Treaties: Vol. 1: 1776-1917; Vol. 2: 1918-1930; Vol. 3: 1931-1945; Vol. 4: 1946-1949; Vol. 5: Bilateral: Afghanistan-Burma; Vol. 6: Canada-Czechoslovakia (Dept. of State Pub. 8407, 8441, 8484, 8521, 8543, and 8549, Washington, 1968-1971). For an evaluation of this publication, see my book review in the March, 1971, issue of the American Political Science Review, Vol. 65, pp. 234-236.

<sup>4</sup> 187 (42%) of the 449 multilateral treaties published in the multilateral part of the Bevans edition referred to in the preceding footnote, were no longer in force at the time of their publication, while 262 (58%) treaties were still in force then.



supplements thereto shall be furnished to the Public Printer in the manner directed by the Joint Committee on Printing.”<sup>5</sup>

The bills were referred to the Senate Committee on Rules and Administration and to the House Committee on House Administration, respectively.

Following standard procedure, the House Committee asked the Department of State for its “evaluation and recommendation,” which were negative. In a letter dated October 6, 1970, to the Subcommittee on Printing of the House Committee, the Department pointed out the difficulties of a Treaty Code analogous to the U. S. Code Annotated. Such difficulties are real indeed, and the point would have been well taken if such an analogous publication had been intended, which was not the case. Admittedly, the title of the bills lends itself to such misinterpretation, and it is proposed to submit better drafted bills in the 92nd Congress. The Department further stressed that “the amount of annotation material . . . in regard to treaties would not justify a separate publication that would include the full texts of the treaties.” With all due respect, this remains to be seen. The data published in the abortive *U. S. Treaty Developments*, covering only part of the material, would seem to indicate the contrary, not to mention the fact, as seen above, that it will have taken some 70 volumes to print the texts of all treaties.

The Department of State rightly pointed out that “questions regarding the interpretation or application of a treaty may be resolved by supplementary agreements between the United States and the other country concerned, in which cases the texts of the supplementary agreements are now published separately.” This is true, but instead of having to look for and finding the texts of such supplementary agreements elsewhere, the suggested publication would either (preferably) print them together with the main treaty or refer to one of the few other volumes comprising the publication.

The Department of State then mentions various publications, such as Stat., U.S.T., T.I.A.S., the Malloy and Bevans compilations and the new Whiteman *Digest of International Law* for the texts of the treaties and some treaty interpretation. As has been shown, even the texts of the treaties are not conveniently available, not to speak of the relevant practice thereunder.

Having “found that some treaty provisions that are of constant application and the subject of numerous inquiries can be compiled separately,” the Department listed the following “compilations which are revised periodically and transmitted to State authorities and, upon request, to others”:

Treaty provisions in force between the U. S. and other countries relating to:

Notification of consular officers of the arrest of their fellow nationals;  
exemption of government-owned property from real property taxes;

<sup>5</sup> 91st Cong., 2nd Sess., S. 3308 and H.R. 15744. The above bills are identical to the bills introduced by the late Senator Estes Kefauver (D. Tenn.) in the 86th and 87th Congresses; see S. 3002 and S. 625, respectively.

most-favored-nation treatment of consular officers; rights of inheritance, acquisition, and ownership of property; competency and authority of consular officers in the settlement of estates.

These are indeed useful compilations but they cover, of course, only a very small part of United States treaty law.

Finally, the Department of State announced that it has "under active study a computerization project which, when completed, should serve as a source for compilation of all relevant treaty information." It hopes "to have this project under way in the near future" and added that

if any publication along the lines of an annotated treaty code were found to be feasible, both in technical and financial respects, it should be developed on the basis of the material that would be stored in the proposed computer system. For the present, in view of the above factors, the Department would not favor expenditure of funds or other resources for an annotated treaty code.

In transmitting this letter to Congressman Duncan, the Chairman of the House Subcommittee on Printing stated: "In view of the negative correspondence from the State Department, no further action is anticipated on this proposal."

This super-cautious attitude of our Government in terms of pace and money contrasts sharply with that of the Canadian Government towards the independently conceived Queen's University Treaty Project under the direction of Professor Hugh Lawford. Originally the Project was designed to gather information about treaties relating to Canada only, but was soon expanded to cover the entire Commonwealth of Nations. It has become "the most exhaustive single collection of information concerning Commonwealth treaties." Its research staff consisted at the start in 1961 of one director and one research assistant. In March, 1970, it comprised one director, eight full-time and ten part-time research assistants, one secretary and four terminal operators. A consolidated statement of its receipts for the years 1967, 1968 and 1969 lists grants by the Canadian International Development Agency in the amount of over \$97,000 and by the Canadian Council of over \$52,000.<sup>6</sup>

I do not know how long the Department of State's computerization project has been under active study, when it will be through with the study, when the computerization will begin, and how long it will take to complete it. If and when completed, this computerization would indeed yield all the data required for the proposed annotated edition of the United States treaties in force. However, it would still be necessary to publish those data in some form to make them generally accessible. And it is still necessary to publish the texts of the treaties in force in some convenient, easily accessible form. *Quic usque tandem?*

<sup>6</sup> See Queen's University Treaty Project, Cumulative Progress Report to the Canadian International Development Agency for the Period ending March 15, 1970, Working Paper No. 8, pp. 1, 2, 9, 14. See also note by Professor Lawford in 64 A.J.I.L. 925 (1970).

According to Article 24 of the Statute of the International Law Commission, the latter "shall consider ways and means for making the evidence of customary international law more readily available." As the above samples show, evidence of international and national *treaty* law is not readily available either.<sup>7</sup>

SALO ENGEL

*The University of Tennessee*

P.S. After the completion of the above, Senator Baker introduced indeed a bill which omits any mention of a Code and restricts the scope of the proposed publication to the *multilateral* treaties in force. It is "to provide for publication of the United States Multilateral Treaties in Force, Annotated." See 92nd Cong., 1st Sess., S.1033. A companion bill will be introduced in the House by Representative Duncan.

S.E.

#### TEACHING INTERNATIONAL LAW

*The University of Texas at Austin*

*January 27, 1971*

One of the perennial complaints from students of international law is that the standard introductory course is not "relevant." Who cares what happened to the officer of a French ship in a collision off the coast of Turkey almost fifty years ago, or to the Schooner *Exchange* in 1812? The fault may well have been mine in the presentation; but my students have flatly refused to read the stuff, and I would get half a dozen "unprepareds" in a row, day after day, and wind up leading them by the hand.

This past autumn, with about 110 students registered, I decided on an experiment which would at least shut off this particular criticism. I required each student to take out student membership in the Society and to subscribe to *International Legal Materials* for the calendar year 1970, and announced that the five issues of the JOURNAL and the six issues of *ILM* would be the only text materials for the course. The students were a little surprised, but interested and curious. They did not complain, as the cost was within the range of what they have come to expect to pay for an ordinary book of "Cases and Materials."

The Society's co-operation was unstinted; without this it would not have worked at all. On the first day of class my students already had three issues of the JOURNAL and four of *ILM* on which to begin work, and I had had them long enough to do some organizing and prepare an outline and advance assignments.

The thing that astonished me was how easy it was to draw from this hot-off-the-griddle accumulation of current material—and in the case of

<sup>7</sup> In 1950 this writer proposed the creation of an International Legislation Register which would contain up-to-date information on the status of multipartite treaties of general interest; see Engel, "On the Status of International Legislation," 44 A.J.I.L. 737-739, at 739 (1950).

*ILM*, current *raw* material—things of immediate importance that took us quite naturally through almost all of the standard introductory course in international law, plus a lot of things that we would not have got from any prepared collection. On a good many of the items I had, of course, to provide background by lecture. But the students wanted and needed only enough of this to enable them to understand what is going on *now*; and by the same token, they were interested in having the background on something that was obviously important today.

I think the students were surprised to find how readily they would understand the materials and the problems they presented, and the extent to which they could identify with the people who were sweating them out. Reading drafts and counterdrafts gave them a sense of human fallibility and of the satisfaction of accomplishing even a slight step forward. Before the end of the semester we all found ourselves reading the daily newspapers with a fresh realization that international law is alive and well and living in every quarter of the globe.

It was not all easy. I had to dig out several lectures that in an ordinary course would have been served up already prepared in the text. There were a few places where we got the impression that we were going a little catch-as-catch-can. The students were a little dismayed to find that their materials have no resale value; and I am a little dismayed to realize that my own work on this semester's materials will be of limited usefulness next time around with a new set of them.

I think, though, that the success of the experiment outweighs these disadvantages; I would do it again. Perhaps the best indicator is that I prepared an examination which covered fairly the material we had gone over, and after preparing it, realized that it was by far the most searching one I had ever drawn up. The students thought so, too!

WOODFIN L. BUTTE

*Professor of Law*

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, Office of the Legal Adviser, Department of State.

The references in the headings are to sections of the *Digest of International Law* prepared by Marjorie M. Whiteman (1963 to date) dealing with the same subject matter as the material presented.

### RIGHTS AND DUTIES OF STATES

#### *Recourse to Pacific Settlement* (5 Whiteman's *Digest*, Ch. XIII, §20)

Beginning on January 11, 1971, naval forces of the Government of Ecuador seized a number of United States fishing boats while those vessels were fishing far off the coast of Ecuador. The Government of Ecuador imposed substantial fines on the vessels. As a result of these seizures, the United States, pursuant to its domestic law (§3(b) of the Foreign Military Sales Act, P.L. 90-629, 82 Stat. 1320, as amended by §1 of P.L. 91-672, 84 Stat. 2053), suspended its military sales to Ecuador.

The following note was addressed to the Chairman of the Permanent Council of the Organization of American States by the Representative of the United States in connection with that situation:

*January 27, 1971*

Mr. Chairman:

On instructions of my government, I have the honor to request that the Permanent Council, acting under the provisions of Article 86 of the Charter of the Organization of American States, take cognizance of and refer to the Inter-American Committee on Peaceful Settlement, the dispute that has unfortunately arisen between the Government of Ecuador and the Government of the United States concerning:

(1) The apprehension by Ecuadorean naval vessels of fourteen fishing vessels of United States registry in waters well beyond 12 nautical miles of the Ecuadorean coast but within 200 nautical miles thereof, and the imposition of heavy fines against these vessels for allegedly fishing in Ecuadorean waters without license as well as the imposition of license fees.

(2) The charge by the Government of Ecuador that the United States Government is in violation of Article 19 of the Charter of the Organization of American States in suspending military sales to the Government of Ecuador under the terms of the Foreign Military Sales Act relating to the seizure of United States fishing vessels in international waters beyond 12 miles from the coast of the country concerned.

The United States Government is fully aware of the fact that the Ecuadorean Government claims a territorial sea as well as fishing jurisdiction of 200 nautical miles and that it therefore asserts that all fishing vessels

must have Ecuadorean licenses in order to fish in these waters in accordance with Ecuadorean law. However, it must also be realized that neither the United States Government nor the majority of the countries of the world recognize jurisdictions of this extent. It is the view of the United States Government and of most other countries that waters beyond 12 nautical miles are international waters open to fishing without license by vessels of any nationality, subject to any conservation arrangements that may be agreed to among the countries fishing such waters.

Hence it is the view of the United States Government that the apprehension, fining, and required licensing of United States vessels fishing beyond 12 nautical miles, including the use of naval force for this purpose, constitute unwarranted acts; and that the consequent application of United States law affecting government sales of military supplies and equipment represents a reasonable response to this unwarranted act and that it does not in any way constitute coercive action within the meaning of Article 19 of the Charter of the Organization of American States.

Regarding the juridical problem of differences over territorial waters and fisheries jurisdiction, and pending a final solution that will hopefully emerge from the Law of the Sea Conference which the United Nations General Assembly has convoked for 1973, the United States Government stands ready at any time to join with the Government of Ecuador in referring this aspect of the matter to the International Court of Justice.

With regard to a practical solution to the problem, the United States Government during the past two and a half years has on several occasions met jointly with the Governments of Ecuador, Peru and Chile in an effort to arrive at a practical agreement, without prejudice to juridical claims, regarding fishing and conservation in Southeast Pacific waters as well as assistance the United States Government is prepared to extend in the development of the fishing industry in those three countries. The last such quadripartite meeting was held in September, 1970. As already stated to the three governments, the United States Government is eager to resume these talks as soon as possible, as it continues to believe that such a quadripartite agreement offers real possibilities of finding a workable solution to the problem.

My Government also remains ready to resume bilateral conversations with the Government of Ecuador in an effort to resolve the immediate problem that has arisen. Unfortunately, however, the most recent conversations have not resulted in agreement on the matter.

Therefore, my Government believes that the Inter-American Committee on Peaceful Settlement, through its good offices, could be of great assistance in this matter in suggesting to the two parties suitable procedures to arrive at a satisfactory and workable settlement. If the committee finds this matter to be within its competence and if it then, under the provisions of Article 86 of the Charter, offers its good offices to the Government of Ecuador, my Government sincerely hopes that that Government will be agreeable to this procedure, within the spirit of fraternity and peaceful settlement embodied in the Charter of the Organization of American States.

As a member of the Inter-American Committee on Peaceful Settlement, while at the same time being a party to the dispute, the United States Government is, of course, prepared to absent itself from the Committee when it considers this matter, in accordance with Article 5 of the Committee's statutes.

Accept, Excellency, the renewed assurance of my highest consideration.

(O.A.S. Official Records, Ser. G, CP/Doc. 81/71 Corr. 1. For additional statements of the United States position, see 64 Dept. of State Bulletin 245-250 (1971).)

On January 29, 1971, Ambassador John J. Jova, United States Representative to the Organization, made the following statement:

With reference to item 3 on the agenda, my delegation wishes to record its position that, as a matter of principle, the Permanent Council is obliged under the provisions of Article 86 of the Charter to refer *immediately* to the Inter-American Committee on Peaceful Settlement requests, such as that made by my Government, for the Committee's good offices.

However, in view of the fact that the matter in question is to be taken up in another body, namely the Meeting of Consultation of Ministers of Foreign Affairs, and in view of the fact that the Representatives here are also fully pre-occupied with the OAS General Assembly, my Government asks that consideration of Agenda item 3 be postponed until further notice.

#### NATIONAL JURISDICTION

##### *Judicial Assistance: Service of Legal Documents and Processes Abroad* (6 Whiteman's Digest, Ch. XIV, §11)

The following is an excerpt from a letter dated February 10, 1971, addressed to one of the Embassies in Washington from the Assistant Legal Adviser for Administration and Consular Affairs, Department of State, in response to an inquiry concerning service in the United States of legal documents emanating from foreign courts:

Since [your government] is not a party to the [Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague on November 15, 1969], service of documents in civil or commercial matters is done pursuant to comity rather than as an international obligation. It differs in no way in the case of [your country] from the case of any other country not a party to the said convention. The Department of Justice accomplishes service by forwarding the documents to the appropriate United States marshal who attempts to locate the person to be served and returns a copy of the documents with notation either of personal service or of failure to locate the person.

If [your government] should so wish in criminal cases, there is no obstacle under United States law to service upon individuals within the United States directly by [your] consular authority having jurisdiction or through the United States mail, return receipt. The validity of such service in [your country], of course, would be a matter for [your own domestic]

law. United States courts, however, normally would not give effect to the judgment of a [foreign] court in a criminal case no matter what the form of service.

If such a form of direct service were resorted to in civil cases, United States courts are not required to give effect to judgments of [foreign] courts in any event but are probably less likely to do so in the absence of proof of personal service by an impartial officer.

In civil cases, should [your government] wish to send requests for service to the Department of State directly from a consular authority, rather than through the Embassy, the Department of State is prepared to process them in the same way as requests from the Embassy, if the prepayment and other requirements applicable to requests from the Embassy are complied with.

(Correspondence on file in the Office of the Legal Adviser.)

#### THE UNITED NATIONS

*Promotion of International Economic and Social Co-operation: International Co-operation in Economic, Social, Cultural and Humanitarian Fields* (13 Whiteman's Digest, Ch. XXXIX, §10)

In a working paper <sup>1</sup> submitted on October 1, 1970, to the United Nations Commission on Narcotic Drugs, the United States indicated its intention formally to propose amendments to the Single Convention on Narcotic Drugs, 1961. The following memorandum was transmitted on March 18, 1971, as an addendum to a letter addressed to the United Nations Secretary General from the Permanent Representative of the United States:

MEMORANDUM OF THE UNITED STATES OF AMERICA RESPECTING  
ITS PROPOSED AMENDMENTS TO THE SINGLE CONVENTION  
ON NARCOTIC DRUGS, 1961

The international community has long recognized that the legitimate interests of no State are served by illegal narcotics activity. The first general multilateral Convention relating to the Suppression of the Abuse of Opium and Other Drugs was signed at The Hague in 1912. The Single Convention on Narcotic Drugs, 1961, codified earlier conventions, significantly advanced the principle that the production, manufacture, export, import, distribution of, trade in, use and possession of narcotic drugs should be strictly limited to medical and scientific purposes, and provided for continuous international co-operation. The United States believes it is now time for the international community to build on the foundation of the Single Convention since a decade has given us a better perspective of its strengths and weaknesses and of the magnitude of the narcotics problem.

The United States signified its intention to propose formal amendments to the Single Convention at the Special Session of the Commission on Narcotic Drugs in September 1970. In now submitting those amendments the United States believes that an international conference, as envisaged

<sup>1</sup> 65 A.J.I.L. 191 (1971).



in article 47, should consider them and all other amendments that may be proposed to strengthen the Single Convention on Narcotic Drugs, 1961, early in 1972. It hopes that the Economic and Social Council will decide to convene this conference and will request the Commission on Narcotic Drugs to devote part of its session in September 1971 to a preliminary consideration of the proposed amendments. The United States will be gratified if States will consider our proposals a useful basis from which to begin their consideration of what is necessary to strengthen the Single Convention, and it looks forward to a fruitful dialogue when they have had an opportunity to develop their own views.

The Single Convention provides essentially voluntary restraints on parties with respect to cultivation of the opium poppy, production of opium, manufacture of opium derived drugs, and import and export of these substances. The United States proposals are designed to build wherever possible on the existing foundation and to provide the international community with new authority to control production and illegal traffic of narcotic drugs. In particular, the United States proposes that the International Narcotics Control Board should be strengthened. This Board, composed of eleven technical experts serving in their individual capacities, has demonstrated its ability to act impartially in seeking to restrict narcotics activity to medical and scientific requirements.

The United States believes that the functions and powers of the Board can be usefully strengthened in five key areas:

1. *Access to information.* The Board can at present require States to provide only information relating to consumption of drugs, stocking of drugs, utilization of drugs for the manufacture of other drugs, and import and export of drugs. We propose, in amending articles 14, 19 and 20, to give it the important additional authority to inquire about the cultivation of the opium poppy and the production of opium in a State party to the Single Convention. This will allow the collection of information about the raw material of narcotics from which illicit diversion normally occurs.

2. *Opportunity to make use of all available information.* The Board may now base its actions only on information officially submitted by a Government under an article of the Single Convention or communicated to it by United Nations organs. We propose, by amending article 14, to add to this authority so that the Board could act on the basis of all information that may become available to it by any means, not only the information officially submitted but also other information which it may obtain through public or private sources. This will be a particularly useful addition to its powers since the official information released by governments often does not and cannot provide data that is relevant to illicit diversion.

3. *Local inquiry.* The rapid spread of hard narcotics addiction has demonstrated the need to give the Board authority, in certain instances, to designate, with the agreement of the State concerned, an individual or a team to make on-the-spot inquiry of drug related activities. We propose to give the Board this authority by amending article 14.

4. *Power to modify estimates.* The Single Convention requires parties

to furnish the Board estimates on consumption of drugs, stocking of drugs, and use of drugs to manufacture other drugs. These estimates are in turn linked to manufacture and importation of drugs. The Board now may only question these estimates; it may not change them. We propose that in addition to requiring estimates for the first time on cultivation of the opium poppy and production of opium, the areas where the threat of illicit diversion is greatest, the Board be given new authority to modify estimates submitted by States. This will permit the Board to control narcotics activity that is a real or potential source of illicit diversion and to conform that activity to world medical and scientific requirements as determined by experts. We propose, therefore, to amend articles 12, 19 and 24, and to insert a new article 21 *bis* entitled "Limitation of Production of Opium."

5. *Mandatory embargo.* The Board may now only recommend certain steps to States parties, including that they cease export and/or import of drugs to or from a particular country when the Board believes the aims of the Single Convention are being seriously endangered by reason of the failure of the country concerned to carry out the provisions of the Convention. We propose, by amending article 14, to give the Board the power to make such an embargo mandatory upon all parties in the above circumstances or when it determines that, regardless of intent or negligence, there is a danger that any country or territory is becoming a centre of illicit traffic. As at present, the country concerned would continue to have the right to appeal to the Economic and Social Council as the political body primarily responsible for supervision of the Single Convention.

If these amendments are adopted, the international community will be able for the first time to require as a matter of right full information on the cultivation of the opium poppy and the production of opium, to order reductions in cultivation or production where there is a significant danger of illicit diversion or where world needs are already being met, and to order worldwide remedial measures to be taken.

Additionally, the United States believes it would be desirable, by amending article 36, to strengthen the extradition provisions contained in the Single Convention along the same lines as the new Convention for Suppression of Unlawful Seizure of Aircraft recently adopted at The Hague. Narcotics offences already enumerated in the Single Convention would thus immediately become extraditable offences.

(U.N. Doc. E/4971/Add. 1.)

#### TREATIES AND OTHER INTERNATIONAL AGREEMENTS

*Enforcement: Duty to Comply* (14 Whiteman's *Digest*, Ch. XLII, §27);  
and *Termination or Suspension: Effect of Violation* (*id.*, §39)

The following is an excerpt from the Written Statement of the Government of the United States submitted to the International Court of Justice in connection with the advisory proceedings relating to Namibia (South West Africa):

## SECTION III

*There is a Legal Obligation to Observe Treaties in Good Faith*

In 1969 the United Nations Conference on the Law of Treaties brought to a successful close more than fifteen years' work within the Organization relating to the codification of treaty law. The Convention that was produced by the combined efforts of the 110 States participating in the Conference, although it is not yet in force, constitutes a primary source of reference for determining what are the customary principles of treaty law applicable to [South Africa's Mandate over the Territory of Namibia].

Article 4 of the Vienna Convention on the Law of Treaties provides that the Convention applies only to treaties which are concluded by States after entry into force of the Treaties Convention with regard to such States. However, it specifically preserves the applicability to all treaties of rules of customary treaty law that are contained in the Convention. Many of the provisions of the Convention codify pre-existing customary law. In this regard the Legal Counsel of the United Nations has pointed out that the debates and decisions of the Conference—

... may show the opinions of Governments about what the present rules are, and thus may furnish evidence of existing customary international law. If a rule was adopted by a very large majority and with a general understanding that it represents existing law, it may be taken to formulate such law. (Letter of 11 May 1970 from the Legal Counsel (Stavropoulos) to the Secretary General (Twight), International Civil Aviation Organization.)

Two articles of the Treaties Convention which both on the basis of their content and according to the criteria laid down by the Legal Counsel of the United Nations may be taken to formulate existing law are those relating to *pacta sunt servanda* (Article 26) and to the consequences of breach of a treaty (Article 60).

Article 26 provides that a State is bound to carry out in good faith its treaty obligations. The International Law Commission described the rule as "the fundamental principle of the law of treaties." (*Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, G.A.O.R., 21st Session, Supplement No. 9, p. 42.) The formulation of this principle proposed by the Commission was adopted without any negative vote at the second session of the Conference.

The Preamble to the Charter of the United Nations affirms the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained." Paragraph 2 of Article 2 expressly provides that Members "shall fulfill in good faith the obligations assumed by them in accordance with the . . . Charter."

International tribunals have also affirmed the principle of good faith performance of treaty obligations. In the *North Atlantic Coast Fisheries* case, a tribunal of the Permanent Court of Arbitration declared: "Every

State has to execute the obligations incurred by treaty *bona fide* . . ." (U.N., *Reports of International Arbitral Awards*, Vol. XI, p. 186.) A former judge and distinguished commentator on the Permanent Court observed: "The assumption runs throughout its jurisprudence that States will in good faith observe and carry out the obligations which they have undertaken." (M. O. Hudson, *The Permanent Court of International Justice 1920-1942*, (1943) p. 636.)

In *Certain Norwegian Loans, Judgment*, I.C.J. Reports 1957, page 53, Judge Lauterpacht stated:

Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.

Commenting on this statement Sir Gerald Fitzmaurice declared:

Action in good faith is an international law obligation . . . and accordingly action not in good faith must be considered as a breach of international law . . . ("Hersch Lauterpacht—The Scholar as Judge: Part II", 38 *British Year Book of International Law* 9 (1962).)

#### SECTION IV

#### *A Material Breach of a Treaty Entitles the Other Party to Suspend its Operation in Whole or in Part*

A second relevant rule of treaty law, codified in Article 60 of the Convention, deals with termination or suspension of the operation of a treaty as a consequence of its breach. Paragraph 3 of that Article restricts its application to cases of material breach, which is defined as:

- (a) a repudiation of the treaty . . . , or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

The basic principle embodied in the Article is that a material breach of a treaty on one side may give rise to a right on the other side to abrogate the treaty or suspend its operation in whole or in part. The commentary to the corresponding article in the Harvard Draft summarizes traditional international law doctrine regarding breach and demonstrates that the principle has been recognized in municipal courts since late in the eighteenth century. (29 *American Journal of International Law Supplement*, pp. 653, 1078 (1935).) The International Law Commission's 1966 Commentary on its Draft Articles on the Law of Treaties stated that "the great majority of jurists" recognized the principle expressed in Article 60. (*I.L.C. Report, Eighteenth Session*, G.A.O.R., 21st Session, Supplement No. 9, at p. 82.) At the Conference on the Law of Treaties, in which South Africa participated, no delegation denied the principle in the rather extensive debate in the Committee of the Whole; no delegation voted against the adoption of the article in the Plenary. The foregoing evidence is more than sufficient to establish that the principle in Article 60 may be regarded as representing existing law.

The fact that the Mandate is not a treaty between States does not affect the applicability to it of the treaty law contained in the Treaties Convention. Article 3 of the Convention provides that any of the rules set forth in the Convention may be applied to treaties between States and international organizations where such rules would be applicable "under international law independently of the Convention."

The rule relating to material breach, like that relating to *pacta sunt servanda*, was recognized before the adoption of the Convention as applying to all treaties, not only to those between States. Indeed, each of the Special Rapporteurs on the Law of Treaties, Brierly, Lauterpacht, Fitzmaurice and (in his second report) Sir Humphrey Waldock, proposed an article on breach which would have applied to all written treaties without regard to the nature of the parties. It was only later, in 1965, in order to simplify the drafting of certain of the articles, principally those relating to the conclusion of treaties, that the International Law Commission removed from the scope of the Convention treaties to which one or more international organizations were parties.

The rules relating to *pacta sunt servanda* and to material breach have been shown to be formulations of the law as it existed independently of the Treaties Convention; they are properly applicable to the Mandate. Therefore, if South Africa was in material breach of its obligations under the Mandate, the United Nations was entitled to terminate her rights and authority under the Mandate.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Diplomatic personnel—sale of duty-free products abroad—ambassador's power to regulate sale in Brazil of duty-free vehicles by diplomatic personnel*

ARTWOHL v. UNITED STATES. 434 F.2d 1319.  
U.S. Court of Claims, December 11, 1970.

Plaintiffs, members of the United States Armed Forces assigned to the Joint Brazil-United States Military Commission, brought a claim against the United States for alleged unconstitutional taking of their property under regulations promulgated by the United States Ambassador to Brazil. Members of the Military Commission enjoyed the privilege accorded diplomatic personnel of importing motor vehicles into Brazil duty-free for their personal use. Upon termination of their assignments, they customarily sold the cars in Brazil rather than return them to the United States. The high demand for such cars in Brazil, coupled with the circumstances of their importation into the country, led to profiteering which began to cause tension in the relations between the two states. As this same situation obtained in other countries of like economic conditions, the Department of State authorized American ambassadors in such states to issue regulations designed to control profiteering in duty-free products. The regulations issued by the United States Ambassador to Brazil provided several options in the disposal of motor vehicles: export at United States Government expense for eligible owners; sale to another person enjoying duty-free privileges; or sale to or through a foundation established by the Embassy. In the latter case the foundation arranged for the sale of the car to a Brazilian national. Any profit above a "formula price," which included the original cost, excise taxes, transportation charges, would accrue to the Foundation and be dispensed by it for charitable purposes in Brazil. A person selling to or through the foundation was required to execute a quit-claim. Plaintiffs contended that the taking of their excess profits pursuant to this arrangement constituted a violation of the Fifth Amendment. The commissioner for the Court of Claims found for plaintiffs. The court reversed this decision and dismissed the case.

At the outset, Judge Nichols stated that "[d]iplomatic personnel do not have a *right* to sell their vehicles duty-free, even if . . . [certain] conditions are fulfilled." (434 F.2d 1319 at 1325, quoting *Finks v. United States*, 395 F.2d 999 at 1003, 184 Ct. Cl. 480, cert. denied, 393 U.S. 960 (1968), emphasis by court.) Plaintiffs were unable to show

any arbitrary or capricious action on the part of the defendant. On the contrary, the record shows clearly that this action was taken only in pursuance of legitimate foreign policy goals and appeared reasonable under the circumstances. (434 F.2d 1319 at 1325.)

Granting the Ambassador's authority to regulate the sales of duty-free cars, Judge Nichols pointed out that plaintiffs had not shown that deprivation of the excess profits from such sales had violated their Fifth Amendment rights. The court said:

But of course it is evident that the owner of property taken can agree with the taker on how he is to be compensated. We find that plaintiffs bargained away their compensation in excess of the amount agreed to in return for the privilege of making the sale at all. (*Ibid.* 1326.)

Duress could not be pleaded where plaintiffs were aware of the policy regarding sales and acted under it. The plaintiffs entered into an accord and satisfaction with the United States, releasing any claims for compensation above the "formula price" at which the cars were sold.

*International law—relation to municipal law—municipal legislation in conflict with Federal power to regulate foreign commerce*

BETHLEHEM STEEL CORPORATION v. BOARD OF COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES.  
80 Cal. Rptr. 800.

California Court of Appeal, 2nd Dist., Sept. 18, 1969; as modified Sept. 19, 1969; hearing denied, Nov. 12, 1969.

In two consolidated cases, plaintiff, a manufacturer of structural steel products, sought injunctive relief against the Department of Water and Power of the City of Los Angeles on the ground that defendants had awarded or proposed to award contracts for structural steel beams to certain firms which intended to supply steel manufactured in Japan in violation of the California Buy American Act (Government Code §§4300-4305, cited by court). Section 4303 of the Act provided:

The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) the construction, alteration, or repair of public works or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States. (80 Cal. Rptr. 800 at 802, footnote by court.)

It was contended that these contracts must be modified so as to conform to the Act. Plaintiff also sought damages and a declaration that the Department must comply with the Act in awarding public contracts in the future. Defendants moved for summary judgments in both suits, arguing that the Act "violated certain international agreements of the United States,

and was unconstitutional as a burden on foreign commerce and a denial of due process and equal protection of the law." (*Ibid.* 801.) The Superior Court of Los Angeles County granted defendants' motion. The Court of Appeal affirmed this judgment.

Acting Presiding Judge Stephens held that the California Buy American Act "is an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs, and constitutes an undue interference with the United States' conduct of foreign relations." (*Ibid.* 802.) The court said:

The California Buy American Act, in effectively placing an embargo on foreign products, amounts to a usurpation by this state of the power of the federal government to conduct foreign trade policy. That there are countervailing state policies which are served by the retention of such an Act is "wholly irrelevant to judicial inquiry" (*United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796) since "[i]t is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." (*United States v. Belmont*, . . . 301 U.S. 324, 332, 57 S.Ct. 758, 761, 81 L.Ed. 1134.) Only the federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of national concern, not state regulation. State regulation can only impede, not foster, national trade policies. The problems of trade expansion or nonexpansion are national in scope, and properly should be national in scope in their resolution. (80 Cal. Rptr. 800 at 803.)

*Act of state doctrine—international comity—Federal court may not enjoin prosecution of patent action in Canadian court*

CANADIAN FILTERS (HARWICH) LIMITED *v.* LEAR-SIEGLER, INC. 412 F.2d 577.

U.S. Court of Appeals, 1st Circuit, June 9, 1969.

Plaintiff (Filters), a Canadian corporation, sought a declaratory judgment that certain United States and Canadian patents owned by defendant (Lear), a Delaware corporation, were invalid and, consequently, that Filters' sale of its fans in the United States did not constitute an infringement of Lear's patents. Three weeks after Filters filed its complaint, Lear filed suit in Canada in the Exchequer Court against Filters for infringement of the former's Canadian patents. Filters then sought an injunction in the Federal District Court against Lear's prosecution of the patent action in Canada. Lear moved for dismissal of this part of Filters' complaint, arguing that the act of state doctrine enunciated in *Banco Nacional de Cuba v. Sabbatino* (376 U.S. 398 (1964); 58 A.J.I.L. 779 (1964)) precluded the assertion of jurisdiction by the District Court over the matter. The District Court granted the injunction against further proceedings in Canada but reserved the issue of its jurisdiction over the Canadian patent until it had decided the issue of the United States patent. The Court of Appeals ordered the injunction vacated and the action remanded.

Chief Judge Aldrich said:



The issue is not one of jurisdiction, but one, almost as important when a foreign sovereign is involved, of comity. The presence of the parties confers on the district court jurisdiction to act, *Cole v. Cunningham*, 1890, 133 U.S. 107, 121, 10 S.Ct. 269, 33 L.Ed. 538, but the direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint. . . .

Doubtless there are times when comity, a blend of courtesy and expedience, must give way, for example when the forum seeks to enforce its own substantial interests, or in limited circumstances when relitigation would cover exactly the same points. . . . However, these exceptions do not apply to this case where the subject matter of the foreign suit is a separate, independent foreign patent right. . . . Filters sought the wrong relief. Rather than, in effect, attempt to strong-arm the Canadian court, it should have asked that court, if it thought it was so entitled, to postpone its proceedings until the United States court had taken action. Short of that, there must be some adjustment for the improper departure from principles of comity. Since the injunction has been in effect for virtually a court year, the district court is instructed to take no further proceedings as to either patent, except with the consent of Lear, before March 1, 1970, provided that Lear proceeds with reasonable diligence in its Canadian suit, or unless the Canadian court elects to defer to the court below. (412 F.2d 577, 578-579.)

*Recognition of acts of foreign state—extraterritorial effect of expropriation decree—choice of law—Federal Republic of Germany—German Democratic Republic—Trading With the Enemy Act*

CARL ZEISS STIFTUNG v. V.E.B. CARL ZEISS JENA. 433 F.2d 686.  
U.S. Court of Appeals, 2d Circuit, November 2, 1970.

Carl Zeiss Stiftung (Zeiss), a foundation located in the Federal Republic of Germany and its subsidiary, Zeiss Ikon, A.G., brought an action for trademark infringement against V.E.B. Carl Zeiss Jena (V.E.B.), a corporation located in the German Democratic Republic, and two of its distributors in the United States, Steelmasters, Inc. and Ercona Corporation. Both principals claimed exclusive use of the trademarks as successors to the original Carl Zeiss Stiftung (Foundation) which was established in 1889 in Jena, then in the Duchy of Saxe-Weimar-Eisenach, later known as Thuringia. The Foundation engaged in the manufacture of optical equipment; surplus profits were used for educational and other non-industrial purposes. The affairs of the Foundation were managed by two boards. In 1945, these boards were moved to Heidenheim, Württemberg, in the United States Zone of Occupation, when it became apparent that Thuringia was going to come under Soviet control. In December, 1945, the Soviet authorities sequestered the Foundation's assets, including its patents, and in the course of the following year, they removed most of the plant's equipment and many of its employees to the Soviet Union. Meanwhile, the Foundation's boards in Heidenheim took steps to revive the Zeiss optical business and continued to assert responsibility for the Foundation's interests in Jena.

In 1948 the Soviet Military Administration in East Germany expropriated the commercial facilities and assets of the Foundation, including the trademarks. The Foundation's enterprise in Jena was then transferred to V.E.B. Following this action, Zeiss obtained a decree from the State of Württemberg recognizing Heidenheim as the domicile of the Foundation. Zeiss' subsidiary, Zeiss Ikon, A.G., was organized in 1926 for the manufacture of photographic equipment and was registered in Dresden, Saxony. In 1947 this firm was expropriated without compensation by the Government of Saxony, then in the Soviet Zone. In 1948 the stockholders of Zeiss Ikon, A.G., meeting in the American Zone, transferred the domicile of this firm from Dresden to Stuttgart, an action which was later affirmed by the Federal Supreme Court of West Germany.

Between 1950 and 1953, V.E.B. sold its products outside the Communist-bloc countries under a *modus vivendi* with Zeiss pending establishment of a licensing arrangement. In 1954 when the parties could not agree on terms, Zeiss notified all foreign distributors to stop handling equipment bearing the Foundation's name but made in East Germany. In a series of legal actions, each party attempted to assert its sole right to the use of the Foundation's trademarks.

The first Zeiss trademark was registered in the United States in 1907. Title to these trademarks was apparently vested in the Alien Property Custodian in 1919. Despite this vesting, the Foundation's products and those of Zeiss Ikon, A.G., were sold in the United States under the Zeiss trademark from 1925 or 1926 to 1941 through Carl Zeiss, Inc., a New York corporation. In 1942 the capital stock of this corporation was vested in the Alien Property Custodian. It was sold in 1960 by the United States to Carl Zeiss Stiftung (Zeiss). That enterprise was recognized by the United States as the only legitimate Carl Zeiss Foundation.

In 1968, the District Court for the Southern District of New York held that Zeiss in Heidenheim was identical with the Foundation and was entitled to exclusive use of the Zeiss trademarks in the United States and that its subsidiary, Zeiss Ikon, A.G., was entitled to exclusive use of that name and related trademarks in the United States (293 F. Supp. 892; 63 A.J.I.L. 636 (1969)). The court held that V.E.B. had infringed these trademarks and had violated Section 43(a) of the Lanham Act (15 U.S.C. §1125(a), cited by court) by selling its products in the United States as a purported licensee of Zeiss. The court further held that V.E.B. was barred from asserting any claim to the Foundation's name or trademarks by Section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. §5(b)) and regulations thereunder and struck down V.E.B.'s assertion of an antitrust defense. The Court of Appeals for the Second Circuit affirmed this judgment with modifications.

In treating the disputed successorship to the Foundation, Judge Jameson said:

The district court properly held that whether German law as declared or construed by the courts of unrecognized East Germany or recognized West Germany should be applied depends to some extent

on the nature of the question to be resolved; that normally "the acts of an unrecognized regime which pertain to its purely local, private, and domestic affairs will be given effect"; but that here the court is "dealing with decisions of East German courts with respect to matters extending beyond the borders of East Germany, such as the nature of a foundation under federal law and the effect to be given to acts of Wuerttemberg." (433 F.2d 686 at 699, quoting 293 F. Supp. 892 at 900-901.)

The Foundation came under Federal law in 1905 when its Statute was amended pursuant to the new German Civil Code. The transfer of domicile from Jena to Heidenheim had been effected in order to enable the Foundation to carry out its objectives. This change was made in conformity with the provisions of Section 87 of the German Civil Code and was approved by the State of Wuerttemberg as a member of the German Federation. That this change in domicile worked no change in the identity of the Foundation was affirmed by a decision of the Federal Supreme Court of West Germany in July, 1957. Judge Jameson approved the District Court's ruling that little weight could be given to the opinions of East German courts that V.E.B. was the successor to the Foundation, because they "did not have before them much of the essential proof relied upon" by the District Court and they did not bring a "reasoned objective approach" (433 F.2d 686 at 700) to the controversy. Although V.E.B. cited decisions of courts in England, Switzerland, Pakistan, Norway, India, and Australia as proof of the acceptance of East German law as to the capacity of V.E.B. to institute suit, Judge Jameson was satisfied that these courts for the most part did not make a final determination on the merits and that they did not have before them as complete proof as that before the District Court.

The Court of Appeals accepted the District Court's opinion as to the application of the act of state doctrine in this case and agreed that

although the Wuerttemberg decrees and the German Parliament's Act of 1967 are not entitled to recognition as acts of state to the extent that they purport to terminate the Foundation's domicile in East Germany since to that extent they acted extraterritorially, they are entitled to such recognition insofar as they acted to give a legal status to the Foundation's *de facto* existence in West Germany as a continuation in the West of the original Zeiss cooperative enterprise, whose remaining commercial assets (worth 30 million marks) and personnel were almost entirely within the West's territorial jurisdiction. (*Ibid.* 703, quoting 293 F. Supp. 892 at 912.)

Judge Jameson also adopted the District Court's holding that (1) Zeiss Ikon, A.G., now transferred to Stuttgart, is identical with the firm of the same name originally established in Dresden; (2) Zeiss Ikon, A.G., is owner of the United States Zeiss Ikon trademarks; (3) V.E.B. is "barred from asserting any claims to the United States trademarks in dispute by §5(b) of the Trading With the Enemy Act (50 U.S.C. App. §1 et seq.) and regulations thereunder (8 C.F.R. §507.46)." (*Ibid.* quoting 293 F. Supp. 892 at 916.) The District Court's rejection of V.E.B.'s conten-

tion that it was entitled to concurrent or joint use of the trademarks because of laches, acquiescence, or abandonment on the part of Zeiss was approved by the Court of Appeals as was the former's rejection of V.E.B.'s defense that Zeiss had used the trademarks in violation of the antitrust law.

Judge Jameson held that Zeiss could not recover damages, however, under the Lanham Act (15 U.S.C. §1117, cited by court) for trademark infringement. The court said:

Again we are confronted with a unique situation, with no prior cases precisely in point. The district court has found, and we agree, that appellee Foundation is the successor of the Carl Zeiss Stiftung and is the owner of the trademarks. We agree also that appellants were on full notice of appellees' claims. On the other hand, appellants were at all times denying appellees' claims and asserting their own claim to the exclusive use of the trademarks as licensees of the Jena Foundation.

Appellants did not seek to have the American public believe that their goods originated in Heidenheim. Nor were they claiming to be licensees of the Heidenheim Foundation. Rather they claimed that as licensees of the Jena Foundation (which they contended was the successor of the Carl Zeiss Stiftung) they were entitled to the exclusive use of the trademarks in the sale of goods manufactured in Jena.

The determination of ownership and right to use of the trade names and marks has involved the resolution of many complex and difficult factual and legal issues. The Supreme Court of East Germany expressly held that appellant V.E.B. was entitled to the use of the trademarks, and decisions from other courts have lent some support to appellants' claim. There was a difference of opinion on the part of German legal experts with respect to the applicable German law. Prior to the trial of this case there were many unresolved factors upon which appellants might reasonably rely in support of their claims.

Even though in this case the factual and legal issues have now been resolved against appellants, we cannot find under all the circumstances that they acted in bad faith in asserting their claim. We conclude that the "injunction will satisfy the equities of the case" and that the claim for damages should be disallowed. (433 F.2d 686 at 707.)

*Jurisdiction—theft of motor vehicle in Canada—prosecution in United States for larceny—objective territorial jurisdiction—the law of Massachusetts*

COMMONWEALTH v. WHITE. 265 N.E.2d 473.

Supreme Judicial Court, Massachusetts, December 30, 1970.

The accused was charged with theft of a motor vehicle in Massachusetts. He moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction of the offense. The parties stipulated "solely for the purposes of . . . [the] motion to dismiss" that the motor vehicle was owned by a Canadian resident and that the "asportation of the . . . vehicle . . . occurred in Montreal" and not in Massachusetts (p. 473). It was not disputed that the vehicle had been found in Massachusetts. The indictment was dismissed by the trial court on the basis of *Commonwealth v. Uprichard* (3 Gray 434 (1855), cited by court), in which

Chief Justice Shaw, speaking for the court, declined (at p. 439) to extend to a theft, originally taking place in the territory of another nation, the principle that a thief who has brought to Massachusetts goods stolen in another State is guilty of larceny here because of the continuing asportation. (P. 474.)

On appeal, the order dismissing the indictment was reversed.

At the outset, Judge Cutter pointed out that *Uprichard* was not consistent with *State v. Bartlett* (11 Vt. 650, 653-655, cited by court) "which had held that a thief, who had stolen oxen in Canada and taken them to Vermont, could be prosecuted and convicted of larceny in Vermont. The weight of authority, however, now supports the view of the *Bartlett* case and not that of the *Uprichard* case." (P. 474.) The court continued:

The distinction drawn in the *Uprichard* case (3 Gray, 434) between bringing into Massachusetts (a) goods stolen in another nation's territory and (b) goods stolen in another State, is illogical and cannot stand. *First*, the court's decision in that case appears to have been largely based (pp. 440-441) on its reluctance to look to the law in force in Nova Scotia to determine in Massachusetts whether the original taking of goods in Nova Scotia constituted larceny under its law. The basis for the court's reluctance if indeed it ever was of importance, has now been removed by G. L. (Ter. Ed.) c. 233, §70, which provides that the courts of the Commonwealth "shall take judicial notice of the law . . . of any state . . . or of a foreign country whenever the same shall be material." . . . *Second*, the rule laid down in the *Uprichard* case . . . is inconsistent with the necessities of law enforcement today, when an automobile, stolen in Montreal can easily be moved by the thief to Boston the same day. The decision is an unnecessary impediment to effective administration of the criminal law. (Pp. 474-475.)

Defendant contended that the rule of *Uprichard* would protect him against future prosecution in Canada on the same charge. The court said:

There is no suggestion that White has already been tried for larceny in the Province of Quebec. Thus Massachusetts, in any event, is not precluded from trying him. It apparently has taken jurisdiction first and may now proceed to complete the prosecution. . . . We assume, without deciding, that the alleged larceny in Canada and the continuing asportation in Massachusetts are so far separate offenses as to permit two prosecutions. (P. 475.)

*Aliens—reciprocal rights of inheritance—Soviet nationals—California law—aliens—discrimination against—Federal control of foreign relations*

IN RE ESTATE OF HORMAN. 90 Cal. Rptr. 439.

California Court of Appeal, 4th District, October 13, 1970.

The State of California filed a petition in 1965 to determine heirship pursuant to Section 1080, Probate Code, asserting that John Horman, who died intestate in 1961, leaving an estate in excess of \$450,000, had no heirs entitled to inherit, so that the estate escheated to the State. Within five years of decedent's death, twenty survivors who were nationals and residents

of the Soviet Union "‘appeared and demanded’ by filing in the heirship proceeding statements of interest" (90 Cal. Rptr. 439 at 443); one person filed a separate petition. One of the twenty was S. A. Lavrik. After the expiration of the five-year filing period under Section 1026, Probate Code, he filed a "Second Amended Statement of Interest" listing four additional claimants, also nationals and residents of the Soviet Union. At trial the State contended that the survivors had not established their relation to the decedent, but did not raise any question about compliance by the four claimants with Section 1026. Judgment was awarded to the State. On appeal, this judgment was reversed.

At retrial, the State filed an answer to Lavrik's "Second Amended Statement of Interest," asserting that as the four claimants had not appeared within the five-year period, they were precluded from filing a statement of interest in the estate. The trial court found for the four claimants on the ground that their appearance within the five-year period had been effectively barred by the decision of the California Supreme Court in *Estate of Gogabashvele* (195 Cal. App.2d 503, 16 Cal. Rptr. 77 (1961)). In that case, the Supreme Court had held that in the absence of effective reciprocal rights of inheritance between the United States and the Soviet Union, as required by Section 259, Probate Code, Soviet nationals residing in the Soviet Union could not inherit under California law. This decision was reversed in 1966 in *Estate of Larkin* (65 Cal. App.2d 60, 52 Cal. Rptr. 441). The trial court reasoned that as long as *Gogabashvele* was unchanged, there was little purpose in claimants' attempting to assert their interest in the Horman estate. On appeal, the Court of Appeal reversed this judgment and directed the trial court to enter judgment that the State was entitled by escheat to the interests asserted by the four claimants.

Associate Justice Kaufman said with respect to the argument based upon *Gogabashvele*:

We could agree with claimants that the implied exceptions found in the cases dealing with Code of Civil Procedure, section 583 should be, on a proper showing applied to Probate Code, section 1026. (Cf. *Estate of Caravas*, *supra*, 40 Cal.2d 33, 39-41, 250 P.2d 593). The difficulty is that the circumstances presented by the case at bench do not demonstrate legal or physical impossibility, practical impossibility or futility. In the first place, notwithstanding the rationale of decision (see *Estate of Larkin*, *supra*, 65 Cal.2d at 80-84, 52 Cal. Rptr. 441, 416 P.2d 473), *Gogabashvele* could only decide that in that case the existence of reciprocal inheritance rights was not established. Claimants in the case at bench were in no way prevented by that case from presenting their claim and presenting proof of a change in the law or administration of the law of the U.S.S.R., nor were they prevented from challenging the soundness of the reasoning in *Gogabashvele*. That is precisely what was successfully done by the claimants in *Larkin*. Moreover, the other 20 survivors herein did not find it impracticable or futile to "appear and demand" within the five-year period notwithstanding *Gogabashvele*, and there is nothing in the record to indicate that claimants herein relied on *Gogabashvele* in failing to "appear and demand" within the prescribed time.

Under claimants' tolling theory, whenever a precedent was over-

turned recognizing a right of action theretofore denied by case law, all persons who had been aggrieved between the decision of the precedent case and the decision of the overruling case could then file suit, no matter how many years had elapsed between. Such a proposition cannot be sustained. (90 Cal. Rptr. 439 at 445.)

The court rejected claimants' contention that by not raising the five-year requirement in the first trial the State was estopped from raising it in the second trial. The court held that, after reversal on the first appeal, the State had the right to amend its pleadings.

Claimants advanced several arguments against the constitutionality of Section 1026. They claimed that it violated the Equal Protection Clause of the Fourteenth Amendment in that it discriminated against non-resident aliens by making them "appear and demand" within five years from the date of death of decedent, whereas Section 1027 allowed other persons to "appear and demand" within five years from the date of the decree making distribution. The court observed that

the distinction in the statutory scheme in question is not, strictly speaking, based upon alienage. Resident aliens are treated the same as citizens. The point of distinction is residency as opposed to non-residency. Nor is the distinction based on race or nationality. The statutory scheme applies to all nonresident aliens alike, regardless of their race or nationality. Neither can the interests here involved be classified as fundamental. "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction." (Irving Trust Co. v. Day (1942) 314 U.S. 556, 562, 62 S.Ct. 398, 401, 86 L.Ed. 452.) . . .

The statutory scheme of which Probate Code, section 1026 is a part appears to us to have two purposes, both of which constitute legitimate State governmental concerns. Obviously, the State has a legitimate concern that property within its borders should have an ascertainable title within a reasonable period of time so that it can be sold, developed and otherwise dealt with, and one purpose of the statutory scheme is to fix a time at which title can be definitely ascertained. A second purpose would appear to be the State's preferring itself over nonresident aliens, at least when they have not appeared and demanded within the five-year period. This, too, is a permissible exercise of the State's power. . . .

The distinction between nonresident aliens and other persons is rationally related to these purposes. We think the rational connection between the distinction and the purpose of the State's preferring itself to a potential heir is obvious. Citizens and resident aliens are likely to have substantial contacts and relationships with the State, directly or indirectly through the national government or other state governments, that nonresident aliens lack. (90 Cal. Rptr. 439 at 448-449.)

Claimants also contended that Section 1026 deprived them of a vested property right without due process of law and thereby violated international standards of justice. The court said:

Since the State has the power to withhold absolutely the right of succession but has seen fit to bestow upon nonresident aliens a vested but conditional property interest, we fail to see how the divestment of that interest by nonoccurrence of the condition upon which it was granted constitutes a deprivation of property without due process of law or contrary to standards of international justice. Nor can we perceive how that conclusion is altered by the fact that nonresident aliens are not likely to obtain actual notice of the proceedings. (*Ibid.* 450.)

Finally, claimants argued that Section 1026 constituted an infringement by the State upon the Federal Government's exclusive control of foreign relations, citing *Zschernig v. Miller*, 389 U.S. 429 (1968) (62 A.J.I.L. 971 (1968)) among other cases. Justice Kaufman pointed out that:

The cases relied upon by claimants do not support the unconstitutionality of Probate Code, section 1026. Their rule is that state legislation is invalid as an infringement upon the federal power to deal with foreign relations when "it has a direct impact upon foreign relations, and may well adversely affect the power of the central government to deal with those problems." (*Zschernig v. Miller*, *supra*, 389 U.S. at 441.) (90 Cal. Rptr. 439 at 450-451.)

The court concluded:

Probate Code, section 1026, does not involve the State in any inquiry into foreign law, administration of foreign law, credibility of foreign governmental officials or any other matter condemned by *Zschernig*. All that is required by Probate Code, section 1026 is the computation of five years from the date of death of the decedent. The same time period applies to all nonresident aliens alike, regardless of their country of residence, its law or its policies. (*Ibid.* 451.)

*Aliens—whether daily or seasonal commuters to the United States from Canada or Mexico are immigrants entitled to exemption from labor certification provisions of immigration laws*

GOOCH v. CLARK. 433 F.2d 74.

U.S. Court of Appeals, 9th Circuit, September 8, 1970.

In a class action on behalf of resident farm workers in southern California, plaintiffs sought an order directing the Federal Government to bar alien commuters who maintained homes abroad from entering the country as immigrants exempted from the labor certification provisions of the immigration laws. The AFL-CIO intervened as plaintiff representing a broader class of United States residents with whom the alien commuters competed in the labor market. Plaintiffs argued that (1) an alien commuter is not "an immigrant, lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. §1101(a)(27)(B)); (2) he should not be exempted from the usual documentary requirements when entering the country; (3) he cannot enter the country without prior certification by the Secretary of Labor that there are insufficient workers available in his line of activity and that his employment will not adversely affect the labor market (8 U.S.C. §1182(a)



(14)). The District Court granted summary judgment in favor of the Government. The Court of Appeals affirmed this judgment.

Circuit Judge Hufstедler observed that the term "permanent resident" denoted status under the Immigration and Nationality Act rather than "the actuality of one's residence." (433 F.2d 74 at 79.) The court concluded from an examination of the legislative history of the Act as amended, together with thirty-eight years of practice by the Immigration and Naturalization Service, that commuters making daily or seasonal entries into the United States were accepted as returning from temporary visits abroad and that there were no grounds for redefining this understanding. With regard to the labor certification provisions of the Act as amended in 1965, the court pointed out that once a commuter has been lawfully admitted into the country under 8 U.S.C. §1182(a)(14), he could continue to re-enter without being subject to further restrictions under this section.

Circuit Judge Wright, dissenting, objected to the majority opinion as being "at war with the most elementary principles of statutory construction and unsupported by any consistent administrative interpretation. . . ." (*Ibid.* 83.)

*Claims—denial of judicial review of decisions of Foreign Claims Settlement Commission*

FRAENKEL v. UNITED STATES. 320 F. Supp. 605.

U.S. District Court, So. Dist., New York, Sept. 8, 1970.

In an action to review the denial of his claim by the Foreign Claims Settlement Commission, plaintiff contended that the legislative prohibition on judicial review of the Commission's decisions violated his Fourteenth Amendment rights in that it resulted in the taking of his property without due process of law as well as a denial of equal protection of the laws. Plaintiff had filed a claim with the Commission for damage to or loss of property in Austria or Hungary, apparently as a result of confiscation by Soviet authorities. In a Proposed Decision, the Commission denied this claim. Following a hearing on plaintiff's objections to this decision, the Commission issued its Final Decision, which granted part of the claim but denied that part concerning an alleged loss of 105 railroad carloads of paper amounting to 10,500 metric tons. Three years later, plaintiff began the present action, in which he sought to show that his claim was identical to Krewer-Silberstein Claim No. W-9809, in which the Commission had found for claimants, and requested an order directing the Commission to reverse its decision and a declaratory judgment on the Constitutional issue. In authorizing the Commission to adjudicate claims which were to be paid out of the War Claims Fund consisting of enemy assets frozen under the Trading With the Enemy Act (50 U.S.C. App. §2012, cited by court), Congress barred judicial review of the Commission's decisions with a view to expediting their proceedings within the four years allowed for the process of adjudication. Defendants moved

for dismissal of the complaint for want of jurisdiction. The District Court granted defendants' motion.

Judge Mansfield observed that upon argument plaintiff had withdrawn the contention regarding denial of due process of law, and he noted that this contention had been rejected in a number of cases. The court said:

For one thing plaintiff has no standing to assert a claim of denial of due process because he had no proprietary interest in the frozen enemy assets constituting the War Claims Fund, which is the source of payment of awards upon claims that have been proven. . . . Nor does plaintiff have any vested property rights or other right to payment of claims upon presentation to the Commission. Section 7(f) of the International Claims Settlement Act of 1949, 22 U.S.C. §1626(f), which is expressly made applicable to claims under the War Claims Act of 1948, provides that nothing in the law shall be construed as an assumption of any liability by the United States for payment or satisfaction in whole or in part of any claim asserted by a U.S. national against a foreign government. The Committee on Interstate [and] Foreign Commerce of the House of Representatives expressed the reasoning behind the statutory provision as follows:

"It should be borne in mind that no vested property rights are involved in the determinations of the Commission in any claim filed under proposed title II. Such rights as may be created would be purely statutory in nature. Payments on awards would be clearly gratuities." House Report, pp. 3834-3835.

In such circumstances the Due Process Clause assures a claimant of nothing more than the right to present evidence and to be heard, all of which has been accorded to plaintiff here. (320 F. Supp. 605 at 607-608.)

Plaintiff's contention that the Commission's affirmative decision in the allegedly identical Krewer-Silberstein Claim had denied him equal protection of the laws was rejected by the court on the ground that the two claims were clearly different. Moreover, as an administrative agency, the Commission had the power to change its rules and to overrule its previous decisions. In any event, with the expiration of its statutory existence, the Commission was unable to provide the relief sought by plaintiff.

*Consuls—immunity from counterclaim—waiver of sovereign immunity*

KITA v. MATUSZAK. 21 Mich. App. 421, 175 N.W.2d 551.

Court of Appeals, Michigan, February 4, 1970.

Plaintiff, Consul General of Poland acting as attorney-in-fact for certain Polish nationals, brought an action alleging that defendant had caused a false will to be probated which stated that decedent had named defendant as her sole legatee. Denying the alleged fraud, defendant filed a counterclaim for libel against plaintiff and two others. Plaintiff moved to strike the counterclaim on the ground that 28 U.S.C. §1351 barred a State court from taking jurisdiction over a foreign consul. Section 1351 provides:

The [Federal] district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

The Wayne County Circuit Court denied plaintiff's motion, holding that by instituting the action against defendant, plaintiff had voluntarily submitted to the court's jurisdiction. The Court of Appeals reversed this decision and remanded the case.

Presiding Judge Fitzgerald observed at the outset:

To support its holding, the [trial] court analogized cases in which foreign governments, sovereign states, and immune officials of foreign nations have become amenable to counterclaim by instituting suits. (175 N.W.2d 551 at 552.)

The court pointed out that such cases as *National City Bank of New York v. Republic of China* (348 U.S. 356 (1955), cited by court; 49 A.J.I.L. 405 (1955)); and *Republic of China v. Pang-Tsu Mow* (105 F.Supp. 411 (D.D.C., 1952), cited by court), among others, upon which the trial court relied,

are not on point and cannot be considered as authority for obtaining personal jurisdiction over a foreign consul by the courts of our State. . . . In all of the cases cited, there was no such impediment as 28 U.S.C. §1351 which provides for exclusive Federal jurisdiction of all actions against foreign consuls.

It is recognized as the practice under the law of nations, and also treaty stipulations for consuls, that, upon the demise of one of their nationals, it is proper to care for the property left by him and to see to it that it reaches the proper parties. Consuls may take appropriate measures for the protection of the property interests of the citizens of the country which they represent. See *In re Herman's Estate* (1924), 159 Minn. 274, 198 N.W. 1001; 4 Am.Jur.2d, Ambassadors and Consuls, §19, p. 101. It is clear from the facts of the case at bar that Consul Kita was acting in his official capacity in instituting the original action in the Wayne County circuit court and therefore that court cannot assert jurisdiction as to the counterclaim. (175 N.W.2d 551, 552-553.)

The defendant could accordingly be sued only in a Federal court, and the State court was without jurisdiction in the case.

*General Agreement on Tariffs and Trade, 1947—suspension of trade agreement concessions—most-favored-nation treatment*

STAR INDUSTRIES, INC. v. UNITED STATES. 320 F. Supp. 1018.  
U.S. Customs Court, December 23, 1970.

Plaintiff protested the imposition by the Collector of Customs at the Port of New York of duty at a rate of \$5.00 per proof gallon on brandy valued at over \$9.00 per proof gallon which was imported by plaintiff from Spain. It was contended that the duty should be \$1.25 per proof gallon as established in item 168.20 of the Tariff Schedules. The higher rate of duty on beverages appeared in item 945.16, which was added to the Appendix to the Tariff Schedules by Presidential Proclamation No.

3564 (1963) in response to certain restrictions imposed by the European Economic Community upon poultry imported from the United States. The Proclamation stated that "such unreasonable import restrictions directly and substantially burden United States commerce" (320 F. Supp. 1018 at 1019) and that, pursuant to Article XXVIII(3) of the General Agreement on Tariffs and Trade (T.I.A.S., No. 1700; 55-61 U.N. Treaty Series), certain trade agreement concessions would be suspended on a most-favored-nation basis. Plaintiff objected *inter alia* that Proclamation No. 3564 was illegal and void on the ground that it increased the rate of duty on brandy imported from all countries. Defendant argued that the President had statutory authority to terminate prior proclamations and that such authority was not limited to action directed against an offending country. The Customs Court sustained the protest.

Judge Richardson, while disclaiming any authority to review the rationale for the issuance of Proclamation No. 3564, stated that

the court can and should, where the legality of a Presidential proclamation is questioned, determine whether the proclamation accords with the laws and international obligations governing and affecting its issuance and render judgment thereupon accordingly. (320 F. Supp. 1018 at 1022.)

The court continued:

As we read paragraph 3 of Article XXVIII of GATT it does not require suspension of trade agreement concessions on a most favored nation basis. In fact, favored nation treatment is not even mentioned or implied in paragraph 3. Under paragraph 3 a country having a principal supplying interest or a substantial interest is permitted to withdraw *substantially equivalent concessions initially negotiated with the applicant contracting party*. We construe this language merely to authorize reciprocal action on the part of contracting parties to GATT with respect to modification of tariff concessions, following a breakdown in negotiations and unilateral withdrawal of concessions by a contracting party. (*Ibid.*, emphasis by court.)

Moreover, Section 252 of the 1962 Trade Expansion Act (19 U.S.C.A. §1882, cited by court) could not be construed, in the court's opinion, as authorizing the President to withdraw such tariff concessions on a most-favored-nation basis.

Judge Richardson said:

As we have concluded herein that upon the basis of the instant facts the President, proceeding under section 1882(c), could only suspend, withdraw, or prevent the application of trade agreement concessions as to EEC countries, we find that the termination power of section 1351(a)(6) [Tariff Act of 1930; 19 U.S.C. §1351(a)(6)] could only be utilized here by the President to achieve that result, i.e., the termination of any prior proclamations to the extent that they proclaim rates of duty for products of EEC countries inconsistent with those provided for in the schedule of duty rates set forth in paragraph (2) of the proclamation. However, in Proclamation No. 3564 the President proclaimed that the duty rates provided for in the paragraph (2) schedule were effective as to *all* articles entered, or withdrawn from

warehouse, for consumption on and after January 7, 1964. In so doing, he exceeded the authority granted to him in the enabling statute, namely, section 1882(c), and as the result, Proclamation No. 3564 is invalid and void, and we so hold. (320 F. Supp. 1018 at 1024; emphasis by court.)

*War—Trading With the Enemy Act—denial of license for contribution to war relief in North Viet-Nam*

WELCH v. KENNEDY. 319 F. Supp. 945.

U.S. District Court, District of Columbia, December 9, 1970.

Plaintiff, a Quaker, brought an action for review of the Treasury Department's denial of his application for a license under the Trading With the Enemy Act (50 U.S.C. App. §5(b), cited by court) to send \$2000 to the Canadian Friends Service Committee for the purpose of providing medical supplies to non-combatants in North Viet-Nam. He contended that the Act was unconstitutional and that this issue should be heard by a three-judge District Court (28 U.S.C. §§2282, 2284, cited by court). In the alternative, plaintiff argued that the Act did not empower defendants to interfere with his humanitarian enterprise. Defendants moved to dismiss. Cross motions for summary judgment were also filed. The District Court granted defendants' motion for summary judgment.

Judge Gesell disposed of the Constitutionality issue by pointing out that the Constitutionality of the Trading With the Enemy Act had been upheld in a number of cases, e.g., *Sardino v. Federal Reserve Bank* (361 F.2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966) cited by court). The principal issue was whether Congress had intended the Act to reach beyond control of commercial transactions to control of contributions to civilian war relief. The court said;

Such an interpretation would be inconsistent with the broad purpose of the Act, which was to give the President full power to conduct economic warfare against belligerent nations in time of war or national emergency. . . .

The history of administration under the Act evidences no understanding that contributions for the purchase of medical supplies are outside its terms, but rather reflects a flexible use of the delegated power to meet the exigencies of varying circumstances. The Treasury Department's decision of February 27, 1967, to license donations for war relief to North Vietnam only under certain conditions, was within the scope of the power delegated by the Act, and was neither arbitrary nor irrational. Under the conditions prevailing in the present conflict, as outlined in the statement of material fact, there is no way to ensure that supplies provided to North Vietnam will be used only for civilian relief. Their diversion to combat forces may free funds for military hardware—and this our Government may take all steps within its power to prevent. (319 F. Supp. 945, 946-947.)

The court observed that denial of the license did not violate plaintiff's right to free exercise of his religion under the First Amendment. With regard to plaintiff's contention that the national emergency under which the Trading With the Enemy Act was operative had become "stale," the

court pointed out that the emergency had been reaffirmed by three presidents since 1950. Judge Gesell concluded:

If such emergency as currently exists does not warrant exercise of the powers granted by Congress in the Trading with the Enemy Act, it is for Congress to speak. (*Ibid.* 948.)

*Status of military forces abroad—conditions of trial for non-service-connected offense—Treaty of Peace with Japan, 1951—United States occupation of Ryukyu Islands*

WILLIAMSON v. ALLDRIDGE. 320 F. Supp. 840.

U.S. District Court, Western Dist., Oklahoma, December 21, 1970.

In a habeas corpus proceeding, petitioner challenged his conviction by court-martial in Okinawa on a non-service-connected charge of murder on the ground that he should have been tried in the civilian court available to him in Okinawa. The Treaty of Peace with Japan of 1951 recognized Japan's residual sovereignty over the Ryukyu Islands (3 U.S. Treaties 3169; 136 U.N. Treaty Series 45). Pursuant to the treaty, the United States continued to occupy the area. In Executive Order 10713, the President of the United States established a dual system of government in the area, known as the Ryukyu Government and the Ryukyu Civil Administration, respectively (1 U.S. Code, Congressional and Administrative News, 903-907 (1957), cited by court, 320 F. Supp. 840 at 842). Each government had its own court system; however, members of the United States Armed Forces were excluded from the jurisdiction of the Ryukyu Government courts, and they could submit to the jurisdiction of the Ryukyu Civil Administration courts only on the authorization of the military commander. The record showed that jurisdiction over any person subject to court-martial had never been relinquished to the Ryukyu Civil Administration courts. Petitioner contended that he had been denied his Constitutional rights of indictment by grand jury and trial by jury which would have been available to him under the judicial system of the Ryukyu Civil Administration and that the court-martial had no jurisdiction over him where the civilian alternative existed. The District Court denied the petition for habeas corpus. Judge Daugherty said:

Although it would appear that Petitioner would enjoy full constitutional rights in the Civil Administration Government courts of Okinawa, the source of the rights enumerated by Sec. 12 . . . [Executive Order 10713, cited above] and noted in *Rose v. McNamara* . . . [375 F.2d 924 (D.C. Cir. 1967), cert. denied, 389 U.S. 856 (1967); 62 A.J.I.L. 191 (1968)] is not constitutional. The Ryukyu Islands are, as stated before, a foreign country, and the United States Constitution does not extend to United States citizens in foreign countries even though tried by courts of the United States. *Ross v. McIntyre*, 140 U.S. 453, 11 S.Ct. 897, 900, 35 L.Ed. 581 (1891). . . . The President alone is empowered to provide for the administration of the Ryukyu Islands. In his unfettered discretion, he may at any given moment revoke Executive Order 10713 and abolish the Civil Administration courts with their rights of trial by jury and indictment by grand jury

established thereunder. He may do these things by virtue of the powers conferred on him, not by the United States Constitution, nor by Congress, but by Japan through Art. 3 of the Treaty of Peace. Thus, it is also within his power, unrestricted by constitutional considerations, to require that military persons in a foreign country be tried by military tribunals for any offense that they commit cognizable under the Uniform Code of Military Justice. The United States Constitution simply is not present in Okinawa. The rights to grand jury indictment and jury trial in the Civil Administration courts are not constitutional rights but only rights existing at the pleasure of the President. It follows that Petitioner was not under the protection of the United States Constitution in Okinawa and his remission to the Civil Administration courts would not have secured to him United States Constitutional rights as contemplated by *O'Callahan v. Parker*, ... [395 U.S. 258 (1969)]. (320 F.Supp. 840 at 843.)

It followed that petitioner's complaint of denial of Constitutional rights was unfounded. The court further observed that the civilian court could only exercise jurisdiction over petitioner if the military commander had waived military jurisdiction over him, which action had apparently not been taken here.

*Dual nationality—nationality acquired by minor through parents' naturalization—treaty exemption of nationals from involuntary military service—construction of treaty—Treaty of Friendship, Commerce and Navigation with Argentina, 1853—the law of the United States*

VAZQUEZ v. ATTORNEY GENERAL OF THE UNITED STATES. 433 F.2d 516. U.S. Court of Appeals, District of Columbia Circuit, July 16, 1970.

Appellant, born in 1949 in Argentina of Argentine nationals, was brought to the United States at the age of six when he and his parents were admitted into the country for permanent residence. When he was twelve, his parents were naturalized in the United States. According to Section 321(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. §1432(a)), a child under the age of sixteen acquires United States citizenship upon the naturalization of his parents. When appellant was fifteen, his mother sought to file an "Application for a Certificate of Citizenship" on his behalf, but the process was not completed. Thereafter, appellant registered annually as an alien resident pursuant to 8 U.S.C. §1305. In 1967 at the age of eighteen, he registered with his local Selective Service Board (§3, Military Selective Service Act of 1967, 50 U.S.C. App. §453). In May, 1968, he registered with the Argentine Consulate for military service in accordance with Argentine law. The following year he was ordered to report for induction into the United States armed forces. At his request the Argentine Embassy notified the Department of State that he was exempt from compulsory military service by the specific terms of Article X of the Treaty of Friendship, Commerce and Navigation of 1853 between the two countries (10 Stat. 1005). The National Headquarters of the Selective Service System was notified accordingly, and appellant's induc-

tion notice was subsequently canceled. Thereafter, the District Director of the Immigration and Naturalization Service in Los Angeles, where appellant resided, questioned this action on the ground that appellant had acquired United States nationality through his parents' naturalization and so was liable to induction. When a new induction notice was sent to appellant, he brought an action for a preliminary injunction against his induction and a declaration of his status as an Argentine national, resident in the United States, but exempted by treaty from serving in the United States armed forces. Appellees sought *inter alia* a summary judgment on the merits. The District Court granted appellees' motion. On appeal, the Court of Appeals for the District of Columbia Circuit reversed this judgment and remanded the case.

The main question was whether a person possessing dual Argentine and United States nationality could benefit by the treaty exemption of nationals of one state from military service in the other state. Appellees relied in particular upon a letter from an Assistant Legal Adviser to the Department of State which took the view that appellant as a dual national residing in the United States could not claim this benefit. Circuit Judge McGowan said:

We are not persuaded that this is so, at least in respect of one like appellant who has such an exiguous record of affirmative preference for his United States citizenship over his Argentine. First, it seems clear that one party to the Treaty—Argentina—does not agree that the Argentinian component of appellant's dual citizenship is beyond the scope of the Treaty exemption from involuntary military service. The record reflects that the Argentine Embassy explicitly represented to the State Department its view that appellant fell within the Treaty's protection. The opinion of one party to a compact is not, of course, conclusive of its proper construction, but it is evidence of the intent of the parties which, in this instance, is given added weight by the further showing that Argentina has, continuously since 1869, implemented that understanding by a law which protects an American-born minor resident in Argentina from being subjected involuntarily to Argentinian citizenship solely because his father becomes an Argentinian citizen by naturalization. Such a minor, although resident in Argentina, acquires Argentinian citizenship only by seeking it from a Federal Judge upon an affirmative showing that he has voluntarily enlisted in the armed forces of the Argentine. (433 F.2d 516 at 520.)

The record clearly showed appellant's desire to retain his Argentine nationality. The court continued:

Appellees insist that it is contrary to equity and good conscience for one to reside in this country with all the benefits inherent in such residence and, at the same time, to avoid the burdens of universal military service. As a general proposition, this may well be true. It is, at any rate, a cardinal principle embodied in the Military Selective Service Act of 1967 in its application to resident aliens generally. It is not, however, a principle which entered into the negotiation and ratification of the 1853 Treaty with Argentina or with a small number of other countries with whom similar treaties are still subsisting. It may well be that the Government today would not commit itself to such an undertaking, but dissatisfaction with a solemn engagement has not as yet been thought, by this country at any rate, to be an



adequate basis for ignoring the commitment. We need not dwell upon the legal problems, as obvious as they are serious, involved in any reading of Section 321(a) as an intentional effort by the Congress to evade the 1853 Treaty. (*Ibid.* 521.)

FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES

*Claims—confiscation of property by Cuban Government—measure of compensation*

IN THE MATTER OF COLGATE-PALMOLIVE COMPANY. Claim No. CU-0730.

Decision No. CU-4547, March 4, 1970; final decision, Feb. 3, 1971.\*

Claimant, a United States corporation, sought to recover for losses sustained when Crusellas y Cia., S.A. and Detergentes Cubanos, S.A., Cuban corporations in which claimant was a substantial shareholder, were nationalized by the Cuban Government in 1960. On March 3, 1970, the Commission issued a Proposed Decision awarding claimant the amount of \$5,427,581.84 with interest. Claimant objected to this decision on two grounds: (1) the Commission did not take into consideration the large amount of stock held by claimant in both corporations, and (2) the Commission did not give sufficient weight to expert opinion that the aggregate value of both corporations was \$40,000,000 when the Commission evaluated "said stock interests by capitalizing the average annual net earnings of the two Cuban corporations for the years 1957 through 1959 at 10%. . . ." (Claim No. CU-0730; Decision No. CU-4547, p. 1). It was argued on behalf of claimant that in view of the facts that both corporations were showing increased earnings and promising growth rates in 1959, the valuation should be 20 times their net earnings for 1959 or an amount determined by applying a multiple between 18 and 43 to their average net earnings in that year.

Reconsidering their decision following additional hearings, the Commission recognized claimant's ownership of substantial amounts of shares in the corporations. Given the potential growth rates of the corporations, the Commission found that "the valuations most appropriate in this case and equitable to the claimant are the results obtained from applying a multiple of 15 to the net earnings of the two corporations for 1959 to arrive at the going concern values of the corporations." (*Ibid.* 3.) The award amounted to \$14,507,935.04 with interest from the date of nationalization to the date of settlement.

FEDERAL REPUBLIC OF GERMANY CASE

*Treaties—non-self-executing character—General Agreement on Tariffs and Trade, 1947—the law of the Federal Republic of Germany*

JUDGMENT INVOLVING THE NON-SELF-EXECUTING CHARACTER OF GATT.

16 Aussenwirtschaftsdienst des Betriebs Eraters (AWD) 91 (1970).

Tax Court, Hamburg, October 29, 1969.\*\*

\* Text of decision provided by Professor Richard B. Lillich.

\*\* Translated by Professor Stefan A. Riesenfeld, University of California Law School.

The levy of turnover equalization tax upon the apples imported by plaintiff is lawful.

## I

Plaintiff cannot claim successfully that an exemption of the import of apples from the turnover equalization tax is prescribed directly by Section 4, No. 1a of the Turnover Tax Law, and this independently of whether or not the particular commodity is included in the list of exempt goods established pursuant to Section 28, par. 1. This is not possible because apples are not primary or auxiliary commodities that are necessary for German production and not, or not in sufficient quantities, produced in Germany within the purview of Section 4, No. 1a of the Turnover Tax Law. . . .

## II

1. The unlawfulness of the levy of a 2.5% turnover equalization tax upon apples also cannot be derived from Article III, pars. 1 and 2, of GATT. This provision establishes for the Contracting Parties a similar regulation as is instituted by Article 95 of the E.E.C. Treaty with respect to commerce among the member states. It prohibits discrimination against imported goods, and, in particular, with respect to similar goods in par. 2, first sentence, and with respect to substitutable goods in par. 2, second sentence. Since apples are also produced domestically, plaintiff in the present case could invoke Article III, par. 2, sentence 1, of GATT, which prohibits the imposition by the contracting parties of higher internal taxes or other charges on imported goods than on similar domestic goods. While, however, according to the Judgment of the European Court of Justice of June 16, 1966, in Case 57/65, it must be concluded that Article 95, par. 1, of the E.E.C. Treaty is capable of having immediate effects and of creating individual rights of persons which must be observed by the national courts, such effects cannot be attributed to Article III, par. 2, of GATT.

To be sure, the Federal Republic of Germany approved by law of August 10, 1951, the Torquay Protocol of April 21, 1951, as well as the GATT, and promulgated both the Protocol and GATT "with the force of law" (German Stat. II 1951, p. 173). The expression "with the force of law" used in the statute of approbation, however, does not signify that the whole GATT has become law in the substantive sense. It only connotes that GATT is law in the formal sense. Subsequent statutes of approbation refrain from the use of this clause (Maunz-Dürig, Commentaries to the Bonn Constitution, marginal No. 27 to Art. 59). Contrary to plaintiff's contention, the approbation law as such does not support the conclusion that individual citizens can derive immediate rights from Article III of GATT. This result could only be assumed if the content of the treaty were transformed into domestic law, which, however, in turn would have the consequence that the treaty law exists only alongside the ordinary domestic law.

Whether treaty law is transformed into domestic law depends solely

upon the fact whether the treaty according to its content intends to create rights and duties of the individual citizens (*cf.* Maunz-Dürig, *loc. cit. supra*, marginal Nos. 24 and 25). This effect, however, is not determined by the legislature, but by the writers and the courts on a case-by-case basis (*cf.* Maunz-Dürig, *id.*, No. 26). The Federal Supreme Tax Court has answered the question in the negative with respect to Article III of GATT, in a series of decisions (Judgment of Oct. 15, 1959, BFH VII 108/58, 1959 BStBl. III 486, 1960 BZBl. 62; Judgment of July 26, 1961, BFH VII 43/60, 1961 BStBl. III 411; 1961 BZBl. 861; Judgment of April 29, 1969, BFH VII 81/65, 1969 BZBl. 1007). The Federal Supreme Tax Court has correctly held that the Federal Republic of Germany by the law approving GATT has merely become bound to observe a particular commercial policy, viz. by Article III, a treatment of foreign and domestic goods on an equal footing. GATT, as a world-wide trade agreement and by way of a compromise solution of the hardly bridgeable differences in commercial and economic policies, contains many quite flexible and elastic provisions which frequently require further uniform regulation by the contracting parties. The general character of GATT leads to the conclusion that this treaty obligated the contracting parties to observe the envisaged commercial policy, but that it did not establish any legal norms which reach directly and immediately into the legal sphere of the citizens of the member nations (*cf.* also Christiansen, 1967 ZfZ 196).

That the contracting parties themselves have not attributed any direct effect to Article III of GATT with respect to the individual citizen follows also from the text of the Protocol of Torquay, No. 1a, par. 2, which likewise is included in the approbation law of GATT (1951 BGBl. II, Supplement, Volume III, 1984). According to the Protocol each state must apply Part II of GATT (which includes Article III) provisionally "to the fullest extent not inconsistent with the national legislation existing on the date of this Protocol." Even in the case, therefore, that the turnover equalization tax rates, in force at the date of the enactment of the approbation law, had been discriminatory, the Federal Republic of Germany would not have been obliged to modify the inconsistent provisions of the Turnover Tax Law. If it is true, however, that the existing national legislation has precedence over Article III of GATT, then it cannot be assumed that this provision intended to attribute rights to the individual citizens.

Plaintiff cannot invoke the decisions of the Court of Justice of the European Communities construing Article 95, pars. 1 and 2, of the Treaty of Rome (Cases 57/65 and 27/67) for the purpose of supporting its contention that Article III of GATT is self-executing. It cannot be denied that both articles resemble each other and that Article 95 of the Treaty of Rome is patterned after Article III of GATT. Nonetheless Article III of GATT differs in a critical respect from Article 95 of the Treaty of Rome. It does not obligate the contracting parties to repeal or alter provisions, existing on the date when GATT went into force, to the extent that they contravene the prohibitions against discrimination provided in pars. 1 and 2, as is required by Article 95, par. 3, of the Treaty of Rome. If,

however, the contracting parties are not obligated to enact legislation, then it can likewise not be assumed that they intended to vest direct rights based on Article III of GATT in the individual citizens.

In this connection it must further be noted that the decisions of the Court of Justice of the European Communities deal with community law, while in the case of GATT normal international treaty law is in issue. In contrast to community law, which is neither international nor municipal law of the member states (*cf.* Order of the Federal Constitutional Court of Oct. 18, 1967, 1 BvR 216/67, 22 BVerfGE 293), but stems from an autonomous source of law and, according to the prevailing doctrine, has precedence over municipal law (see Everling, 1967 NJW 465; Ipsen, 1968 Europarecht 134, Comment by Brandmüller to the order of the BVerfG of Oct. 18, 1967, 1969 BB 119), in the case of GATT only law with the same rank as already existing statute law is created, even if Article III were transformed into municipal law by virtue of the approbation law (*cf.* Christiansen, 1967, ZfZ 199).

2. Plaintiff likewise cannot derive immediate rights from GATT by virtue of Article 25 of the Bonn Constitution. According to this article the general rules of international law form part of the Federal law. They have precedence over statutes and create rights and duties directly for the inhabitants of the Federal territory. According to the decision of the Federal Constitutional Court (Order of May 14, 1968, 2 BvR 544/63, 23 BVerfGE 288; 1968 BStBl. II 636), the general rules of international law consist principally of rules of customary international law of universal validity supplemented by recognized general principles. They are manifest only in some cases, and in many other cases their existence and scope must first be established. Opinions differ as to whether contractual international treaty law may also be considered as general rules of international law. While the authors of the Bonn Commentary to the Constitution (and apparently also the Federal Constitutional Court) answer that issue in a negative sense (Note III, 2 to Article 25 of the Bonn Constitution, Maunz-Dürig asserts in marginal No. 19 to Article 25 that treaty law is not excluded *a priori* from the notion of general rules. Bilateral commercial agreements, however, which cannot establish general legal norms, may not be regarded as general rules of international law even according to the view of Maunz-Dürig (*id.*, marginal No. 17). This panel does not deem GATT to constitute general rules of international law, although it is not bilateral but multilateral treaty law. A contrary view is precluded because of GATT's lack of comprehensive scope (see Maunz-Dürig, *id.*, No. 17), which is a prerequisite for recognition as general international law. To be sure, a great many nations of the European Continent have acceded to GATT, including all Eastern bloc countries with the exception of the Soviet Union. Likewise the People's Republic of China is not a contracting party. The absence of two world Powers such as the U.S.S.R. and China precludes, in the opinion of this panel, the qualification of GATT as a general rule of international law. This applies all the more to Article III of GATT, since the contracting parties themselves have not obligated

one another to bring their municipal law into harmony with GATT, as has been stated with reference to section 1a, par. 2, of the Torquay Protocol. Consequently GATT is an international agreement but not a general rule of international law. International treaty law cannot be elevated to a general rule of international law by reason of the principle, *pacta sunt servanda*, invoked by plaintiff (see Maunz-Dürig, *id.*, Article 25, marginal No. 29 and comment No. 1 to marginal No. 20).

In view of the fact that the foregoing comments show that there are no serious doubts on the issue that Article III of GATT does not constitute a general rule of international law (*cf.* Judgment of the Supreme Federal Tax Court of July 26, 1961, cited above, at II, 2), this panel is not bound to request a decision by the Federal Constitutional Court pursuant to Article 100, par. 2, of the Bonn Constitution (*cf.* Order of the Federal Constitutional Court of May 14, 1968, cited above).

The further argument of plaintiff to the effect that the German Turn-over Tax Law must be construed so as not to contravene the anti-discrimination mandate of GATT does not lead to a different result. To be sure, it is correct that municipal law must be interpreted in conformity with international law (*cf.* Maunz-Dürig, *loc. cit.*, marginal No. 30 to Art. 25). Nevertheless the construction contended for by plaintiff would result in treating Article III of GATT as directly applicable municipal law. Exactly this effect must be rejected as has been shown above, for the reason that Article III of GATT has not been transformed into municipal law and does not constitute a general rule of international law.

## BOOK REVIEWS AND NOTES

LEO GROSS

*Book Review Editor*

*Académie de Droit International. Recueil des Cours, 1966.* Tomes I, II, III (Vols. 117, 118, 119 of the Collection). Tome I: pp. viii, 640; Tome II: pp. viii, 642; Tome III: pp. x, 267. Indexes. Leiden: A. W. Sijthoff, 1967, 1968, 1969. Fl. 50 each.

My distinguished predecessor in the reviewer's chair began his last review of the prestigious "Hague Lectures" on a "more critical note." Invoking the *Zeitgeist* which "favors innovation even in venerable academies," Dr. Schachter pointed (1) to the "lack of originality" of many lecturers, (2) to the lawyers' "impressionistic, selective, argumentative handling of the facts" and their "imperviousness" to the new methods developed in the social sciences and contemporary philosophy, and (3) to the "reluctance" of international legal scholars to "engage in basic criticism of each other." And he wondered whether the lectures could not be organized "so that conflicting points of view would be advanced on given subjects."<sup>1</sup> This is a suggestion which deserves sympathetic consideration by the Academy. It would involve a topical arrangement of the lectures and a concentration on fewer subjects than are traditionally taken up each year at The Hague. These subjects might be selected with regard to their timeliness and could then be discussed from different points of view. This might also facilitate the selection of the lecturers—a task complicated by the *embarras de richesses* which must face the Academy's Curatorium.

The 1966 lectures (Vol. III of which was published only in 1969 and received only in 1970) do not include the customary general course on the principles of public international law. The closest to such a course, but still very far away from it, are the related lectures by Judge Sobhi Mahmassani of Lebanon on "The Principles of International Law in the Light of Islamic Doctrine" (I, pp. 205–328), and by Professor K. R. Sastry on "Hinduism and International Law" (I, pp. 507–615). Mahmassani's purpose is "to show that the main principles of international law are in conformity with the basic doctrine or philosophy of Islam and perhaps may even be said to be part of that doctrine or philosophy," and Sastry's aim is to investigate *to what extent* these principles are in conformity with Hinduism or part of it. This would be quite an undertaking even in more than 123 or 108 pages, respectively. Instead of reaching for the stated ambitious goals, it might have been better if the authors, who ob-

<sup>1</sup> 63 A.J.I.L. 839 (1969).

viously know their Islamic or Hindu law had explained it in detail, including its *practical application*—a discussion of which cannot simply be dismissed as a violation of the law, as is done by Judge Mahmassani. *Qui trop embrasse mal étreint*. It should not have been too difficult to add lectures on the theory and practice of international law in the light of other world religions. This would have shown the value of Dr. Schachter's suggestion that a particular subject be dealt with from different angles.

Ideology plays an unfortunate rôle in another lecture, which would have been of particular interest in connection with the recent 25th anniversary of the United Nations. Professor Grigory I. Tunkin's paper on "The Legal Nature of the United Nations" (III, pp. 7-68), which is very critical of others, leaves very much to be desired for a "bourgeois, capitalist, Westerner." The admittedly knowledgeable and prominent Russian, a former chairman of the International Law Commission, thought it necessary to start his lectures with an unoriginal repetition of the old Party line on the production process, the superstructure, the "new" principles of international relations (equality, self-determination, prohibition of aggressive war, etc.) proclaimed by the Soviets, as against the "reactionary principles of the old international law." He is skeptical with regard to the effect of subsequent practice on the interpretation of the Charter (except where it suits his state's purposes), although as a Marxist he should not minimize the "*normative Kraft des Faktischen*."

If Professor Tunkin's lectures are marred by ideology, those by Professor Richard A. Falk of Princeton University on another very timely subject, "The New States and International Legal Order" (II, pp. 7-103), suffer from the new terminology which is creeping into the writing on international law. What is more serious is that this terminology affects concepts. International legal order in the gifted author's view "comprises less a corpus of rules than a social process of continuous interaction occasioned by differing views of what is permissible and desirable behavior in the various sectors of international activity." Apparently "corpus of rules" means legal rules, while the social process and the differing views could be of a political, ideological, moral, religious, economic, but not specifically legal, nature. A legal order is only one of many social orders, and the problem is to determine the characteristic features of the legal order. Since Kant and Kelsen it should no longer be considered "misleading to accept any strict distinction between what is and what ought to be" and the nature of the "ought" should be accurately defined. The busy author acknowledges the help of others, who provided him "with successive drafts of these lectures under great time pressure" (II, p. 6), but the above fundamental concepts are hardly the products of pressure.

With one exception, to be noted below, the other 1966 lectures in the field of international law are equally timely. Professor Georg Schwarzenberger of London University deals with "The Principles and Standards of International Economic Law" (I, pp. 5-98). The "practical importance" of this law being "self-evident," he shortly sketches its "theoretical significance": (1) With the expansion of the "functional frontiers of Inter-

national Law," the "separate treatment of the more promising of (its branches) is needed to provide a clearer picture of both the rules underlying the fundamental principles of international customary law and its consensual superstructures"; (2) "To do justice to the abundance of more specialised material available in fields ranging from International Air Law and International Social Law to International Economic Law, a more intensive legal analysis of this material is required"; (3) The development of these branches "leads to experiments with new techniques of treaty analysis" and to "research into the optional principles and standards evolved in this consensual type of international law"; (4) In International Economic Law "the ideological uses to which . . . naturalist doctrines have been put" can be observed with "little effort"; (5) The "relative stability" of the law in these fields "underlines the fundamental significance of the sociological working principle" behind it, namely, "substantive reciprocity" (I, pp. 5-6). In the different chapters of his lectures the well-known and stimulating author substantiates the preceding five hypotheses. The reviewer found Chapter 3 on the history and sociology of international economic law and Part II on its principles especially interesting, even if he cannot agree with all the particulars.

Dr. C. Wilfred Jenks, who has pioneered in so many fields of international law, has contributed an innovative study on "Liability for Ultra-Hazardous Activities in International Law" (I, pp. 105-200). It deals with aviation, pollution, nuclear, space, deep-sea, environmental, electronic, biological, and the "unknown hazards presented by contemporary scientific and technological developments." Of particular significance are Chapter I on the scope and nature of ultra-hazardous liability in international law, Chapter II on the elements of liability, and Chapter XII on a draft declaration of legal principles concerning ultra-hazardous liability, with the Declaration of Legal Principles Governing the Activities of States in Outer Space, adopted by the U.N. General Assembly in 1963, as a "highly suggestive precedent." It is not surprising that the draft declaration is quite novel and progressive.

Closely related to Dr. Jenks' lectures are those by the late Rear Admiral M. W. Mouton on "The Impact of Science on International Law" (III, pp. 191-260). In fact, one of the chapters (III) deals in part with regulations concerning liability. The problems considered are: new dimensions and domains, new sources of energy, the international regulation of new devices, research, pollution, food, work and health. A chapter on co-operation between scientists, between governments, between governments and scientists, and between scientists and international lawyers, was contemplated but not completed because of the author's death.

The only exception with regard to timeliness, mentioned above, is Professor Antonio Poch de Caviedes' "*De la Clause 'rebus sic stantibus' à la Clause de Révision dans les Conventions Internationales*" (II, pp. 109-208). It could have been timelier had the author considered the provisions on the *clausula* and on the amendment and modification of treaties in the Vienna Convention on the Law of Treaties of 1969. As this writer has



shown in a study published in 1939, there are a number of revision clauses in multipartite treaties which constitute codifications of the *clausula*. Otherwise this is a competent study of an important problem.

Since this JOURNAL is primarily concerned with public international law, and for reasons of time and space, the lectures in the field of private international law may be mentioned only briefly. Two are of a general nature: "Historical and Comparative Introduction to Conflict of Laws" (II, pp. 443-622) by Dean Rodolfo de Nova of the University of Pavia Law School, and "*Tendances Doctrinales Actuelles en Droit International Privé*" (II, pp. 317-433) by Professor Dimitrios J. Evrigenis of the University of Thessalonica. Three lectures deal with particular topics: "Conflicts Problems in Air Law" (III, pp. 75-182) by Professor Ludovico Masseo Bentivoglio of the University of Parma; "*Le Conflit Mobile en Droit International Privé*" (I, pp. 333-444) by Professor François Rigaux of the University of Louvain Law School; and "*Le Divorce en Droit International Privé*" (I, pp. 448-501) by Professor Fritz Schwind of the University of Vienna (probably the shortest set of lectures given at the Academy). Last, but not least, reference is made to "Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Associations and Economic Development" (II, pp. 213-312) by Professor Florentino P. Feliciano of the University of the Philippines, which "includes problems of private . . . as well as . . . of public international law" (II, p. 216).

SALO ENGEL

*International Law as Applied by International Courts and Tribunals.* By Georg Schwarzenberger. Vol. II: *The Law of Armed Conflict*. London: Stevens & Sons Ltd., 1968. pp. lv, 881. Index. £8 8 s.

The original conception of Professor Schwarzenberger's treatise on international law was that three volumes would deal respectively with the decisions of international tribunals (primarily the Permanent Court of International Justice), British diplomatic practice and "significant treaties concluded between the British Empire and other States," and international law as applied in British and other Commonwealth courts.<sup>1</sup> The task which the learned author set for himself was a formidable one, and it is not surprising that even so prolific and versatile an author as Professor Schwarzenberger should have had to concentrate his attention on the first phase of this cycle. British state practice is only now being reported in the multiple volumes of Professor Parry's *British Digest of International Law* and Mr. Lauterpacht's publication, *British Practice in International Law*. As for British cases, to say nothing of those of the Commonwealth, the eight volumes of Parry's *British International Law Cases* contain well over 7,000 pages of reports, only recently compiled and reprinted.

The present volume on the law of armed conflict grew out of a part

<sup>1</sup> Schwarzenberger, *International Law* 5-6 (1st ed., 1945).

of the first two editions of *International Law as Applied by International Courts and Tribunals*. A third volume, likewise created out of a rib of Volume I, will deal with *The Law of International Institutions*.

Rejecting the "voluntarist" and "diplomatist" views of international law, which are "nothing but a new 'natural law' in positivist disguise,"<sup>2</sup> Professor Schwarzenberger seeks evidence of the law only in "material of the highest persuasive character" (p. 4). The laws of war "must be shown to be the product of one of the three primary law-creating processes—international customary law, treaties and the general principles of law recognised by civilised nations" or to be the result of recognition or consent, as elsewhere defined by Professor Schwarzenberger (p. 27). This view of the law excludes evidence of state practice and the decisions of national tribunals, both of which have been heavily influential in creating and declaring the legal principles generally conceived to be applicable to the existence and conduct of warfare. The hundreds of decisions by national war crimes tribunals, including the purportedly international tribunals convened under Control Council Law No. 10 in Germany, and of municipal courts dealing with the legal consequences of war (e.g., the Singapore Oil Stocks case) are not regarded, although an occasional reference to such cases finds its way into the footnotes.

The result is a peculiarly lopsided and at times archaic view of the law. Evidence of the law of aerial bombardment, as part of a chapter dealing with the "trend towards total war," is found in two cases decided by the Greco-German Mixed Arbitral Tribunal, one dealing with the destruction of a quantity of coffee in a zeppelin raid on Salonica in 1916 and the other with the killing of a claimant's husband by a bomb dropped by German planes on Bucharest in 1916 (pp. 144–146). The Breisach Trial of 1474 occupies a separate chapter of five pages (pp. 462–466). And in light of the barbaric treatment to which prisoners of war and interned civilians have been subjected over the last half-century and the attempts to ameliorate their condition through the Geneva Conventions of 1949, the case of Mr. Trudgett, who was denied fresh vegetables and adequate ventilation while interned by Germany in 1917, hardly merits five paragraphs (pp. 433–434). The discussion of neutrality has a peculiarly archaic quality, thanks to reliance on the Hague Conventions of 1907 and old arbitrations. What little international law now governs the "economic blockade" of the enemy cannot be discerned without reference to state practice and national prize law. The rôle of neutrality under the United Nations Charter is dealt with only fleetingly, after full analysis of the older cases. And the Geneva Conventions of 1949 for the Protection of War Victims are singularly lifeless when considered in isolation from the state practice and national decisions that preceded and followed their adoption.

This dated view of the law sometimes leads the learned author into error. Examination of state practice, which would have shown that no Protecting Powers have been designated since the close of the Second

<sup>2</sup> *Ibid.* at 2.

World War, would have kept Professor Schwarzenberger from optimistically writing: "Protecting Powers and the International Red Cross Committee [*sic*] are now in a better position than they were in the past to supervise effectively the application of these [Geneva] Conventions, prevent by the very existence of these rights some breaches of the Conventions and assist in the rectification of others" (p. 459). "Recognition of revolutionaries as belligerents," far from becoming "an accepted device of state practice" (p. 691), has passed into desuetude.

To these objections, Professor Schwarzenberger is no doubt entitled to reply that his treatise is to be judged for what he intended it to be—a study based on treaties, international judicial decisions, and general practices accepted as law—rather than for what a reviewer might have preferred it to be. There can be no doubt about the thoroughness of the author's research and the powerful analytic skills that he brings to bear on the cases and the treaties. Readers will linger admiringly over his trenchant and lucid analyses of the law (see, *e.g.*, his discussion of the economic law of belligerent occupation at pp. 250–253, and an astringent comment on the Genocide Convention at p. 530). But the fact remains that the volume is not a comprehensive and contemporary view of the law of war. As a description of only three types of evidence of the law conforming to the author's juridical theories, it cannot be used in isolation from other guides to the law. A rather high level of sophistication will then be needed in order to reconcile the evidence of the law recorded in this volume with that to be found elsewhere. What the volume has set out to do, it has done exceptionally well, but it is not a satisfactory guide to the law of war in all of the richness and detail imparted to it by the practice of nations, by national case law, and the other sources and evidence of law to which most international lawyers look.

The work is concluded by a fine sixty-page selected bibliography, the work of Professor Bin Cheng and Messrs. R. H. F. Austin and E. D. Brown.

R. R. BAXTER

*The Status of Law in International Society.* By Richard A. Falk. Princeton, N. J.: Princeton University Press, 1970. pp. xvi, 678. Index. \$15.00.

This large and expensive book can best be described as a series of relatively disconnected and somewhat redundant essays. All but three of the chapters have been published elsewhere or delivered as papers, and Professor Falk's brief attempt, in the introduction of six pages at the beginning of the book and the introductions to the five sections (fourteen pages altogether), succeeds in pointing out some common themes in the chapters but does not develop a rigorous organizational structure. Ranging in scope from his well-known discussion of contemporary theories of international law, which first appeared in the *Virginia Law Review*, to a discussion of the extraterritorial implications of American anti-trust regulation which had not been previously published, this book enables the

reader thoroughly to experience Richard Falk's views on international law. One is provided a view of Falk as empirical and normative theorist, analyst of specific cases and issues, scholarly critic and reviewer of books, as well as advocate for a reformed international order.

Those familiar with some of Falk's writings will no doubt find the book valuable in providing a chance to learn of some of his less well-known writings. Those unfamiliar with his writings will find the book valuable as a survey of Professor Falk's approach to, theory of and prescriptions for international law and the international system. Whether the reader belongs to the former or latter category, he has to be impressed with Professor Falk's range of knowledge, facility of style and commitment to a better world. These qualities alone would make the book worth reading for any scholar interested in international law.

However, it is not Professor Falk's capabilities alone that one ought to consider when assessing this book from a scholarly point of view. Additional criteria must also be applied, and one obvious criterion is the degree to which Professor Falk's image of his work in the study of international law corresponds to the reality of his scholarly output. From the Introduction as well as his essays throughout the book, Falk outlines his goals in terms of both (1) a substantive interpretation of international law and (2) a methodological approach to the study of international law. The remainder of this review will discuss Falk's conception of his work in international law and the degree to which his work corresponds to that conception.

In the Introduction Professor Falk suggests that he seeks to avoid the orientations of the positivists, who have been too passive; those in the natural law tradition, who have confused their belief in an immutable moral order with their assumptions that such an order affects the behavior of men and the advocates of world government, who are so busy painting a picture of the new world that they have ignored the transitional processes necessary to get to that world. In avoiding these orientations, Falk seeks to balance the similarities and differences between domestic and international law as part of his theoretical focus. Searching for that balance, Falk wishes to steer a course between the attempt to subvert international law through an overconcern for its relevance, as he argues McDougal has done on the one hand, and the attempt to establish international law as an autonomous force, as he argues Kelsen has done on the other.

Substantively, Falk appears to see himself, then, as a synthesizer searching for common ground. A dialectic is very apparent in Falk's work as he begins many of his essays reacting negatively for the most part to existing literature, and he finishes up by developing a balanced and synthetic position. This image corresponds closely to the work he has done in the field. In fact, the substantive contribution Falk has made to the study of international law lies not in the newness of his position but in his ability to synthesize and find common themes in existing positions. His writings exhibit the idealism of Sohn and the realism of Morgenthau; an awareness of the traditional legal scholarship and a familiarity with the

writing of the more prominent social scientists; the ability to theorize and a substantial awareness of contemporary international relations detail. Although there is a clear commitment to the more moderate "New Left" ideological positions, there is none of the "Know-Nothing" attitude which has come to be an ostensible characteristic of the extreme proponents. For its substantive quality, then, the work of Falk which this book represents is worth reading, since it does represent the synthesis that Falk has been trying to achieve.

If the image and reality of Falk's substantive position are relatively compatible, his view of himself as a new breed of social scientist approaching international law in a scientific manner and the actual approach he has followed are not. Except for his occasional use of social science concepts (*e.g.*, decision-making, game theory, and model), his approach is relatively indistinguishable from the international law scholars that have preceded him. Although he sets down guidelines for approaching the study of international law in Chapter I, he fails to follow those guidelines throughout his writings. The deductively formulated theory that he advocates cannot be found if one looks for clearly stated propositions and implications explicitly deduced from those propositions. His criticism of existing theorists for failing to formulate their conclusions in "testable propositions" can be applied equally to his own work. Even though he has entitled a section of his book "A Plea for Systematic Procedures of Inquiry," he has not really taken that plea seriously. There are few attempts at comparative analysis, little or no use of quantitative data to illustrate, let alone test, his ideas, and a tendency to employ imprecise formulations to express his theoretical ideas.

Ultimately, the shortcomings in Falk's approach to the study of international law has limited the power of his substantive interpretations. As he would be the first to agree, one cannot effectively evaluate or prescribe until one understands the existing reality. Without systematically investigating the actual impact of international law on the behavior of states, the substantive views one has of international law are likely to be determined ultimately by one's values and one's idiosyncratic experiences. To achieve a really new approach to international law, Falk must combine his ability to synthesize existing theoretical ideas with a serious commitment to assess the validity of those theoretical ideas on a systematic basis. If he were able to do this, the image and reality of his approach would be more compatible, and his substantive interpretations and policy suggestions might carry the weight that he believes they deserve to carry.

WILLIAM D. COPLIN

*The Law Relating to Activities of Man in Space.* By S. Houston Lay and Howard J. Taubenfeld. Chicago and London: University of Chicago Press, 1970. pp. xii, 333. Bibliography. Index. \$17.50.

Professors Lay and Taubenfeld wrote this large, double-columned treatise under the aegis of the American Bar Foundation. The stated object of the

authors was to chart the law applicable to principal space capabilities by analyzing treaties, custom, statute, and related sources.

The treatise makes a significant contribution to a fascinating but somewhat esoteric aspect of international law. Comprehensive treatment of the law of outer space is made possible by the authors' precision of expression within a well-organized, easy-to-follow format. By way of background, the book covers the physical and political-legal setting as well as the general legal regime of outer space, with careful analogies drawn from other realms of international law. The present legal order is then discussed, with separate chapters devoted to satellite communications, liability for damages, and natural resources and pollution in connection with space activities. A useful appendix of relevant documents and a generous bibliography, including a section arranged under topical headings, are provided.

The authors' analysis of the issues and scholarly examination of alternative developments is often thought-provoking. At times, however, the copious footnoting runs far afield and is distracting to the reader. Throughout the book the thesis is well substantiated that a considerable number of rules and principles have been accepted as applicable to outer space activities. This should not be surprising, as the emerging law of outer space cannot be expected to be entirely novel. After all, legal regulations and processes are being applied to traditional interests, which have merely been extended into a new physical environment. The peaceful evolution of legal rules and principles has largely been made possible by a co-operative attitude among the small number of active participants in space development.

This book is a forward-looking reference work and, over-all, it is highly recommended to attorneys, teachers, government officials and others who have a need for encyclopedic coverage and commentary on the latest materials pertaining to the law governing man's movement into outer space.

MYRON H. NORDQUIST

*Nuremberg & Vietnam: An American Tragedy.* By Telford Taylor. Chicago: Quadrangle Books, 1970. pp. 224. \$5.95, cloth; \$1.95, paper.

It is an unusual and felicitous combination when an Army general is also an historian, professor of law, and a master of the written word. Telford Taylor combines these talents in an unpretentious volume—*Nuremberg & Vietnam: An American Tragedy*. As U. S. Chief of Counsel for War Crimes following Mr. Justice Robert H. Jackson, General Taylor played a prominent rôle in establishing what came to be known as the Nuremberg Principles. As a Professor of Law at Columbia University, Dr. Taylor here seeks to measure American action in Viet-Nam against the legal doctrines which he helped to create.

Following a brief historical analysis of the laws of war, Professor Taylor reminds us that war does not confer an unlimited license to kill or de-

stroy without justifiable reason or restraint. It is the responsibility of the one who gives a command to see to it that the order is legal. Professor Taylor, who teaches Constitutional Law, takes issue with the view expressed by Professor Richard A. Falk of Princeton that the Supreme Court should deal with the issue of the legality of the war itself. The determination of aggression in Viet-Nam, says the author, would not be nearly as clear-cut as the case presented by Hitler's well-documented invasions of his peaceful neighboring states. He assumes that intent and motive would have to be determined, although, under the definition espoused by Mr. Justice Jackson, these elements were not prescribed. In any case, he concludes that under the Supremacy Clause of Article VI of the Constitution, the Supreme Court would not be authorized to weigh the legality of our participation in Viet-Nam.

The author also disagrees with Professor Falk's suggestion that draft resisters could present a valid defense by arguing that they believe the Vietnamese war to be aggressive, and that, on the basis of the Nuremberg precedent, participation in the war might therefore render them liable to punishment as war criminals. Professor Taylor correctly notes that international law does not confer immunity from military service on the basis of an individual's personal judgment that his country's foreign and military policies are wrong. Nevertheless, he welcomes such arguments, despite their lack of persuasiveness, for they serve to focus public attention on profound moral and political issues, which he concludes are best resolved outside any existing judicial forum.

The views expressed on the war crimes allegedly committed at My Lai will probably be cited by both prosecution and defense. Professor Taylor argues that an Army court-martial is not the most appropriate judicial forum for the trial of war crimes charged against U. S. soldiers. He is not unmindful of the dilemmas faced by U. S. soldiers in Viet-Nam. Adherence to the law of war is particularly difficult where the enemy is aided by civilians, women and children, and it is often impossible to distinguish the protected non-combatant from the hostile partisan. Nor has he overlooked that the saturation bombings of World War II were not regarded as war crimes when committed by either friend or foe. He does, however, draw attention to the important principle of proportionality which must be respected. Like the ancient maxim: "There are some remedies worse than the disease," he recalls that: "The military end sought should be sufficient to warrant the suffering and destruction inflicted." (P. 143.) The author raises serious doubts about the legality or justification of U. S. evacuation procedures, the handling of prisoners, the extent of devastation, the outlawry of human life in the so-called "free-fire zones," and the slaughter of helpless persons who could not possibly be considered legitimate threats to our military mission.

In *Sword & Swastika*<sup>1</sup> General Taylor pointed the dagger at the German generals for failing to stop Adolf Hitler. Now he reserves his sharp-

<sup>1</sup> Simon and Shuster, 1952, p. 431.

est criticism for the high-ranking U. S. officers. The Army, he says, has allowed certain attitudes to develop which have made it possible for the troops to consider and treat the Vietnamese as less than human beings. They have encouraged "body counts" as a measure of success and allowed killings beyond the requirements of military necessity. For the lower ranks, there is compassion and an inclination toward mitigation, but for those higher officers responsible for training the troops, there is no such tolerance. "The consequence of allowing superior orders as a defense is not to eliminate criminal responsibility for what happened but to shift its locus upwards." (P. 52.)

The General recites to his fellow generals the decision of their revered former colleague, General Douglas MacArthur, who, as he confirmed the death sentence imposed on General Yamashita for failing to prevent his troops from committing cruel and wanton crimes, said: "This officer entrusted with high command involving authority adequate to responsibility has failed his duty to his troops, to his country, to his enemy, to mankind." (P. 182.)

Professor Taylor's book has raised painful doubts whether our conduct as a nation may have been arrogant and blind, unable to perceive the lessons of the past or the trends of the present. Although legal answers to all the questions are less than certain, he believes it both unwise and cruel to compel people to serve in a war to which there has been so much opposition. Admitting his change of heart, he now describes Viet-Nam as "the most costly and tragic national blunder in American history." (P. 207.) Responsibility for crimes, he says, must rest with the top leaders of the Army, and responsibility for Viet-Nam must rest with the top leaders of the country. The failure of the United States itself to learn the lessons it undertook to teach at Nuremberg is, according to Professor Taylor, today's American tragedy.

This thoughtful little book touches some of the open sores of American society. Where does responsibility begin, and have we forgotten the promise and hope which this nation once held forth to all the world? Some of the comparisons made between the action of American troops and the barbarities of the Nazi criminals seem exaggerated. Whatever atrocities may have been committed in Viet-Nam, they were never part of United States national policy. Unlike Germany, in the United States there has been widespread public denunciation from the White House to Main Street of inhumane conduct by U. S. troops. After all, it is the United States which is putting the alleged offenders on trial. The lines have been perhaps too sharply drawn by Professor Taylor as a deliberate device to attract attention to the dangers of complacency.

Unfortunately, there is no Nuremberg Tribunal in existence today, but the need for an International Criminal Court to deal with war crimes and aggression is apparent. What is even more regrettable is that our Government seems to have lost the spirit which existed at Nuremberg—a spirit which condemned aggression, which expressed concern for humanity, and which placed responsibility on the shoulders of those with the power to



command. It was a spirit designed to advance the rule of law as an instrumentality for world peace.

Professor Taylor's book calls upon the public to know and care about what our Government does and to contrast it with what we solemnly professed and hopefully still profess to be the principles for which we stand.

BENJAMIN B. FERENCZ

*A Modern Introduction to International Law.* By Michael Akehurst. (Minerva Series of Students' Handbooks, No. 25.) London: George Allen and Unwin Ltd., 1970. pp. 367. Table of Cases. Index. £3.75; £2.25, paper.

The last few years have seen appear on the market an ever growing number of international law textbooks in English, most of them claiming to relate their subject matter to the international political process to a greater extent than has been done by their predecessors. However, almost all of them lack one or more of the elements which the ideal *introductory* textbook for students of *political science* ought to *combine* (at least in this reviewer's opinion): reasonably complete coverage of the subject, lucidity, non-technical style, and, perhaps most important, that certain degree of realism, plausibility, and persuasiveness necessary to convince critical (especially non-law) students of the significant rôle of international law in contemporary world affairs.

It is submitted that the book under review, written by a British international lawyer holding law degrees from Cambridge and Paris, formerly on the legal staff of the United Nations in the Middle East and at present lecturer in law at Keele University, comes closer to this ideal than any of its competitors. Especially its first chapter answering the question "Is International Law Really Law?" (pp. 9-22), and the second on "Historical and Political Factors" (pp. 23-36) are an invaluable basis for discussion. Also as far as the remaining subject matter is concerned, Akehurst's treatment leaves almost nothing to be desired, although he could have developed his stimulating approach in greater detail. The Communist theory of international law, the attitudes of newly independent states toward the international legal order, acts of international organizations as sources of international law, *ius cogens*, the Rhodesian and South West African questions, the European Convention on Human Rights and the 1966 United Nations Covenants, the 1965 World Bank Convention on the Settlement of Investment Disputes, the status of special missions, devolution agreements, flags of convenience, the legal situation of the deep seabed, the ocean floor and outer space, the representation of China in the United Nations, United Nations forces, legal aspects of decolonization and economic aid, the reasons for the unpopularity of international arbitration and judicial settlement, the problem of "anticipatory" self-defense, the Cuban missile crisis, the Soviet invasion of Czechoslovakia, legal aspects of the use of nuclear weapons, war crimes, "wars of national liberation,"

the Viet-Nam war—all these topics and cases are treated in an up-to-date, concise, and remarkably unbiased way. For the first time in a text, the law of treaties is discussed in the form of a commentary to the 1969 Vienna Convention. Occasional references to rules of British law relevant to international relations (e.g., the British Nationality Act, 1948) could, in further editions, be supplemented by examples chosen from other municipal legal orders. In short, Akehurst's *Modern Introduction to International Law* is an excellent teaching tool, setting a new standard in the field of compact international law texts.

BRUNO SIMMA

*Common Market Law.* By Alan Campbell. London and Harlow: Longmans, Green and Co. Ltd.; New York: Oceana Publications Inc., 1969. 2 vols. Vol. I: Tables of treaty articles, regulations, cases; subject index of agriculture regulations. pp. ccxlv, 601. Index. Vol. II: Annotated Treaty of Rome and Appendices. pp. vii, 673. £20; \$50.00 a set.

English lawyers and legal scholars have not shown a great deal of interest in the new legal order that has been emerging on the Continent since the early nineteen fifties. Among the significant exceptions have been Professors Otto Kahn-Freund at Oxford, J. D. B. Mitchell at the University of Edinburgh, and Georg Schwarzenberger at the University of London; Dr. D. G. Valentine, Dennis Thompson and E. H. Wall of London and Professor K. R. Simmonds, formerly of the British Institute of International and Comparative Law; and last, but not least, Lord Denning, Master of the Rolls, who wrote a foreword to the book under review. The present work by Alan Campbell, a thoroughly revised, vastly expanded and updated version of an earlier edition,<sup>1</sup> should stimulate interest on the part of the British legal community, since it assembles the principal basic texts and information in the English language at a time when the admission of the United Kingdom to the European Communities looms as a distinct possibility. For this, if for no other reason, one must welcome *Common Market Law* in its latest reincarnation.

The focus of the work is on the European Economic Community Treaty and on the legal acts implementing this treaty, with only marginal attention given to the European Coal and Steel Community and the EURATOM. This emphasis makes a great deal of sense, particularly if one views the complex subject matter from the pragmatic viewpoint of a government official or practicing lawyer.

Since the principal purpose of the book is obviously to serve as a reference work, it is comforting to note that the author promises to keep it "up to date by the provision of supplements." In fact, as of this writing, a first supplement already would be in order, to make available the im-

<sup>1</sup> Alan Campbell and Dennis Thompson, *Common Market Law, Texts and Commentaries* (London: Stevens and Sons; Leiden: A. W. Sijthoff; South Hackensack, N.J.: Fred B. Rothman & Co., 1962). First Supplement (1963).

portant new texts adopted in 1970 in the field of financing the common agricultural policy and other Community expenditures. The new arrangements providing for gradual transfer to the Community treasury of proceeds from agricultural levies, customs duties, and from a portion of the harmonized value-added tax are apt to have a long-range systemic impact on the evolution of the Community.

Unlike the first edition, the current version distributes the material between two volumes. The first volume is essentially in the form of a treatise, but it does not purport to provide a comprehensive, more or less general survey of the activities of the Community from the British viewpoint, such as was offered to English readers for instance by Shanks and Lambert in their early work.<sup>2</sup> Instead, Campbell has selected only those areas which he considered of particular relevance to the legal profession and has sought to treat these subjects in a systematic, professional manner. Thus the nine chapters of the first volume deal with the nature and sources of Community law, agriculture, restrictive agreements, industrial property, transport, the structure and working of the Court of Justice of the Communities, "foreign relations," including the association agreements and trade agreements with non-member states, and the new developments in the field of conflict of laws and company law. One may wonder why the author decided not to include separate chapters on freedom of establishment and supply of services, or on the law developed in connection with the removal of customs duties, quotas and similar barriers to the movement of industrial goods, although the more important activities in this field are referred to in other contexts.

A major portion of the second volume is devoted to an annotated text of the Treaty establishing the European Economic Community in the English translation published by Her Majesty's Stationery Office in 1967. This translation appears to be an improvement over the 1962 version and in certain respects also over the early English text published in Brussels.<sup>3</sup> Also included in the second volume are the full texts of the annexes to the basic treaty and certain implementing acts and conventions, including the treaty "merging" the executive bodies of the three Communities which came into effect on July 1, 1967, the important Yaoundé Convention of Association between the Community and Franco-African states and the

<sup>2</sup> Michael Shanks and John Lambert, *Britain and the New Europe, The Future of the Common Market* (London: Chatto & Windus, 1962).

<sup>3</sup> The last-mentioned text was published by the Secretariat of the Interim Committee for the Common Market and Euratom, Brussels, 1931/5/57/4. It should be kept in mind that no authentic English text of the treaty exists; only the texts in the four official Community languages are authentic; and the same applies to the hundreds of Community regulations and other legal acts. The Government of the United Kingdom has been providing translations of the Community regulations in a series of its own documents. Unofficial English translations of the judgments of the Court of Justice appear in the *Common Market Law Reports*, a private periodical based in London. The Commerce Clearing House loose-leaf service, "Common Market Reporter," makes available English translations of selected Community acts and judgments of the Court. Both the British and American translations vary in quality.

antidumping regulation adopted by the Community on the basis of the Kennedy Round agreements in GATT.

The organizational scheme adopted by the author has proved more effective in some subject areas than in others. Thus the treatment of the new Community institutions in the first chapter is informative and effective, particularly since it takes into account not only the written rules but the "living law" of the organization as well.<sup>4</sup> On the other hand, a reader seeking professional guidance on the law governing restrictive practices may experience difficulty in working his way through the narrative in Chapter 3, interlaced as it is with complete or partial texts of regulations, which one would normally expect to find in an appendix, and with summaries of court opinions, the import of which is not always easy to grasp. Some of the relevant texts (the handy Commission's *Practical Guide to Treaty Articles 85 and 86* and the recent communications by the Commission) are included in the appendix, while two more recent decisions of the Commission follow the annotations to Article 85. These annotations are extremely brief (seventeen lines) and consist mostly of cross references. The selection and organization of the material elucidating the crucial Article 85 both in the principal chapter and in the annotations raise some questions. Thus no mention is made, either in "The incidence of Article 85" or in the annotations, of the important divergence among the four authentic texts of Article 85 in the clause prescribing that a restrictive practice must "affect trade between Member States" before the prohibition in the article can become applicable.<sup>5</sup> On the other hand, the chapter on the common agricultural policy (Chapter 2) is more manageable, since, with some exceptions, the narrative is only occasionally interrupted by excerpts from the basic texts. Also included here (pp. 79-86) are summaries of a few (of the many) opinions of national courts and of the Court of Justice rendered in cases concerning the implementation of the agricultural policy. A special subject index of regulations affecting agriculture adds to the value of the chapter, even though, through no fault of the author, the text is already partially out of date, as indicated above. In the extensive two chapters on the Court of Justice (Chapters 6 and 7, pp. 335-544) the author dips heavily into the accumulating case law. This part obviously represents the author's labor of love and reveals a common lawyer's predilection for judge-made law.<sup>6</sup> Of particular interest are the occasional and more or less casual references to United Kingdom law.<sup>7</sup>

It is a matter of some regret that this handsomely designed and printed

<sup>4</sup> See, e.g., Vol. I, pp. 16-19 and the quotations from Noël's illuminating article on pp. 9 and 19.

<sup>5</sup> The point is dealt with in a sense in the context of a specific case under the heading of "Appellate jurisdiction of Court of Justice under Article 173" at pp. 185-186.

<sup>6</sup> See, in this connection, the exhaustive recent treatise, *Political Integration by Jurisprudence, The Work of the Court of Justice of the European Communities in European Political Integration*, by Andrew Wilson Green (Leiden: A. W. Sijthoff, 1969); reviewed in 65 A.J.I.L. 233 (1971).

<sup>7</sup> See, in this connection, Keeton and Schwarzenberger, *English Law and the Common Market* (London: Stevens and Sons, 1963).

set has not been edited with greater care so as to eliminate misprints in references to foreign institutions and names.<sup>8</sup> Again, in the brief summary of the European institutions (other than the Communities) and GATT, one is puzzled to read at p. 311 in Vol. II that the 1962 United States Trade Expansion Act "enabled the United States to participate for the first time in a multilateral scheme of tariff reduction" and "[s]ince the USA were participating in the negotiations for the first time it was natural that these negotiations were called the 'Kennedy Round.'" The historic fact is that it was the United States that called for the first multilateral negotiation on tariff reduction after World War II. Thereafter, the United States participated actively in all six "rounds," starting with the first round in 1947, on the basis of the Reciprocal Trade Agreements Act of 1934, which has been extended periodically.

The above observations should not obscure this reviewer's admiration for the author's industry and, above all, his courage in dealing single-handedly with the widening stream of the new law. If anything, one may wonder whether a reference work of this scope is still within one man's capacity, since it calls for technical, specialized knowledge in a great variety of divergent fields.

ERIC STEIN

*Legal Effects of United Nations Resolutions.* By Jorge Castañeda. Translated by Alba Amoia. New York and London: Columbia University Press, 1970. pp. xii, 243. Index. \$10.00.

Wisdom in the analysis of most legal problems begins when doctrinal generalization yields to particularization of component issues. As Felix Cohen poignantly wrote, any difference is clarified when it is reduced to a question of degree. Jorge Castañeda, the Chief Director in the Mexican Ministry of Foreign Affairs, has applied this principle with predictably good results to the important problem of the international legal effects of United Nations resolutions. In doing so he convincingly demonstrates that a range of General Assembly resolutions produces legal effects which may be meaningfully spoken of as "binding" or "obligatory."

The specific purpose of Castañeda's book is the study of what he calls "resolutions of [a] non-recommendatory nature" as opposed to mere "recommendations." His methodology is to identify a variety of resolutions whose legal effects seem to be accepted in practice as greater than merely recommendatory and then to analyze the specific causes and effects of each general variety. The six principal types of "nonrecommendatory resolutions" which he identifies are internal resolutions pertaining to the structure and operation of the United Nations, resolutions relating to the maintenance of international peace and security, resolutions that determine the existence of facts or concrete legal situations, resolutions whose binding force rests on instruments other than the Charter, resolutions expressing

<sup>8</sup> There are, for instance, five errors of this sort on p. 53 of Vol. I.

or reflecting an agreement among United Nations Members, and resolutions declaratory of customary international law or general principles of law. In general, practice confirms that each of these types of resolutions is in some meaningful sense "binding." The first category includes resolutions dealing with matters internal to the United Nations, such as the admission of Members, the consideration and approval of the budget, the creation of subsidiary organs, the adoption of procedural rules and the schedules of sessions. Castañeda indicates that almost four fifths of United Nations resolutions to date have been in this category of "internal law." The second category includes, in addition to decisions of the Security Council to take enforcement action, decisions of the Security Council and General Assembly to carry out non-enforcement functions. It also includes recommendations of the Security Council and General Assembly concerning the adoption of enforcement measures after a finding of a threat to the peace, breach of the peace, or act of aggression. Castañeda indicates that in large measure this enlarged competence results from the practice of the Organization rather than any initial understanding of the framers of the Charter. The third category, resolutions which determine the existence of facts or concrete legal situations, includes resolutions such as those deciding whether a non-self-governing territory has attained full self-government for the purpose of implementing the obligations of Chapters XI and XII of the Charter. Resolutions in this category provide the hypothesis or condition of the applicability of a rule of law and cannot be effectively juridically opposed by a dissenting Member. Resolutions in the fourth category obtain binding force by virtue of specific agreements other than the Charter by which states delegate special authority to an organ of the United Nations. Examples include the Italian Peace Treaty, which delegated decisional authority to the General Assembly in case of disagreement among the signatories about the future of the former Italian colonies, and the trusteeship agreements entered into between the United Nations and individual states, which create obligations to apply certain United Nations recommendations to the trust territories. The fifth category, resolutions expressing or reflecting an agreement among United Nations Members, includes resolutions such as the resolution dealing with Member Nation assent to the transfer to the United Nations of the functions, activities and assets of the League of Nations. Resolutions in this category are "binding" because they are intended by Member States voting for them as an expression of assent to an international agreement. Castañeda refers to resolutions in this category as "multilateral executive agreements," and indicates that while they have played a significant rôle in the specialized agencies, they have been the exception in the principal organs of the United Nations. The last category includes resolutions which are declaratory of customary international law or general principles of law, such as those confirming the principles of the Charter and Judgment of the Nuremberg Tribunal. Castañeda indicates that such resolutions achieve a "binding" effect as authoritative proof of international law, even though they do not formally create law.

The identification and detailed exploration of a range of "binding" United Nations resolutions is a useful contribution to the theory of the legal effect of United Nations resolutions. Although a number of previous studies had adverted to the "binding" effect of resolutions in some of these categories, particularly resolutions concerning United Nations "internal" law,<sup>1</sup> Castañeda's focus on a broad range of resolutions which can be considered "binding" is particularly illuminating. His study is also useful in that it particularizes the legal effects of the resolutions in each category rather than merely labeling each as "binding." His book further provides a valuable taste of the complexity of the problem of the lawmaking effect of United Nations resolutions and demonstrates the bankruptcy of simplistic generalizations which deny that any General Assembly resolutions can produce legal effects. But though it is a useful book, it would be more useful if it were set in a broader jurisprudential framework. Thus, the book defines the critical concepts of "binding force" or "obligatory effect" in question-begging terms of "modification of the pre-existent legal situation" rather than by explicit reference to the expectations of members of the international community about the legal effects of the different types of resolutions. As a result, there is some tendency to generalize in either/or terms rather than to maintain focus on a continuum of legal effects for different (and contextually differentiated) types of resolutions. For example, the initial division of resolutions into "recommendatory" and "non-recommendatory" resolutions suggests an overly neat conceptualization of a more complex reality. Similarly, because of the focus of the book on "nonrecommendatory" resolutions, by negative implication it minimizes the importance of United Nations resolutions for the creation of new customary international law as opposed to the mere declaration of pre-existing customary law. As such it may be unrealistically conservative in assessment of the full range of effects of United Nations resolutions. Failure to provide an empirical referent to the concept of "binding obligation" may also have contributed to the occasional lapse into logic-chopping as, for example, in the treatment of the legal effects of Resolution 181 (II) concerning the Palestine Partition Plan (pp. 132-133).

Though it seems likely that the overwhelming complexity of the problem of the legal effects of United Nations resolutions will yield more fully only to a more broadly based jurisprudential framework,<sup>2</sup> Castañeda makes an important contribution to understanding of the legal effects of United Nations resolutions.

JOHN NORTON MOORE

<sup>1</sup> See, e.g., O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* 2-6 (1963); R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 3-5 (1963).

<sup>2</sup> For an example of a more broadly based jurisprudential framework in the context of the development of customary international law in general, see Raman, "The Role of the International Court of Justice in the Development of International Customary Law," 1965 *Proceedings, American Society of International Law* 169. See also Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *A.J.I.L.* 782 (1966).

*Implied Powers of the United Nations.* By Rahmatullah Khan. Delhi, Bombay, Bangalore: Vikas Publications, 1969. pp. xiii, 236. Index. Rs. 28.50.

As the United Nations enters its second quarter-century, it is appropriate to examine the record. Politically the history of the Organization has not been a very happy one and the present Secretary General, U Thant, has predicted its demise within a decade if it is not altered drastically. The study under review, however, is not primarily concerned with political issues, but rather with legal factors, although the author realizes the interaction between the two. If evidence of this relationship is required, the most recent example can be found in U Thant's sudden directive to the more than fifty United Nations Information Centers throughout the world to terminate the old practice of receiving and transmitting petitions concerning human rights to U. N. Headquarters, a procedure for which there is no specific Charter provision. U Thant, who does not pursue an activist rôle, undoubtedly yielded to Soviet pressure after Russian citizens attempted to deliver a communication on the violation of human rights to the Moscow Center in 1969.

The basic theme of this volume deals with the theory of implied powers and institutional effectiveness of the United Nations which give an organization endowed with international legal personality "unrestricted legal capacity under international law" (p. 30). Yet these "tools" (p. 222) do not provide it with a "*carte blanche*" (p. 33). Rather the organization's activities must meet certain criteria. They must conform to its over-all purposes, must be essential to its functions, and must arise by necessity out of its constitutive document. After setting forth the conceptual framework primarily in terms of the jurisprudence of the International Court of Justice, and more specifically the *Reparations* and *Expenses* opinions, theory is tested against practice in a number of ways. The author analyzes the activities of the Organization, first, in the sense in which implied powers and institutional effectiveness have augmented its authority; second, in the way in which they have reduced the strict application of its express authority; and, third, in the dual manner in which they have expanded and limited its power.

This makes for interesting reading, although the writer engages in a good deal of polemics. Illustrative of these is the statement that collective fiscal responsibility is likely to become a "landmark" in the "evolution of the UN" (pp. 28-29). Perhaps; but surely at present the evidence is to the contrary. Even the United States, the prime mover in this area, after realizing the impracticability of pursuing the matter to its logical conclusion, subsequently reserved its position. And in 1970 the U.S. Congress went even further and repudiated our financial obligations to the I.L.O. Similarly, it is somewhat difficult to regard the Congo operation as a "landmark in the organic development" of the U.N. (p. 53) or to consider the veto as the most "vital element" (p. 46) which permeates the collective security system. Would attempts at enforcement measures be more effec-



tive and successful by exempting them from the veto and initiating them against the wishes of one of the super-Powers, or is the veto in this field merely an expression of the underlying conflict between Members? Surely political power is a fact of life!

Such criticism does not really detract from the value of the book, for Dr. Khan has shown considerable insight. At the same time, there are regrettable defects. For example, UNEF becomes the "Gaza operation" (p. 73), Article 27(3) of the Charter is quoted in its unamended form, and attention is drawn to the 1966 text of the I.L.C. Draft Articles on the Law of Treaties without reference to the 1969 Vienna Convention.

Finally, in discussing the limitations on implied powers, a number of pertinent questions, such as the legal effects of unconstitutional acts and the recourse available to an aggrieved state, are raised but only cases which involve abuse or excessive use of implied power are examined. A strong argument is made for the compulsory review of contested acts of inter-governmental organizations, a position which is reiterated at the end. At this point, however, the volume once again includes some rather loose language, for instance, that specialized agencies should "extend to the ICJ jurisdiction" of review (p. 222).

GUENTER WEISSBERG

*Geneva 1954: The Settlement of the Indochinese War.* By Robert F. Randle. Princeton, N.J.: Princeton University Press, 1969. pp. xviii, 640. Index. \$17.50.

Many readers may approach this book, as I did, skeptical whether much more can be said about the 1954 Geneva Agreement until still-secret documents of the conference participants are available. Secondary sources were the basis of most of Professor Randle's work, though he did have access to the private papers of John Foster Dulles and to interviews and statements of Dulles' friends and associates in the Dulles Oral History Collection at Princeton. Yet I suspect that most such skeptics will finish this volume, as I did, amazed at how many issues remain open for further analysis solely on the basis of the evidence discussed by Randle. It is a tribute to his talents that this volume will stimulate many readers to re-examine their views of the Conference and its relevance to current events in Southeast Asia.

This study is divided into three parts: first, the events leading up to the Conference; second, the Conference itself; and third, a legal analysis of the Conference agreements. Randle is trained both as a political scientist and as a lawyer and he writes "less as a historian than as a specialist in international relations and international law" (page vii). But he recognizes that his interpretations of what happened and how it happened have a major impact on his legal analysis. He strives to present the "best evidence," and when there are several versions of a particular incident, he tries to relate them all.

Throughout the work, Randle presents a balanced picture of the options available to decision-makers in the various nations and non-nations involved in what has come to be called the "first" Vietnamese War: Cambodia; the Chinese People's Republic; the Democratic Republic of [North] Vietnam; France; India; Laos; the Republic of [South] Vietnam; the Soviet Union; the United Kingdom; and the United States. Randle is superb at suggesting alternative hypotheses for why particular policy choices were made. He is never hesitant to express his own conclusions and to marshal all the supporting material he can. But he is careful to state the evidentiary bases for those conclusions and to indicate the degree to which they are necessarily tentative.

Randle's treatment of John Foster Dulles seems an exception to his uniformly balanced account of the Conference and his careful analysis of its context. Perhaps ironically, this study may suffer from exposure to one collection of primary materials—the Dulles collection—without adequate access to countervailing primary sources. Randle is no doubt right in criticizing "accounts that picture the late Secretary of State as an inflexible exponent of his own, puritanically inspired views of world politics . . ." (page ix). Yet this version of Dulles' actions and inactions appears to suffer from a sense of obligation to offset the distortions of others with an advocate's defense.

If Dulles was not the villain of international diplomacy that some have suggested, he was certainly not the hero of the 1954 settlement, as Randle would readily acknowledge. That place must be reserved for Eden and perhaps Molotov. Both prodded recalcitrant allies to accept, or at least acquiesce in, an arrangement that brought an end to the seven-year war in Indochina. Eden's role as "honest broker" was particularly impressive. At the very time that the British Empire was slipping away, British statesmanship was at its creative best.

Randle's necessary reliance on secondary sources—with the main exception of the Dulles materials—means that his account is inevitably speculative on some issues. Indeed, he can give only the most fragmentary account of that frantic week before the Mendès-France deadline, when virtually the entire settlement package—three cease-fire agreements and a conference declaration—was negotiated. The crucial bargaining was limited to a few key issues, but that final week must have been a whirlwind.

The study is most speculative, of course, in discussing the policies and actions of Soviet, Chinese, and North Vietnamese leaders. We may never know the extent to which Molotov or Chou En-lai pressed the DRVN to agree to the settlement. Randle presents a convincing case that a good deal of pushing was involved, at least on some issues. Materials on British, French, and United States policies during the period in question, of course, are much more numerous. British and French policies on major issues appear fairly clear from Randle's account. But the United States policy concerning the Conference itself still seems obscure. In part, the problem may be one of time perspective and the distraction of recent events. It is hard to recreate the pressures of the 1950's, internal and external, real and

imagined. Southeast Asian "dominoes" might fall, as President Eisenhower claimed (page 67), but why was the area of "transcendent importance" to the United States (page 60)? Did the President really want a settlement at Geneva, assuming the settlement would involve a temporary partition?

At the least, American conduct concerning the Conference is subject to different interpretations. Perhaps, as Randle concludes, that conduct was part of a broader strategy to frighten non-Westerners. (It obviously frightened some Westerners as well.) Perhaps Eisenhower and Dulles were delighted to see an end to the war and sought only to avoid the stigma of appeasement. An alternative hypothesis is that United States leaders thought that the Geneva Conference could not possibly succeed without active United States participation, that the departure from Geneva of Dulles and then Bedell Smith—leaving only U. Alexis Johnson, who had no explicit instructions or even a clear idea of what he was supposed to do (page 285)—was intended to scuttle the Conference, and that Bedell Smith returned only when a settlement seemed certain. This hypothesis is consistent not only with the domestic pressures in the United States that viewed the settlement as "another Munich," but also with Eisenhower's later characterization of the settlement as "that terrible agreement at Geneva" (page 353). And it accords with Eden's claim that in June 1954 Bedell Smith showed him a telegram from Eisenhower instructing the American representative to do what he could to end the Conference as quickly as possible (page 276). Whatever the rationale of United States policy, one can properly complain—as many did at the time—that neither the rationale nor even the policy was ever very fully articulated by Eisenhower or Dulles.

Randle's analysis makes it tempting to speculate what might have happened if . . . if, for example, the Conference participants, including the United States, had accepted the Eden proposals for a Locarno-like guarantee of the settlement. Even those who resist such speculations must be hard pressed to avoid drawing parallels between the domestic turmoil in France caused by the first Vietnam War and the tragic crisis in the United States occasioned by the second. Randle refers to French officials who had private doubts about the Navarre Plan but were loath to express those doubts publicly, much like recent characterization of officials in the Johnson Administration. There was great pressure in the French Assembly for a quick settlement, much as in the United States Congress today. Those disturbed by the inability of the Nixon Administration to end the fighting quickly may long for a parliamentary system when they read of Mendès-France's promise to resign if he did not settle the war within thirty days. At the least, President Nixon may be somewhat more sympathetic now than he and other Administration officials were in Spring 1954 for the domestic political position of Premier Laniel.

Randle himself wisely avoids drawing analogies between the two Vietnamese wars. Harold Nicolson wrote in a great book about an earlier international conference:

We can learn little from history unless we first realize that she does not, in fact, repeat herself. Events are not affected by analogies; they are determined by the combinations of circumstance. And since circumstances vary from generation to generation, it is illusive to suppose that any pattern of history, however similar it may at first appear, is likely to repeat itself exactly in the kaleidoscope of time.<sup>1</sup>

To accept such good advice obviously does not require us to ignore history, and Randle has provided a sound basis to consider its relevance to contemporary events.

In the first two sections of the book, which are primarily narration and political analyses, Randle reveals a good deal about the impact of law on a major international conference. At several stages both procedural arrangements and some rather abstract substantive principles were critical. The Conference almost died aborning, for example, when Dulles insisted that China not be included among the "inviting" nations—the label might imply United States recognition.

One might have wanted more sense of the impact of law on the process of decision-making in each of the governments concerned. Randle does say that "Dulles was a lawyer who appreciated the role of law even in the quasi-anarchic relations between states" (page 109). But there is comparatively little information on how, let alone how much, law affected decisions on the foreign policy of the United States or other nations.

Paradoxically, many readers whose primary field is international law may be more interested in the first two sections than in the third, which examines the legal implications of the settlement agreements. In part, this is because several articles have been written on legal aspects of the Geneva Agreements, though fewer than one might assume, considering the importance of the agreements. Certainly many international lawyers know more about the texts of the Geneva Agreements than their political context and negotiating history.

In discussing the legal aspects of the Geneva Agreements, Randle delineates what the agreements did not do with as much care as he discusses what they did. He properly deplores cries for "a return to the Geneva settlement" by those with little understanding of the agreements' terms. As he emphasizes, the settlement plainly established a cease-fire; what else it did is less clear. His examination of the Accords and their legal impact is analytic and dispassionate. He says exactly what he means, and no more. He draws conclusions when he thinks they are justified, but also states his premises and the consequences of adopting alternative approaches. Particularly regarding the much controverted question of the legal status of South Viet-Nam, he gives a carefully balanced account by assuming alternative conclusions concerning that status and examining the consequences of each.

This study obviously does not resolve all legal issues concerning the agreements to the satisfaction of all readers. But Randle does press

<sup>1</sup> Nicolson, *The Congress of Vienna* viii (1946). The book is dedicated to Eden.

the analysis of those issues a good deal further than they have been pressed before.

THOMAS EHRLICH

*Contemporary Chinese Law: Research Problems and Perspectives.* Edited by Jerome Alan Cohen. Cambridge, Mass.: Harvard University Press, 1970. pp. xii, 380. Index. \$10.00.

From the point of view of international law, three of the thirteen essays included in this volume edited by Professor Cohen are of particular interest. They are: (1) The Development of Chinese International Law Terms and the Problem of Their Translation into English, by Hungdah Chiu (p. 139 *et seq.*); (2) Japanese Influence on Communist Legal Language, by Dan Fenno Henderson (p. 188 *et seq.*); and (3) Chinese Attitudes Toward International Law—and Our Own, by the editor (p. 282 *et seq.*).

The first essay draws attention to the fact that the reception of international law—in the sense of the modern system as distinguished from analogies and sources in the ancient world, including China—began when Wheaton's *Elements of International Law* was translated into Chinese by W. P. Martin, later a member of the *Institut de Droit International*, and his Chinese associates, and published in 1864. Mr. Chiu then discusses successively the influence of Japan, the comparison of contemporary Nationalist and Communist international law terms, and certain problems relating to the translation of Communist Chinese international law terms into English. This essay had been published originally in the *Journal of Asian Studies*, which indicates that it is a piece of both linguistic and legal scholarship of high standard. The reviewer would have wished that the international law terms in Romanized Chinese were immediately accompanied by their counterparts in Chinese printed characters. Though there is a glossary at the end of the book of legal terms with Chinese characters, this is inconvenient if a reader of this essay wants to follow the reasoning of the author with concentrated attention. Even Chinese scholars of international law will find it as intriguing as a crossword puzzle to guess at the meaning of such an expression as *kuo-chi kuan-li* (international practice), and it will take him a few minutes to find it in the glossary at the end of the book.

The second essay is of interest in its analysis of the interaction of legal developments in Japan and in China in the latter part of the 19th century. As the editor of the volume says in respect of this essay (p. 14):

International law was the vehicle that introduced modern Western legal concepts and their linguistic symbols into China. Soon after an American missionary and his Chinese associates translated the leading textbook of the day into Chinese in 1864, it was imported into Japan and added to the ferment that was already taking place in that country over the need to modernize its entire legal system.

The codification of Japanese law on the basis of European codes made Japan the teacher of China, and Chinese students flocked to Japan to study law, in particular, international law. The author of the essay discusses in detail the stages of Chinese-Japanese co-operation in the field of the modernization of the Chinese legal system toward the end of the Manchu Dynasty. Several eminent Japanese professors of law served as advisers to the codification organs of the Chinese Government even during the beginning of the Republic. When this reviewer began to study international law in the early twenties of the present century, nearly all the textbooks in Chinese were translations from Japanese.

The third essay in the volume has to do with the attitudes toward international law on the part of Communist China in comparison with the attitude of the United States. It was adapted from a paper given by Professor Cohen at the annual meeting of the American Society of International Law in 1967 and printed in the *Proceedings* of the Society. This essay stands apart from the others, as it has a definite thesis to expound. It is thought useful that this essay might be read, for the factual background and data of the question, in conjunction with the numerous studies on the attitudes of Communist China toward international law already existing, a partial list of which is given in footnote 23 of the Introduction to the present volume. Many of these studies were published in this JOURNAL.

In general, the most valuable part of this volume appears to be the Introduction, written by the editor, in which he discusses the renewed interest in Chinese law, reviews the non-American research studies in Chinese law during the past several generations and explores the possibilities of methodology. It is somewhat to be regretted that the editor confined the actual content of the volume to the law of Communist China and did not make use of the law journals and scientific publications on Chinese legal studies which have appeared during the past twenty years in the Republic of China. There is a strong case to be made for maintaining the division of Chinese law into two categories for the purpose of scientific research: (1) Communist Chinese law and (2) non-Communist Chinese law, as Fu-shun Lir did in his annotated bibliography, *Chinese Law: Past and Present*.<sup>1</sup> The importance of the latter has recently been recognized, for example, by Professor Henry McAleavy of the School of Oriental and African Studies, University of London, who, in his survey of Chinese law in the volume entitled: *An Introduction to Legal Systems*,<sup>2</sup> stated in his conclusion: "Overseas, the Nationalist codes are to a far greater extent the effective law of Formosa than they ever were of mainland China. More important still in matters of the family is the influence of the old customary law in Hong Kong and among the Chinese in Southeast Asia." (P. 129.)

YUEN-LI LIANG

<sup>1</sup> Published by the East Asian Institute, Columbia University, New York.

<sup>2</sup> Edited by J. D. Derrett. Published in 1968.

*The Multinational Corporation in the World Economy. Direct Investment in Perspective.* Edited by Sidney E. Rolfe and Walter Damm. For the Atlantic Institute. New York, Washington and London: Praeger Publishers, 1970. pp. xxx, 167. \$10.00.

Papers for a conference sponsored by the Atlantic Institute in May, 1969, have been edited and published along with a summary of discussions and recommendations. The papers are on the subject of direct foreign investment, but the discussion turned somewhat to the multinational corporation. No paper shows a clear understanding of the difference between problems of direct investment and those related to the multinational corporation. The book is mistitled; it concerns the standard, long-discussed problems of foreign direct investment, especially the long-standing problems of antitrust; little is said of the new legal problems facing the multinational corporation.

Being a collection of conference papers, one does not expect nor find new contributions to the literature. Rather, the separate papers describe the present situation as a background to discussion. They include a review by Sidney Rolfe of the magnitude and location of foreign investment, by country and company, with a few comments on the consequences of, and national responses to, foreign investment. Walter Damm reviews the magnitude of, and obstacles to, direct investment in the United States by foreign companies, without assessing the impact of the investment or whether the obstacles should be removed; he concludes that "Governments should abandon their mistrust of direct investment abroad which is looked upon less favorably than exports," but he does not analyze why they should.

The remaining four papers include discussions of legal problems and governmental attitudes: J. J. A. Ellis writes on "Legal Aspects of European Direct Investment in the United States," mostly focusing on antitrust problems, but also mentioning the insecurity of joint ventures under the law and the problems of Securities Exchange legislation. Richard W. McLaren provides a short (four-page) reply from the viewpoint of the Justice Department. Rainer Hellmann provides some statistics on "U. S. Direct Investment in Europe" and comments on the attitudes of governments to take-overs, joint ventures, and new establishments. Thomas L. Powrie gives his attention to investment in Canada; after a statistical presentation, he reviews the performance of foreign-controlled firms as to use of nationals in senior management positions, autonomy of subsidiaries, export permission, research and development, financial policies and efficiency; he also comes back to the antitrust problem. These four papers could have been written some years ago—save for the statistical data—since the legal problems discussed have not changed for over a decade. There is no discussion of the legal problems peculiar to the multinational corporation.

The conference concluded with a series of recommendations: additional information should be provided by international companies on their operations in host countries; codes of investment should be agreed upon by

both governments and corporations; capital markets should be freed or, in the case of the Euro-dollar market, remain free, with self-policing by participants to avoid the necessity of regulation. Investment in the United States by foreign companies should be facilitated; visa regulations should be eased; antitrust insecurity should be diminished; tax regulations should eliminate discrimination; the Interest Equalization Tax should be removed; and U. S. banking law should be relaxed to permit foreigners to set up banks. European governments should eliminate barriers to transnational mergers within Europe. Parent governments should not discriminate in taxation against international investment.

Such recommendations have been made before; the Atlantic Institute is following up some of them by helping to prepare appropriate documentation. Others appear to disregard the fundamental basis of the obstacle or attitude criticized and are, therefore, unlikely to be accepted. For example, Japan is exhorted to accept Western concepts of government-business relations and join in a "code of good behavior for governments." The Canadian fears of the American threat to sovereignty were dismissed by the conferees as "illogical," as was the distinction made by governments between "new investment" and "takeovers." But fears are, by definition, irrational, arising from uncertainty and lack of knowledge of the intentions of others. The responsibility for removal does not rest wholly with the ones who fear.

The conference papers will give to the neophyte an introduction to some of the problems facing foreign investment; they hardly scratch the surface on the rôle of the "multinational corporation in the world economy." Better introductions for the lawyer will be found elsewhere.

J. N. BEHRMAN

*Jahrbuch für Internationales Recht.* Vol. XIV, 1969. Edited by Eberhard Menzel. Göttingen: Vandenhoeck & Ruprecht, 1969. pp. 645. Appendices.

Founded by Rudolf Laun and Hermann von Mangoldt, the *Jahrbuch für Internationales Recht* is still compiled under the supervision of Rudolf Laun, now together with Egmont Zechlin of Hamburg, and the Institute for International Law of the University of Kiel. Part I contains eleven articles. The first, by Professor Menzel of Kiel, is an analysis of the *North Sea Continental Shelf* cases decided by the International Court of Justice on February 20, 1969. The article retells, with new material and insight into the German case, the facts and arguments of all parties. The last few pages summarize the implications of the decision for the North Sea region, for continental shelf doctrine, and for the law pertinent to seabed exploitation generally. The article is 87 pages long, including maps, and is by far the longest piece in the book.

Following Professor Menzel's piece is an article by Professor Sohn tracing the development of international co-operation (or lack of co-operation) to deal with conflicting possible claims to exploitation rights in the seabed



beyond the continental shelf. Annexed to the article is a draft treaty proposed by Senator Claiborne Pell of Rhode Island on March 5, 1968, and apparently not currently being seriously considered by anybody. The article, not surprisingly, is thorough, interesting, and perhaps will be helpful in persuading states of the urgent need to grapple with the conflicting claims before they lead to serious tensions.

The next two articles, by Professor Seidl-Hohenveldern and Dr. Hans-R. Krämer, concern the European Common Market. Professor Seidl-Hohenveldern examines the international status of Austria, its obligations under the European Free Trade Area arrangement and the GATT, and its negotiations with the Common Market. Dr. Krämer's article concerns the impact of the Common Market on the foreign trade of East Germany. The article focuses on trade statistics but brings to light many interesting implications of West Germany's feeling that it belongs to both the European Common Market and an "intra-German" [*innerdeutschen*] trading area.

Professor Bert A. Röling's short article asks whether legal prohibitions on war make sense. He divides war into Clausewitz-war, *i.e.*, war as a conscious policy decision, and Tolstoy-war, *i.e.*, war as the expression of historical and cultural forces of a whole people, which then finds a leader to direct it. He finds that in both cases it makes sense to forbid war as a legal recourse, although doubting that in either case the legal rule by itself can be effective to assure that no war will come. A Clausewitz-war can still arise out of miscalculation; a Tolstoy-war out of unresolved national yearnings. Professor Bart Landheer examines the world social order of co-existence. He finds a social order based on treaty alone to be unthinkable and considers the true basis for an international social order to lie in "morality," by which he apparently means taking care of the weakest. His heart seems to be in the right place.

Dr. Christian Heinze's article is a technical legal analysis of the status of "European Schools" established by agreement of the European Common Market states. Dr. Bernhard Döll analyzes the legal status of the Gulf of Aqaba and concludes generally that Israel has a convincing case and that the Egyptian attempt to close the Strait of Tiran in 1967 was a breach of the 1949 Armistice and therefore illegal. Dr. Knut Ipsen writes about West German Search and Rescue arrangements and the international standards and recommended practices of the International Civil Aviation Organization concerning Search and Rescue. Niels Brandt's interesting article analyzes the Latin American Nuclear Free Zone Treaty of 1967. It seems a dispassionate summary of the current status of the treaty and the problems of enforcement. The last article, by Eibe Reidel, is an analysis of British law regulating the use of radio and television by political parties.

Part II of the *Jahrbuch* contains reports on the activities of various international organizations in 1965 and 1966, including the International Court of Justice, the International Law Commission, the Council of Europe, the Common Market, the Nordic Council and the Organization of American States. A summary of United Nations activities from mid-1961 to mid-1967 is also included.

Part III contains Documents and is divided functionally into Arms Control (documents dated 1967 and 1968); West German "*Entspannungspolitik*" (relaxation of international tensions, documents dated 1967 and 1968); and documents from many sources concerning the continental shelf (dated 1958 through 1969). Part IV contains book reviews. Part V contains summaries of German treaty adhesions in 1965 and 1966 and some tables relating to the Convention on Privileges and Immunities of United Nations Specialized Agencies, and the status of eighteen major conventions relating to the law of the sea and fisheries of particular interest to Western Europe.

ALFRED P. RUBIN

### BRIEFER NOTICES

*Fact-Finding in the Maintenance of International Peace.* By William I. Shore. (Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. 183. Index. \$15.00.) This is an historical survey, weighted on the technical side, of fact-finding procedures and machinery which have been developed and sometimes used since the turn of the century to assist in the peaceful settlement of international disputes or conflicts. Mr. Shore starts with the contributions to this process of the Hague Conferences of 1899 and 1907 and of Secretary of State William Jennings Bryan's "cooling off" treaties of the period 1913-1914, with special reference to provision for "independent international commissions of inquiry" which would be available to states involved in a dispute. Though a number of bilateral treaties embodying such features were renegotiated before World War I, and a number of post-World War I treaties combined such features with conciliation provisions, the "score for implementation of fact-finding provisions in treaties is rather low." Mr. Shore shows how more effective use of fact-finding has been made on a regional basis, especially by the inter-American system. He then analyzes and compares the substantial record of fact-finding or investigatory initiatives taken by the League of Nations and the United Nations.

The record shows, of course, that effective investigation (especially where on-the-spot inquiry is needed) is frequently hampered and sometimes blocked. States continue to invoke the doctrine of sovereign equality and independence, as well as Article 2(7) of the U.N. Charter, when they feel that international inquiry threatens interference in sensitive areas of national life or invasion of the area of "domestic jurisdiction." Mr. Shore stresses how investigations by international organizations and the reports and recommendations which come out of such investigations have tended to blend the functions of pacific settlement and of collective action and responsibility for the maintenance of international peace and security.

Despite the recognized obstacles to further progress along these lines, the author is cautiously optimistic that nations will increasingly recognize their common interest in the improvement and ready availability of "impartial fact-finding machinery."

This is a useful, well-documented contribution from a technical and legal point of view toward understanding the evolution of both concepts and practice in this area of international affairs. There is an excellent bibliography, and several key documents of Hague Conference or U.N. origin are appended.

PHILIP A. MANGANO

*Die Völkerrechtsgrundlagen der Modernen Friedensordnung.* Teil I: *Geschichtliche Entwicklung.* Teil II: *Gegenwärtiger Stand-Zukunftsfragen.* By Kurt Rabl. (Göttingen: Dieterichsche Universitäts-Buchdruckerei W. Fr. Kaestner, 1967, 1969. pp. 132, 259.) The two parts of the present volume were originally published separately but both bear on the same theme: the gradual extension, as the author claims, of international law into what prior to World War I was exclusively the sphere of international power politics, and the concomitant change in our conceptions of international law and international peace. Basic rights of the individual person (human rights) and of collective groups (right of self-determination), conceived in earlier times to be founded on natural law and at best, in some cases, on municipal law, tend to be incorporated to an ever greater extent into positive international law. Accordingly, we are, as the author maintains, no longer content with recognizing as peace the ordering of international relations on the basis of the fluctuating power constellations (*Machtfriede*), but are increasingly inclined to consider as peace only a just order protecting those fundamental individual and collective rights (*Rechtsfriede*). Thus stated briefly, the thesis of the author appears to be inspired by unwarranted optimism. Traces of this hopefulness can indeed be discovered throughout the treatise. This is not to suggest, however, that the author is blind to contradictory currents in twentieth-century history, and, most importantly, to the contradictory interpretations of the new notions of international law and peace. In fact, the description of the tendency of the United Nations to subordinate considerations of law and justice to those of peace is one of the highlights in the author's analysis. The comparison between the concept of "peaceful coexistence" and the principles of Article 2 of the United Nations Charter is equally pertinent. Rabl's main thesis also seems to be open to the objection that the incorporation into positive law of human rights and the right of self-determination is less far advanced than he assumes. But again the careful reader will find sufficient qualifications of the contention to placate him. With all his indulgence in occasional overstatements and oversimplifications, the author has succeeded in writing a significant book. The vastness of the material documenting the history of international law and politics during the last half-century and his familiarity with contemporary literature of international law, German, Anglo-American, and Russian, are truly impressive. The book can be recommended to the students of international law, international organization, and international relations. Its merits far outweigh the few factual errors that have crept into the text.

ERICH HULA

*The New International Actors: The United Nations and the European Economic Community.* Edited by Carol Ann Cosgrove and Kenneth J. Twitchett. (London: Macmillan; New York: St. Martin's Press, 1970. pp. 272. Select Bibliography. Index. \$7.50, cloth; \$2.50, paper.) One of a series of readings on international politics, this volume, with its somewhat extravagant title (only two of today's non-state actors are dealt with), collects twelve articles known to most students of international organization. Among the authors are Max Beloff, Inis L. Claude, J.-B. Duroselle, Geoffrey Goodwin, Ernst B. Haas, and David Mitrany. Topics dealt with include functionalism, regionalism, the management of power in the United Nations, De Gaulle's and Monnet's concepts of Europe, and political power and pressure groups in the E.E.C. By bringing these articles together in a single volume, the editors have produced a useful supplementary textbook for international organization courses.

An Introduction and four chapters are contributed by the editors. The first chapter, entitled "Theories of International Institutional Co-operation," is a disappointing 2½-page summary of the articles by Beloff, Goodwin, Haas, and Mitrany. One might have expected the presentation of a panorama of thought about international organization, particularly after a lead sentence about "considerable controversy" about rôles and objectives. But the brevity of what follows means either that there is a poverty of thought about international institutional co-operation or, more likely, that part of the introduction got detached from its mooring.

The editors' other chapters are useful reviews of developments affecting the United Nations and the E.E.C. They make use of and help to set in perspective the other articles in this collection.

WESLEY L. GOULD

*L'Application des Traités Self-Executing en Droit Américain.* By Jean Russotto. (Thèse de licence et de doctorat présentée à la Faculté de Droit de l'Université de Lausanne. Montreux: Imprimerie Ganguin et Laubscher S.A., 1969. pp. 199. Table of Cases.) Fresh perspective on a problem of our law may sometimes be gained by viewing it through the eyes of a colleague of the civil law. This Swiss doctoral thesis on the enforcement of self-executing treaties in American law considers the distinctions between treaty provisions which are self-executing and those which are not. Within limited compass Mr. Russotto surveys this aspect of our treaty law from its origins at the end of the colonial period and the adoption of the Constitution with its Article VI, Clause 2, through the impact of the Charter of the United Nations.

Part one deals generally with the effect of treaties and executive agreements in our Federal system. Part two considers the decisional distinctions between self-executing and non-self-executing treaties, beginning, of course, with *Foster v. Neilson*.<sup>1</sup> The doctrine is then traced through our commercial, liquor, extradition and industrial property treaties, ending with an exposition of the effect of our adherence to the U.N. Charter with its Articles 55 and 56 and the *Fujii* case.<sup>2</sup> In the third part the author suggests a definition:

A provision of a treaty is self-executing when by its own terms and without any supplementary measure it can be applied by a judicial or executive authority.

As a criterion of autonomy, a provision must be precise and detailed.

It may come as a surprise to be told that one cannot properly speak of self-executing treaties, but only of self-executing rules or provisions of treaties, and that in spite of Article VI, Clause 2, a treaty is not really the "supreme law of the land" unless it is self-executing. Judicial opinions have shown little scholarly analysis of the problems of self-executing treaties, and there has been practically no development of the doctrine since *Foster v. Neilson* in 1829. Mr. Russotto handles his American legal materials well. He discusses or cites 224 cases, and includes a bibliography of over 200 treatises and articles. For anyone reading French this book is a good place to begin a study of this little-explored aspect of our Constitutional and treaty law.

HARRY LEROY JONES

<sup>1</sup> 2 Peters 253 (1829).

<sup>2</sup> 217 Pac. 2d 481 (1950); 242 *ibid.* 617 (1952); 44 A.J.I.L. 590 (1950); 46 *ibid.* 559 (1952).

*The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America.* By John Henry Merryman. (Stanford, Calif.: Stanford University Press, 1969. pp. xiii, 172. Index. \$6.50, cloth; \$2.45, paper.) Whether by necessity or choice, international lawyers frequently become comparative lawyers. The tools and resources encountered in the two disciplines are not the same, however. Much trauma can be experienced by international law scholars who seek to resolve comparative law problems without adequate background in the foreign law systems they encounter.

In this brief notice justice cannot be given to the benefits of this book for the international law scholar or practitioner. In his perceptive and sane survey of civil law doctrines and institutions, Professor Merryman has provided an ideal starting point for international lawyers seeking an understanding of a number of foreign legal systems. The essential elements of the nature, foundations, attitudes, organs, and techniques of the civil law are described in this book with accuracy and balance. More detailed descriptions of civil law institutions and norms in Western European and Latin American countries can be obtained from more elaborate treatises. But for initial insights into the nature of civil law systems the Merryman handbook is an admirable beginning source.

In connection with the international lawyer's search for "general principles of law" under Article 38 of the Statute of the International Court of Justice, the Merryman text provides a number of interesting insights into American law as compared with comparable principles in civil law systems stemming from the Roman law, on which much traditional international law is based. The introduction provided by this book thus constitutes another important step toward giving breadth and depth to international lawyers' perception of the content of such "general principles," for which the members of the international community search so painfully in inter-state transactions.

Beyond such direct benefits, *The Civil Law Tradition* can provide initial guidance helpful in the analysis of conceptual differences arising out of international disputes and in efforts to harmonize national laws and institutions between common law and civil law patterns. Much change is needed in many of these systems. But understanding should precede innovation, and comparative study of exemplars of the civil and common law systems should be a necessary preliminary step. The Merryman study provides perspectives for such a task.

HOMER G. ANGELO

*The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question, 1807-1869.* By Leslie Bethell. (Cambridge Latin American Studies, No. 6. London and New York: Cambridge University Press, 1970. pp. xvi, 425. Bibliography. Index. \$13.50.) The abolition of the Transatlantic slave trade may have some current relevance to the suppression of the drug traffic. It was realized long before the slave trade was finally put down that paying indemnities was not a cure and that more intensive diplomatic efforts, threats and use of force were required. Humanitarian efforts in favor of suppression had to overcome the real or imagined continuing need of planters for cheap slave labor as well as the entrenched economic power of the slave traders.

Over the six decades under discussion the abolitionists in Britain kept up their unrelenting pressure on British politicians of all persuasions to bring the slave traffic to an end. Though humanitarian voices were by no means silent in Brazil, other factors contributing to abolition were

dominant on that side. Some of those opposing the slave trade feared the consequences of further unbalancing of the Brazilian population and the violence that further importation of slaves might produce. But long before the game was won, it was apparent to the Brazilians that the *great* profits in slaving were being made by foreigners and not by Brazilians; hence a patriotic argument could be advanced in favor of suppression. In Britain strong economic factors made for a hard line as well as a softer one. The British sought to protect West Indian produce from the competition of slave-produced commodities. But at the same time British manufacturers needed the Brazilian outlet for their goods, which a too rigorous diplomatic policy might spoil. The diplomatic pressure for terminating the slave trade also had the untoward result of encouraging a build-up in the trade against the day when a suppression might actually come. On the other hand, the glut in the Brazilian slave market brought on by intensification of the trade also contributed ultimately to suppression.

Directing her efforts primarily toward Spain and Portugal, England began to deal with the South Atlantic slave trade problem early in the first decade of the 19th century. But it was not until 1826 that Brazil first came to terms as part of the price of British recognition of Brazilian independence. Though little was made of it at the time, the treaty contained a provision that once the treaty became effective in 1830, the slave trade "shall be deemed and treated as piracy." The meaning of this phrase was never agreed upon by the parties. The British insisted (and subsequent legislation carried this view into force) that British Vice Admiralty courts might condemn slaving vessels unilaterally. On the other hand, the Brazilians took the view that only Brazilian courts or bilateral commissions might exercise that authority and then only within the strict confines of treaty provisions. Pursuant to an Act of Parliament of 1839 the British Navy began to intervene extensively in the slave trade, and large numbers of Brazilian slaving vessels were condemned by the British courts during the '40s. It was not until this British intervention had actually taken place and further British intervention was feared on the Brazilian coast that the Brazilians enacted their anti-slave trade bill of 1850. Once the Brazilians joined in co-operating with the British, the slave trade was almost immediately extinguished. But for the dedication of the British abolitionists to their cause, sustained British pressures could not have been maintained on France, Spain, Portugal, the United States and finally on Brazil for such a very long period and to such good effect.

J. W. McKNIGHT

*International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest, beginning with the Covenant of the League of Nations.* Edited by Manley O. Hudson. (Volume I: 1919-1921, Nos. 1-64. pp. cxviii, 786. Volume II: 1922-1924, Nos. 65-133. pp. xx, 787-1544. (Carnegie Endowment for International Peace Publication, 1931.) Reprint. Dobbs Ferry, N. Y.: Oceana Publications, 1970. \$50.00 a volume; \$400.00 the set of 9 volumes.) It is with the greatest pleasure that the JOURNAL takes note of the reprinting for the first time of Manley Hudson's *International Legislation*, of which the late James W. Garner stated, in his review of the first four volumes, that "It may be doubted whether among all the publications of the Carnegie Endowment for International Peace, there is any one which is likely to be more frequently used and which will be more generally helpful to those whose interests or professions lie in the field of international law." The publication of

this useful collection was initiated by the Division of International Law of the Carnegie Endowment in 1931, and was continued over a period of nearly twenty years, World War II having interrupted work on the series. The last two volumes appeared in 1949 and 1950, and were reviewed in this JOURNAL by Lester Woolsey, who stated that "The whole series is an outstanding contribution to treaty law and it is earnestly hoped that nothing will prevent the continuation of this series in further volumes." Unfortunately 1950 marked the end of such activities by the Carnegie Endowment. The reprinting of *International Legislation* should serve to demonstrate to another generation the usefulness of such a collection.

ELEANOR H. FINCH

### BOOKS RECEIVED \*

- Alexander, Archibald S., R. R. Baxter *et al.* *The Control of Chemical and Biological Weapons*. New York: Carnegie Endowment for International Peace, 1971. pp. vi, 130. \$1.00.
- Annuaire de Législation Française et Étrangère*. Contenant des Notices sur l'Évolution du Droit dans les Différents Pays. (Nouvelle Série, Tome 18, 1969.) Paris: Centre National de la Recherche Scientifique, 1971. pp. viii, 779. Index. Fr. 107.50.
- Asian-African Legal Consultative Committee. *Report of the Tenth Session. Held in Karachi (Pakistan) from 21st to 31st January 1969*. New Delhi: Secretariat of the Asian-African Legal Consultative Committee, 1970. pp. iv, 412.
- Bardonnet, Daniel. *La Succession d'État à Madagascar. Succession au Droit Conventionnel et aux Droits Patrimoniaux*. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1970. pp. ix, 877. Index. Fr. 123.60.
- Bindstedt-Robert, Denise. *The Law of Armed Conflicts*. Report of the Conference on Contemporary Problems of the Law of Armed Conflicts, Geneva, 15-20 September 1969. New York: Carnegie Endowment for International Peace, 1971. pp. vi, 119. \$1.50.
- Bishop, William W., Jr. *International Law. Cases and Materials*. Third edition. Boston and Toronto: Little, Brown and Co., 1971. pp. xlvii, 1122. Index. \$16.00.
- Bourne, C. B. (ed.) *The Canadian Yearbook of International Law, 1970*. Vol. VIII (in English and French). Vancouver, B. C.: University of British Columbia Publications Centre, 1971. pp. ix, 429. Index. \$14.00.
- Boyd, James M. *United Nations Peace-Keeping Operations: A Military and Political Appraisal*. New York, Washington and London: Praeger Publishers, 1971. pp. xv, 261. Index. \$15.00.
- Bozeman, Adda B. *The Future of Law in a Multicultural World*. Princeton: Princeton University Press, 1971. pp. xvii, 220. Index. \$6.60, cloth; \$2.45, paper.
- Bretton, Philippe. *Le Droit de la Guerre*. Paris: Librairie Armand Colin, 1971. pp. 95. Fr. 5.80.
- Brownlie, Ian (ed.). *Basic Documents on Human Rights*. Oxford: The Clarendon Press, 1971. pp. x, 531. Index. \$11.25, cloth; \$5.75, paper.
- Büren, Rainer. *Die Arabische Sozialistische Union. Einheitspartei und Verfassungssystem der Vereinigten Arabischen Republik unter Berücksichtigung der Verfassungsgeschichte von 1840-1968*. Opladen: C. W. Leske Verlag, 1970. pp. xxxiii, 304. DM. 25.
- Butler, William E. *The Soviet Union and the Law of the Sea*. Baltimore and London: The Johns Hopkins Press, 1971. pp. xiii, 245. Index. \$12.00.
- Cafisch, Lucius. *La Protection des Sociétés Commerciales et des Intérêts Indirects en Droit International Public*. The Hague: Martinus Nijhoff, 1969. pp. xvi, 287. Index.

\* Mention here neither assures nor precludes later review.

- Charvin, Robert. *Les États Socialistes aux Nations Unies*. Paris: Librairie Armand Colin, 1971. pp. 87. Fr. 5.80.
- Cocatre-Zilgien, André. *Diplomatie Française et Problèmes Internationaux Contemporains*. Paris: Éditions Cujas, 1970. pp. 264.
- Cocca, Aldo Armando. *Derecho Espacial para la Gran Audiencia*. Buenos Aires: Asociación Argentina de Ciencias Aeroespaciales, 1970. pp. 126.
- Corbett, Percy E. *The Growth of World Law*. Princeton: Princeton University Press, 1971. pp. xii, 216. Index. \$7.50.
- D'Amato, Anthony. *The Concept of Custom in International Law*. Ithaca and London: Cornell University Press, 1971. pp. xvi, 286. Index. \$9.50.
- Deak, Francis (ed.). *American International Law Cases, 1783-1968*. Vol. I: *International Law in General*. Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xxvii, 484. \$40.00.
- Delivanis, Jean. *La Légitime Défense en Droit International Public Moderne. Le Droit International face à ses Limites*. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1971. pp. xv, 201.
- del Russo, Alessandra Luini. *International Protection of Human Rights*. Washington, D. C.: Lerner Law Book Co., 1971. pp. xi, 361. \$12.00.
- De Visscher, Charles. *Théories et Réalités en Droit International Public*. 4th edition. Paris: Éditions A. Pedone, 1970. pp. 450. Fr. 60.
- Deng, Francis Mading. *Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan*. New Haven and London: Yale University Press, 1971. pp. xlv, 401. Index. \$17.50.
- Dhokalia, R. P. *The Codification of Public International Law*. Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xvi, 367. Index. \$12.50.
- Dunlap, Aurie N. (ed.) *Basic Cases in Public International Law*. New York: MSS Educational Publishing Co., 1971. pp. 391. \$10.00.
- . *Readings on National and Regional Foreign Policies*. New York: MSS Educational Publishing Co., 1971. pp. 199. \$5.00.
- École Supérieure des Sciences Fiscales. *Problèmes Fiscaux de la Coopération entre Entreprises Indépendantes de Pays Différents*. Séminaire Européen de Droit Fiscal, Session du 29 au 31 Mai 1969. Brussels: Établissements Émile Bruylant, 1970. pp. 395. Fr. 1,400.
- Éditions Administratives U.G.A., S.A. *Digest of Case Law Relating to the European Convention on Human Rights (1955-1967)*. (In French and English.) Heule, Belgium: U.G.A., 1970. pp. xxix, 523.
- Eek, Hilding. *Världshavens Frihet och Fred*. Stockholm: Bokförlaget Aldus/Bonniers, 1971. pp. 153.
- Ehrhardt, Dieter. *Der Begriff des Mikrostaats*. Aalen, Germany: Scientia Verlag, 1970. pp. 115.
- Fabian, Larry L. *Soldiers without Enemies. Preparing the United Nations for Peacekeeping*. Washington, D. C.: The Brookings Institution, 1971. pp. xii, 315. Index. \$7.50.
- Falk, Richard A. (ed.) *The International Law of Civil War*. Baltimore and London: The Johns Hopkins Press, 1971. pp. xix, 452. Index. \$15.00.
- Feld, Werner J. *Transnational Business Collaboration among Common Market Countries. Its Implication for Political Integration*. New York, Washington, London: Praeger Publishers, 1971. pp. xiv, 139. \$12.50.
- Forsyth, M. G., H. M. A. Keens-Soper, and P. Savigear (eds.). *The Theory of International Relations. Selected Texts from Gentili to Treitschke*. New York: Atherton Press, 1970. pp. 353. \$8.95.
- Frenzke, Dietrich, Jens Hacker, and Alexander Uschakow. *Die Feindstaatenartikel und das Problem des Gewaltverzichts der Sowjetunion im Vertrag vom 12.8.1970*. Berlin: Berlin Verlag, 1971. pp. 184. Index. DM. 20.
- Friedmann, Wolfgang. *The Future of the Oceans*. New York: George Braziller, 1971. pp. xii, 132. Index. \$5.95, cloth; \$2.45, paper.



- Friedmann, Wolfgang G., and Jean-Pierre Béguin. With the Collaboration of James Peterson and Alain Pellet. *Joint International Business Ventures in Developing Countries. Case Studies and Analysis of Recent Trends.* New York and London: Columbia University Press, 1971. pp. xiii, 448. Index. \$15.00.
- Gajendragadkar, P. B. *Kashmir—Retrospect and Prospect.* Patel Memorial Lectures. Bombay: University of Bombay, 1967. pp. xi, 147. Rs. 8.
- Garza, Oscar Ramos. *México ante la Inversión Extranjera: Legislación, Políticas y Prácticas.* Mexico, D. F.: 1971. pp. 306.
- Gericke, Hans-Peter. *Allgemeine Rechtssetzungsbefugnisse nach Artikel 235 EWG-Vertrag.* (Hamburger Abhandlungen aus dem Seminar für Öffentliches Recht, No. 60.) Hamburg: Ludwig Appel & Sohn, 1970. pp. 127. DM. 32.
- Giles, O. C. *Uniform Commercial Law. An Essay on International Conventions in National Courts.* Leiden: A. W. Sijthoff, 1970. pp. 200. Index. Fl. 30.
- Gupta, Sisir. *Kashmir: A Study in India-Pakistan Relations.* (Indian Council of World Affairs.) New York: Asia Publishing House, 1966. pp. xv, 511. Index.
- Han, Henry H. *International Legislation by the United Nations. Legal Provisions, Practice and Prospects.* New York: Exposition Press, 1971. pp. 221. Index. \$9.50.
- International Center for Settlement of Investment Disputes. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States.* Vol. I: *Analysis of Documents* (English, French and Spanish). pp. viii, 403; Vol. II: *Documents Concerning the Origin and the Formulation of the Convention* (in English). Part 1, Documents 1–43, pp. iv, 345; Part 2, Documents 44–146, pp. vii, 647–1088; Vol. III: *Documents Relatifs à l'Origine et à l'Élaboration de la Convention* (French). pp. xi, 867; Vol. IV: *Documentos Relativos al Origen y a la Formulación del Convenio* (Spanish). pp. xi, 717. Washington, D. C.: International Center for Settlement of Investment Disputes, 1970. \$50.00 the set.
- Jabbour, George. *Settler Colonialism in Southern Africa and the Middle East.* (Palestine Books, No. 30.) Khartoum: University of Khartoum; Beirut: Palestine Liberation Organization Research Center, 1970. pp. 216. L.£8.
- Jain, H. C. *Indian Legal Materials. A Bibliographical Guide.* Bombay: N. M. Tripathi Private Ltd.; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xxiii, 123. Index. \$6.50.
- Kalshoven, Frits. *Belligerent Reprisals.* Leiden: A. W. Sijthoff, 1971. pp. xix, 389. Index. Fl. 45.
- La Guardia, Ernesto de, and Marcelo Delpech. *El Derecho de los Tratados y la Convención de Viena de 1969.* Buenos Aires: La Ley Sociedad Anónima Editora e Impresora, 1970. pp. 569.
- Lazareff, Serge. *Status of Military Forces under Current International Law.* Leiden: A. W. Sijthoff, 1971. pp. xv, 458. Indexes. Fl. 58.
- Legg, Keith R., and James F. Morrison. *Politics and the International System: An Introduction.* New York, Evanston and London: Harper & Row, 1971. pp. xiii, 369. Index. \$3.95.
- Leive, David M. *International Telecommunications and International Law. The Regulation of the Radio Spectrum.* Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. 386. Index. \$16.50.
- Lewan, Kenneth M. *Der Nahostkreis in der Westdeutschen Presse.* Cologne: Pahl-Rugenstein Verlag, 1970. pp. 180.
- Mankiewicz, René H. (ed.) *Yearbook of Air and Space Law, 1967.* Montreal: McGill-Queen's University Press, 1971. pp. xix, 456. \$25.00.
- Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. *Fontes Iuris Gentium.* Series A, Section II, Vol. 4. Edited by Hermann Mosler. Cologne and Berlin: Carl Heymanns Verlag KG, 1970. pp. xliii, 1435. Index. DM. 148, cloth; DM. 135, paper.
- McWhinney, Edward. *Hijacking of Aircraft.* Provisional Report of the 18th Commission of the Institut de Droit International. Geneva: Imprimerie de "La Tribune de Genève," 1970. pp. 151.

- (ed.). *The International Law of Communications*. Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. 170. \$7.50.
- Modeen, Tore. *The Deposit and Registration of Treaties of International Organizations. Possible Application of the Rules of the Vienna Convention on the Law of Treaties*. Abo, Finland: Abo Akademi, 1971. pp. 20.
- Nguyen-Huu-Tru. *Quelques Problèmes de Succession d'États concernant le Viet-Nam*. Brussels: Établissements Émile Bruylant, 1970. pp. xii, 323. Fr. 980.
- Panama, Universidad de. Facultad de Derecho y Ciencias Políticas. *Estudios sobre la Unificación del Derecho de Obligaciones*. Panama: Editora Lemania, S. A., 1968. pp. 95.
- Paroutsas, Athanasios D. *Interstate Agreements on International Payments. A Study in International Economic Law*. Athens: 1970. pp. 124. Index.
- Rao, T. S. Rama (ed.). *The Indian Year Book of International Affairs, 1966-1967*. Vol. XV-XVI. (Published under the auspices of the Indian Study Group of International Law and Affairs.) Madras: University of Madras, 1970. pp. vii, 691.
- Reuter, Paul. *La Convention de Vienne du 29 Mai 1969 sur le Droit des Traités*. Paris: Librairie Armand Colin, 1970. pp. 96.
- Rhyne, Charles S. *International Law. The Substance, Processes, Procedures and Institutions for World Peace with Justice*. Washington, D. C.: CLB Publishers, 1971. pp. xxix, 656. Index. \$22.50.
- Roelans, Jacques-Y. *Régimes Fiscaux Applicables aux Fusions de Sociétés dans les États Membres de la C.E.E. et Perspectives Communautaires*. Brussels: Établissements Émile Bruylant, 1970. pp. 124. Fr. 400.
- Ronzitti, Natalino. *La Successione Internazionale tra Stati*. I. Milan: Dott, A. Giuffrè Editore, 1970. pp. ix, 225. Index. L. 2,400.
- Rosenthal, Bent. *Étude de l'Oeuvre de Myres Smith McDougal en Matière de Droit International Public*. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1970. pp. xi, 218. Fr. 33.60.
- Rotondi, Mario. *Inchieste di Diritto Comparato (Draft of a Model Law on Trade-marks)*. In English, Italian, Spanish, German and the original French. Milan: Casa Editrice Dott. Antonio Milani; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. 360. \$12.50.
- Sahović, Milan. *Kodifikacija Principa Miroljubive i Aktivne Koegzistencije—Zbirka Radova*. Belgrade: Instituta za Međunarodnu Politiku i Privredu, 1969. pp. 426.
- Schwarzenberger, Georg. *Economic World Order? A Basic Problem of International Economic Law*. Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xii, 159. Index. \$6.00.
- Société Internationale de Droit Pénal Militaire et de Droit de la Guerre. Recueils. Vol. II: Deuxième Congrès International, Florence, 17-20 Mai 1961. *L'Aéronef Militaire et le Droit des Gens. Subordination et Coopération Militaire Internationale*. Strasbourg: 1963. pp. 465.
- Starace, Vincenzo. *La Competenze della Corte Internazionale di Giustizia in Materia Contenziosa*. Naples: Editore Jovene, 1970. pp. 239. Index. L. 3,800.
- Szasz, Paul C. *The Law and Practices of the International Atomic Energy Agency*. Vienna: International Atomic Energy Agency, 1970. pp. viii, 1176. \$32.00.
- Taylor, Alan R., and Richard N. Tetlie (eds.). *Palestine: A Search for the Truth. Approaches to the Arab-Israeli Conflict*. Washington, D. C.: Public Affairs Press, 1970. pp. xii, 284. \$6.00.
- Taylor, Arnold H. *American Diplomacy and the Narcotics Traffic, 1900-1939. A Study in International Humanitarian Reform*. Durham, N. C.: Duke University Press, 1969. pp. ix, 370. Index.
- Váli, Ferenc A. *Bridge Across the Bosphorus. The Foreign Policy of Turkey*. Baltimore and London: The Johns Hopkins Press, 1971. pp. xv, 410. Index. \$12.50.
- Willrich, Mason (ed.). *Civil Nuclear Power and International Security*. New York, Washington and London: Praeger Publishers, 1971. pp. xvi, 124. \$10.00.

- Wood, Robert S. (ed.) *The Process of International Organization*. New York: Random House, Alfred A. Knopf, 1971. pp. xi, 525.
- Zeileissen, Christian. *Die Abgabenrechtlichen Privilegien in den Diplomatischen und Konsularischen Beziehungen. Mit Besonderer Berücksichtigung der Völkerrechtlichen Verpflichtungen Österreichs*. Stuttgart and Vienna: Wilhelm Braumüller, 1971. pp. vi, 153. Index. \$7.50.
- Zorgbibe, Charles. *La Question de Berlin*. Paris: Librairie Armand Colin, 1970. pp. 96. Fr. 5.80.

## OFFICIAL DOCUMENTS

### PROTOCOL

TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES  
RELATING TO INTERNATIONAL CARRIAGE BY AIR  
SIGNED AT WARSAW ON 12 OCTOBER 1929 AS AMENDED BY THE  
PROTOCOL DONE AT THE HAGUE ON 28 SEPTEMBER 1955

*Signed at Guatemala City, Guatemala, March 8, 1971<sup>1</sup>*

THE GOVERNMENTS UNDERSIGNED

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955,

HAVE AGREED as follows:

### CHAPTER I

#### AMENDMENTS TO THE CONVENTION

##### ARTICLE I

The Convention which the provisions of the present Chapter modify is the Warsaw Convention as amended at The Hague in 1955.

##### ARTICLE II

Article 3 of the Convention shall be deleted and replaced by the following:

##### "Article 3

1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

- a) an indication of the places of departure and destination;
- b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

<sup>1</sup> 54 Department of State Bulletin 555 (1971); 10 I.L.M. 613 (1971). Signed on behalf of: Belgium, Brazil, Canada, Republic of China, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Federal Republic of Germany, Guatemala, Israel, Italy, Jamaica, Nicaragua, Switzerland, Trinidad and Tobago, United Kingdom, United States and Venezuela. Open for signature until Sept. 30, 1971.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

### ARTICLE III

Article 4 of the Convention shall be deleted and replaced by the following:

#### "Article 4

1. In respect of the carriage of checked baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a document of carriage which complies with the provisions of Article 3, paragraph 1, shall contain:

- a) an indication of the places of departure and destination;
- b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the baggage check referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

### ARTICLE IV

Article 17 of the Convention shall be deleted and replaced by the following:

#### "Article 17

1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.

3. Unless otherwise specified in this Convention the term "baggage" means both checked baggage and objects carried by the passenger."

## ARTICLE V

In Article 18 of the Convention

paragraphs 1 and 2 shall be deleted and replaced by the following:

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the cargo is in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever."

## ARTICLE VI

Article 20 of the Convention shall be deleted and replaced by the following:

## "Article 20

1. In the carriage of passengers and baggage the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

2. In the carriage of cargo the carrier shall not be liable for damage resulting from destruction, loss, damage or delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures."

## ARTICLE VII

Article 21 of the Convention shall be deleted and replaced by the following:

## "Article 21

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger."

## ARTICLE VIII

Article 22 of the Convention shall be deleted and replaced by the following:

## "Article 22

1. a) In the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of

the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs.

b) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to sixty-two thousand five hundred francs.

c) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to fifteen thousand francs for each passenger.

2. a) In the carriage of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination.

b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including lawyers' fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable.

b) The costs of the action including lawyers' fees shall be awarded in accordance with subparagraph a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

c) The cost of the action including lawyers' fees shall not be taken into account in applying the limits under this Article.

4. The sums mentioned in francs in this Article and Article 42 shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the

sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

#### ARTICLE IX

Article 24 of the Convention shall be deleted and replaced by the following:

##### "Article 24

1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

2. In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."

#### ARTICLE X

Article 25 of the Convention shall be deleted and replaced by the following:

##### Article 25

"The limit of liability specified in paragraph 2 of Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

#### ARTICLE XI

In Article 25 A of the Convention

Paragraphs 1 and 3 shall be deleted and replaced by the following:

"1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under this Convention.

3. The provisions of paragraphs 1 and 2 of this Article shall not apply to the carriage of cargo if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."



## ARTICLE XII

In Article 28 of the Convention the present paragraph 2 shall be renumbered as paragraph 3 and a new paragraph 2 shall be inserted as follows:

"2. In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party."

## ARTICLE XIII

After Article 30 of the Convention, the following Article shall be inserted:

## "Article 30 A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person."

## ARTICLE XIV

After Article 35 of the Convention, the following Article shall be inserted:

## "Article 35 A

No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

- a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;
- b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;
- c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;
- d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system."

## ARTICLE XV

After Article 41 of the Convention, the following Article shall be inserted:

## "Article 42

1. Without prejudice to the provisions of Article 41, Conferences of the Parties to the Protocol done at Guatemala City on the eighth March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1 a) of the Convention as amended by that Protocol.

2. At each of the Conferences mentioned in paragraph 1 of this Article the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall not be increased by an amount exceeding one hundred and eighty-seven thousand five hundred francs.

3. Subject to paragraph 2 of this Article, unless before the thirty-first December of the fifth and tenth years after the date of entry into force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall on those dates be increased by one hundred and eighty-seven thousand five hundred francs.

4. The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the event which caused the death or personal injury of the passenger."

## CHAPTER II

## SCOPE OF APPLICATION OF THE CONVENTION AS AMENDED

## ARTICLE XVI

The Warsaw Convention as amended at The Hague in 1955 and by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping place in the territory of another State.

## CHAPTER III

## FINAL CLAUSES

## ARTICLE XVII

As between the Parties to this Protocol, the Warsaw Convention as amended at The Hague in 1955 and this Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971*.

## ARTICLE XVIII

Until the date on which this Protocol enters into force in accordance with the provisions of Article XX, it shall remain open for signature by all States Members of the United Nations or of any of the Specialized Agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to this Protocol.

## ARTICLE XIX

1. This Protocol shall be subject to ratification by the signatory States.
2. Ratification of this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, shall have the effect of accession to the *Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971*.
3. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

## ARTICLE XX

1. This Protocol shall enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, represents at least 40% of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year. If, at the time of deposit of the thirtieth instrument of ratification, this condition has not been fulfilled, the Protocol shall not come into force until the ninetieth day after this condition shall have been satisfied. This Protocol shall come into force for each State ratifying after the deposit of the last instrument of ratification necessary for entry into force of this Protocol on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Protocol comes into force it shall be registered with the United Nations by the International Civil Aviation Organization.

## ARTICLE XXI

1. After the entry into force of this Protocol it shall be open for accession by any State referred to in Article XVIII.

2. Accession to this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, shall have the effect of accession to the *Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971*.

3. Accession shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the deposit.

#### ARTICLE XXII

1. Any Party to this Protocol may denounce the Protocol by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

3. As between the Parties to this Protocol, denunciation by any of them of the Warsaw Convention in accordance with Article 39 thereof or of the Hague Protocol in accordance with Article XXIV thereof shall not be construed in any way as a denunciation of the *Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971*.

#### ARTICLE XXIII

1. Only the following reservations may be made to this Protocol:—

a) a State whose courts are not authorized under its law to award the costs of the action including lawyers' fees may at any time by a notification addressed to the International Civil Aviation Organization declare that Article 22, paragraph 3 a) shall not apply to its courts; and

b) a State may at any time declare by a notification addressed to the International Civil Aviation Organization that the *Warsaw Convention as amended at The Hague 1955, and at Guatemala City, 1971* shall not apply to the carriage of persons, baggage and cargo for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

2. Any State having made a reservation in accordance with the preceding paragraph may at any time withdraw such reservation by notification to the International Civil Aviation Organization.

#### ARTICLE XXIV

The International Civil Aviation Organization shall promptly inform all signatory or acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Protocol, and other relevant information.

#### ARTICLE XXV

As between the Parties to this Protocol which are also Parties to the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter referred to as the "Guadalajara Convention") any reference to the "Warsaw Convention" contained in the Guadalajara

Convention shall include reference to the *Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971*, in cases where the carriage under the agreement referred to in Article 1, paragraph b) of the Guadalajara Convention is governed by this Protocol.

#### ARTICLE XXVI

This Protocol shall remain open, until 30 September 1971, for signature by any State referred to in Article XVIII, at the Ministry of External Relations of the Republic of Guatemala and thereafter, until it enters into force in accordance with Article XX, at the International Civil Aviation Organization. The Government of the Republic of Guatemala shall promptly inform the International Civil Aviation Organization of any signature and the date thereof during the time that the Protocol shall be open for signature in Guatemala.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE at Guatemala City on the eighth day of the month of March of the year One Thousand Nine Hundred and Seventy-one in three authentic texts in the English, French and Spanish languages. The International Civil Aviation Organization shall establish an authentic text of this Protocol in the Russian language. In the case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail.

### AMERICAN CONVENTION ON HUMAN RIGHTS

*Signed at San José, Costa Rica, November 22, 1969*<sup>1</sup>

#### PREAMBLE

The American states signatory to the present Convention,

*Reaffirming* their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

*Recognizing* that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

*Considering* that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human

<sup>1</sup> O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Jan. 7, 1970; reproduced in 9 Int. Legal Materials 101 (1970). Signed, at the conclusion of the Inter-American Specialized Conference on Human Rights, held at San José November 7-22, 1969, on behalf of the governments of Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

*Reiterating* that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

*Considering* that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

## PART I—STATE OBLIGATIONS AND RIGHTS PROTECTED

### CHAPTER I—GENERAL OBLIGATIONS

#### ARTICLE 1. *Obligation to Respect Rights*

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

#### ARTICLE 2. *Domestic Legal Effects*

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

### CHAPTER II—CIVIL AND POLITICAL RIGHTS

#### ARTICLE 3. *Right to Juridical Personality*

Every person has the right to recognition as a person before the law.

#### ARTICLE 4. *Right to Life*

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment

rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

#### ARTICLE 5. *Right to Humane Treatment*

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

#### ARTICLE 6. *Freedom from Slavery*

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article the following do not constitute forced or compulsory labor:

- a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judi-

cial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

- b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
- c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
- d. work or service that forms part of normal civic obligations.

#### ARTICLE 7. *Right to Personal Liberty*

- 1. Every person has the right to personal liberty and security.
- 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
- 3. No one shall be subject to arbitrary arrest or imprisonment.
- 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
- 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
- 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
- 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

#### ARTICLE 8. *Right to a Fair Trial*

- 1. Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
- 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:



- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
  - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
  4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
  5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

#### ARTICLE 9. *Freedom from Ex Post Facto Laws*

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

#### ARTICLE 10. *Right to Compensation*

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

#### ARTICLE 11. *Right to Privacy*

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

### ARTICLE 12. *Freedom of Conscience and Religion*

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

### ARTICLE 13. *Freedom of Thought and Expression*

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

### ARTICLE 14. *Right of Reply*

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

#### ARTICLE 15. *Right of Assembly*

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety, or public order, or to protect public health or morals or the rights or freedoms of others.

#### ARTICLE 16. *Freedom of Association*

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

#### ARTICLE 17. *Rights of the Family*

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

#### ARTICLE 18. *Right to a Name*

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in

which this right shall be ensured for all, by the use of assumed names if necessary.

ARTICLE 19. *Rights of the Child*

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

ARTICLE 20. *Right to Nationality*

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

ARTICLE 21. *Right to Property*

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

ARTICLE 22. *Freedom of Movement and Residence*

1. Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
9. The collective expulsion of aliens is prohibited.

**ARTICLE 23. *Right to Participate in Government***

1. Every citizen shall enjoy the following rights and opportunities:
  - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
  - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

**ARTICLE 24. *Right to Equal Protection***

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

**ARTICLE 25. *Right to Judicial Protection***

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - b. to develop the possibilities of judicial remedy; and
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

**CHAPTER III—ECONOMIC, SOCIAL, AND CULTURAL RIGHTS****ARTICLE 26. *Progressive Development***

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

CHAPTER IV—SUSPENSION OF GUARANTEES, INTERPRETATION,  
AND APPLICATION

ARTICLE 27. *Suspension of Guarantees*

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

ARTICLE 28. *Federal Clause*

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

ARTICLE 29. *Restrictions Regarding Interpretation*

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoy-

ment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

#### ARTICLE 30. *Scope of Restrictions*

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

#### ARTICLE 31. *Recognition of Other Rights*

Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

### CHAPTER V—PERSONAL RESPONSIBILITIES

#### ARTICLE 32. *Relationship between Duties and Rights*

1. Every person has responsibilities to his family, his community, and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

### PART II—MEANS OF PROTECTION

#### CHAPTER VI—COMPETENT ORGANS

#### ARTICLE 33

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as "The Commission"; and
- b. the Inter-American Court of Human Rights, referred to as "The Court."

## CHAPTER VII—INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

*Section 1. Organization*

## ARTICLE 34

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

## ARTICLE 35

The Commission shall represent all the member countries of the Organization of American States.

## ARTICLE 36

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.

2. Each of those governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

## ARTICLE 37

1. The members of the Commission shall be elected for a term of four years and may be reelected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.

2. No two nationals of the same state may be members of the Commission.

## ARTICLE 38

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission.

## ARTICLE 39

The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations.

## ARTICLE 40

Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.



*Section 2. Functions*

## ARTICLE 41

The main functions of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority, under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

## ARTICLE 42

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

## ARTICLE 43

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

*Section 3. Competence*

## ARTICLE 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge

petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

#### ARTICLE 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

#### ARTICLE 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- a. that the remedies under domestic law have been pursued and exhausted, in accordance with generally recognized principles of international law;
- b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- c. that the subject of the petition or communication is not pending before another international procedure for settlement; and
- d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

## ARTICLE 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

*Section 4. Procedure*

## ARTICLE 48

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

- a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
- b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.
- c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
- d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.
- e. The Commission may request the states concerned to furnish any pertinent information, and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
- f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

#### ARTICLE 49

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

#### ARTICLE 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Committee may make such proposals and recommendations as it sees fit.

#### ARTICLE 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

## CHAPTER VIII—INTER-AMERICAN COURT OF HUMAN RIGHTS

## Section 1. Organization

## ARTICLE 52

1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

2. No two judges may be nationals of the same state.

## ARTICLE 53

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention in the General Assembly of the Organization, from a panel of candidates proposed by those states.

2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

## ARTICLE 54

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.

2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.

3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges.

## ARTICLE 55

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge.

4. An *ad hoc* judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

#### ARTICLE 56

Five judges shall constitute a quorum for the transaction of business by the Court.

#### ARTICLE 57

The Commission shall appear in all cases before the Court.

#### ARTICLE 58

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when a majority of the Court consider it desirable, and with the prior consent of the state concerned.

The seat of the Court may be changed by the States Parties to the Convention in the General Assembly, by a two-thirds vote.

2. The Court shall appoint its own Secretary.

3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

#### ARTICLE 59

The Court shall establish its secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Court's secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

#### ARTICLE 60

The Court shall draw up its statute, which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

### *Section 2. Jurisdiction and Functions*

#### ARTICLE 61

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

## ARTICLE 62

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

## ARTICLE 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

## ARTICLE 64

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

## ARTICLE 65

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous years. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

*Section 3. Procedure*

## ARTICLE 66

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

## ARTICLE 67

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

## ARTICLE 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

## ARTICLE 69

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

## CHAPTER IX—COMMON PROVISIONS

## ARTICLE 70

1. The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.
2. At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

## ARTICLE 71

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.

## ARTICLE 72

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the con-



ditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

#### ARTICLE 73

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

### PART III—GENERAL AND TRANSITORY PROVISIONS

#### CHAPTER X—SIGNATURE, RATIFICATION, RESERVATIONS, AMENDMENTS, PROTOCOLS, AND DENUNCIATION

#### ARTICLE 74

1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.

2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.

3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention.

#### ARTICLE 75

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

#### ARTICLE 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.

2. Amendments shall enter into force for the states ratifying them on the date when two thirds of the States Parties to this Convention have

deposited their respective instruments of ratification. With respect to the other States Parties, amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

#### ARTICLE 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each Protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

#### ARTICLE 78

1. The States Parties may denounce this Convention at the expiration of a five-year period starting from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

### CHAPTER XI—TRANSITORY PROVISIONS

#### *Section 1. Inter-American Commission on Human Rights*

#### ARTICLE 79

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly.

#### ARTICLE 80

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

*Section 2. Inter-American Court of Human Rights*

## ARTICLE 81

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

## ARTICLE 82

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

## STATEMENTS AND RESERVATIONS

## STATEMENT OF CHILE

The Delegation of Chile signs this Convention, subject to its subsequent parliamentary approval and ratification, in accordance with the constitutional rules in force.

## STATEMENT OF ECUADOR

The Delegation of Ecuador has the honor of signing the American Convention on Human Rights. It does not believe that it is necessary to make any specific reservation at this time, without prejudice to the general power set forth in the Convention itself that leaves the governments free to ratify it or not.

## RESERVATION OF URUGUAY

Article 80.2 of the Constitution of Uruguay provides that citizenship is suspended for a person indicted according to law in a criminal prosecution that may result in a sentence of imprisonment in a penitentiary. This restriction of the exercise of the rights recognized in Article 23 of the Convention is not envisaged among the circumstances provided for in this respect by paragraph 2 of Article 23, for which reason the Delegation of Uruguay expresses a reservation on this matter.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, whose full powers were found in good and due form, sign this Convention, which shall be called "PACT OF SAN JOSE, COSTA RICA", in the city of San José, Costa Rica, this twenty-second day of November, nineteen hundred and sixty-nine.

## GOVERNMENT STATEMENTS \*

## STATEMENT OF ARGENTINA

1. The Delegation of Argentina wishes to go on record that, without prejudice to the active support being given by its government to the proposal to consolidate a system of individual freedom and social justice in this hemisphere, it understands that the rights, duties, and obligations set forth in the American Convention on Human Rights may not affect the full exercise of the sovereignty of the Argentine Republic nor contravene the fundamental rules in the Constitution of Argentina, derived legislation, and the jurisprudential interpretation of both.

2. The Delegation of Argentina points out that the eventual establishment of the American Court of Human Rights will be subject to the optionality of acceptance of its jurisdiction by the governments of the States Parties.

## DECLARATION OF EL SALVADOR

The Delegation of El Salvador has the honor of signing the American Convention on Human Rights without making any reservations at the present time. It wishes to leave on record, however, that it attended this distinguished Conference in the hope that an American Commission and an American Court would arise therefrom which would have sufficient jurisdiction and powers to effectively promote and protect human rights in the hemisphere, and this, we consider, has not been fully attained inasmuch as the compulsory jurisdiction of these organs was not established and, more serious still, this jurisdiction has been left open to acceptance by the states for specific cases.

## STATEMENT OF MEXICO

1. The Constitution of the United Mexican States authorizes in a general way the suspension of any rights that may be obstacles in order to cope, rapidly and easily, with situations of extreme emergency. The Mexican delegation consequently expresses a reservation with respect to point 2 of Article 27, which restricts this authorization of suspension with respect to certain given rights.

2. The Delegation of Mexico understands that clause d) of Article 48 does not eliminate the requirement of prior consent of the States Parties in order for the Commission on Human Rights to be able to function within their respective territories.

3. The Government of Mexico supports the establishment of the Inter-American Court of Human Rights, inasmuch as the jurisdiction of the Court is optional.

\* O.A.S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 70, Rev. 1, Corr. 1, Jan. 7, 1970; reproduced in 9 Int. Legal Materials 126 (1970).

## INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume 10, No. 3 (May), 1971, of *International Legal Materials: Current Documents*:<sup>1</sup>

## VOLUME X, NUMBER 3 (May, 1971)

JUDICIAL AND SIMILAR PROCEEDINGS	PAGE
International Labor Organization: <i>Commission of Inquiry Investigation of Alleged Violations of I.L.O. Conventions by Greece</i>	
Report of Commission of Inquiry .....	453
Statement and Letters of Greek Government .....	504
United States:	
Court of Appeals Reconsideration of Banco Nacional de Cuba v. First National City Bank ( <i>Cuban Nationalizations; Act of State Doctrine; Sovereign Immunity</i> )	
Brief of Banco Nacional de Cuba on Remand .....	509
Brief of First National City Bank on Remand .....	518
Reply Brief of Banco Nacional de Cuba .....	526
Reply Brief of First National City Bank .....	530
Decision of April 27, 1971 .....	536
Dissenting Opinion .....	544
Court of Customs and Patent Appeals Decision in United States v. Hammond Lead Products, Inc. ( <i>Countervailing Duties; Jurisdiction of U. S. Customs Courts</i> ) .....	546
LEGISLATION AND REGULATIONS	
Argentina: " <i>Buy Argentine</i> " Law .....	572
United Kingdom: <i>Oil in Navigable Waters Act 1971</i> .....	584
United States:	
Legislation Concerning <i>Bank Records and Foreign Transactions</i> .	591
Amendments to Law on <i>Foreign Military Sales</i> .....	597
TREATIES AND AGREEMENTS	
Denmark-Federal Republic of Germany-Netherlands: Agreements <i>Delimiting the Continental Shelf in the North Sea</i>	
Protocol between Denmark, the Federal Republic of Germany and The Netherlands .....	600
Treaty between the Federal Republic of Germany and Denmark	603
Treaty between The Netherlands and the Federal Republic of Germany .....	607
International Civil Aviation Organization: Protocol Revising Warsaw Convention Rules on <i>Air Carrier Liability to Passengers</i> ..	613
Union of Soviet Socialist Republics-United States: Agreement on	

<sup>1</sup> The annual subscription for six numbers of International Legal Materials is \$35.00; there is a concessionary rate of \$15.00 for members of the American Society of International Law. Inquiries and orders should be directed to International Legal Materials, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

<i>Cooperation in Exploration and Use of Outer Space</i> .....	617
United Nations: <i>Question of Chemical and Bacteriological Weapons</i>	
General Assembly Resolution 2662 (XXV) .....	630
United Kingdom Revised Draft Convention .....	633
Bulgaria-Byelorussia-Czechoslovakia-Hungary-Mongolia-Poland- Rumania-Ukraine-U.S.S.R. Revised Draft Convention .....	637
Argentina-Brazil-Burma-Ethiopia-India-Mexico-Morocco-Nigeria- Pakistan-Sweden-U.A.R.-Yugoslavia Joint Memorandum .....	642
Bulgaria-Czechoslovakia-Hungary-Mongolia-Poland-Rumania- U.S.S.R. Draft Convention .....	644
West African States: Establishment of <i>West Africa Rice Develop- ment Association</i> .....	648

***Just Published . . .***

# **International Law, National Tribunals, and the Rights of Aliens**

***Frank G. Dawson and Ivan L. Head***

When an individual's person or property is injured or taken by a foreign country, the usual course is to seek relief or recompense from that country through its courts before attempting to persuade his own country to make it a diplomatic or international legal matter. Today there are many more individuals traveling or residing outside their own nations than ever before, subject to a wide variety of legal prescriptions often quite unlike the legal systems of their own countries. A practical guide through the legal labyrinth has long been needed, and this book is designed to provide it.

The authors examined the written law in 24 of the leading countries representing the world's major legal systems, and then visited those countries to see how the laws work in practice in relation to aliens. African, South American, Asian, and European countries were studied, as were Great Britain, Canada, Australia, and the United States.

The result is a book of significant value to individuals and corporations, and to international lawyers representing corporate clients—a handy and concise treatment of the major legal, as well as non-legal, problems confronting the enforcement of the rights of aliens in foreign countries.

Procedural Aspects of International Law, 10. SBN 8156-2152-3 \$11.75

**SYRACUSE UNIVERSITY PRESS**  
Syracuse, New York 13210

## FOREIGN ENTERPRISE IN MEXICO

*Laws and Policies*

by HARRY K. WRIGHT

This latest volume in the Studies in Foreign Investment and Economic Development Series, sponsored by the American Society of International Law, discusses both the laws and policies that affect, directly or indirectly, the entry and operation of foreign enterprise in Mexico. The author, who is now Texaco's area counsel for Latin America, examines in detail every facet of Mexico's legal environment for foreign investment. \$15.00

*Previously published in the series*

## FOREIGN ENTERPRISE IN INDIA

*Laws and Policies*

by MATTHEW J. KUST

"This ambitious and well-prepared survey will have most of the answers for prospective investors, and to some extent, for students of India's constitutional and administrative picture."—Rudolph H. Heimanson, *Professor of Law, Cleveland-Marshall Law School*.

\$10.00

## FOREIGN ENTERPRISE IN COLUMBIA

*Laws and Policies*

by SEYMOUR W. WURFEL

"...an important contribution to the economic history of Columbia...."—*Hispanic American Historical Review*.

\$10.00

## FOREIGN ENTERPRISE IN NIGERIA

*Laws and Policies*

by PAUL O. PROEHL

"...it is the first work of its type to deal with the laws of an African state...and as such it deserves warm commendation."—*Journal of African Law*.

\$7.50

*To be published*

## FOREIGN ENTERPRISE IN JAPAN

*Laws and Policies*

by DAN FENNO HENDERSON

THE UNIVERSITY OF NORTH CAROLINA PRESS  
Chapel Hill, North Carolina 27514



Oxford University Press



## United Nations Peacekeeping, 1946-1967

*DOCUMENTS AND COMMENTARY*

*VOLUME I: THE MIDDLE EAST; VOLUME II: ASIA*

*Edited by* ROSALYN HIGGINS. 1971 Winner of the American Society of International Law's Certificate of Merit. "In these two volumes Dr. Higgins exhibits a complete mastery of the relevant facts and legal policies, creates a framework for inquiry that facilitates the comparative and cumulative evaluation of past experiences in peacekeeping, selects the appropriate primary documentation from an immense and disorganized mass with informed and discriminating judgment, and illumines the entire presentation with a history and commentary that are objective, incisive, and highly lucid. The two volumes, like Dr. Higgins' other works, represent scholarship in its grandest manner and make important contributions to the development and accumulation of knowledge about international law's most difficult task in the maintenance of minimum order."—Committee on Annual Awards, American Society of International Law. (*Royal Institute of International Affairs.*)  
*Volume I*, \$21.00 *Volume II*, \$17.75

## Basic Documents on Human Rights

*Edited by* IAN BROWNLIE, *Wadham College, Oxford*. Sections include: Fundamental Rights in National Legal Systems; Standard Setting by U.N.O.; Implementation and Standard Setting in Conventions sponsored by the U.N.; the contribution of the I.L.O. and U.N.E.S.C.O.; European Institutions and Conventions; developments in Latin America, Africa, and Asia; the Concept of Equality; and Trade and Development.

*Cloth*, \$11.25. *Paper*, \$5.75

## The British Year Book of International Law, 1968-1969

*FORTY-THIRD YEAR OF ISSUE*

*Edited by* SIR HUMPHREY WALDOCK, *Oxford University*; and R. Y. JENNINGS, *Cambridge University*. This yearbook contains commentary on significant events and recent work in international law. The principal papers range from discussions of international financial organizations to human rights. Among the notes are papers on court decisions involving international law. (*Royal Institute of International Affairs.*) \$17.00

OXFORD UNIVERSITY PRESS

200 Madison Avenue, New York, N.Y. 10016

NOW AVAILABLE

(3586-0895)

# HERTSLET'S COMMERCIAL TREATIES

Volumes 1-31 (reduced 4 pp. in one) London

1827-1925 (All published)

Cloth bound set in 10 volumes.....\$675.00

Per combined volume, cloth bound..... 70.00

**Note:**

Volume 16 (bound with volumes 17-19) is a General Index to volumes 1-15.

Volume 22 (bound with volumes 23-24) is a General Index to volumes 1-21.

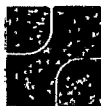
Volume 31 (bound with volumes 29-30) is a General Index to volumes 23-30.

Please include title and code number in your order.

*Hertslet's Commercial Treaties* is a valuable serial publication of important British documents. It includes "treaties and conventions between Great Britain and foreign powers," and "laws, decrees, orders in council, etc., concerning the same, so far as they relate to commerce and navigation, slavery, extradition, nationality, copyright, postal matters, etc."

Publication of *Hertslet's* began in 1827 and continued regularly through 1925 (volume 31) when the British Foreign Office incorporated it in *British and Foreign State Papers*. Its material is principally that of the nineteenth and twentieth centuries, but some papers are of an earlier date. *Hertslet's* nearly one hundred year scope and breadth of coverage make it indispensable to historians, in particular.

This ten volume edition reproduces four pages of the original 31-volume set to each page of the reprint, thus reducing the bulk of the set and facilitating its storage and handling. This new format makes it possible to offer the complete *Hertslet's Commercial Treaties* at a lower price, but in no way decreases legibility.



JOHNSON REPRINT CORPORATION

111 FIFTH AVENUE, NEW YORK, N.Y. 10003

JOHNSON REPRINT COMPANY LTD.

BERKELEY SQUARE HOUSE, LONDON, ENGLAND W1X6BA



Cornell  
University  
Press

# THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW

By

ANTHONY A. D'AMATO

How customary law is actually used by states in adjusting their relations is the most fundamental problem in the international legal process. This lively and erudite book presents the first detailed analysis of customary law—its meaning, relevance, and determination. The author examines past and present views, using a claim-oriented approach based in the reality of the functioning of international politics. He offers a reformulation of the theory and considers legal milestones, from the Twelve Tables to the recent World Court case on the *Continental Shelf*, that show the kinds of arguments that have proved persuasive in legal actions and have affected what states do.

"The importance of Professor D'Amato's contribution can hardly be overestimated. He has given us an authoritative book on a basic topic of international law. His careful reformulation of the topic seems likely to encourage responsible thought and action by statesmen, scholars, and students." RICHARD A. FALK, From the *Foreword*

328 pages.

\$9.50

Cornell University Press ITHACA and LONDON

# from Princeton

## The Future of Law in a Multicultural World

ADDA B. BOZEMAN

Examining the unique cultures of the Islamic Middle East, sub-Saharan Africa, Indianized Asia, and China, Mrs. Bozeman attacks the supposition that world unity can be achieved through the application of Western ideals of international law and organization. ". . . (a) brilliant book."  
—Harold D. Lasswell

Cloth, \$6.50  
Paper, \$2.45

## The Growth of World Law

PERCY E. CORBETT

Professor Corbett discusses specific achievements that constitute a historic transition from international law regulating conduct among nations to world law for mankind—law transcending states and equally applicable to individuals, corporations, international organizations, and states.

\$7.50

## The Art of the Possible

### *Diplomatic Alternatives in the Middle East*

MICHAEL REISMAN

"Reisman's book is the most important effort yet available to point toward a settlement of the Middle East conflict. . . . Its proposals are, of course, controversial, but their careful formulation permits discussion of the conflict to move toward the search for a solution."—Richard A. Falk

Cloth, \$6.00  
Paper, \$1.95

Princeton University Press

Princeton, New Jersey 08540

Newly revised Third Edition

# International Law: Cases and Materials

by William W. Bishop, Jr.

From the First Edition review appearing in this Journal in 1953: "... a prototype. . . . The presentation is a masterful reflection of its author's own rich experience, striking a nice balance between legal theory, teaching needs, law office realism, and governmental pragmatism. . . . well conceived and brilliantly executed."

1122 pages / 1971 / \$16

Law Book Division

Academic discount 20%.  
Charges cancelled if  
adopted in quantities  
of 10 or more.

Little,  
Brown  
and Company  
34 Beacon Street  
Boston, Mass.  
02106

---

## The American Political Science Review and PS

Institutional membership in the American Political Science Association offers subscribing members two journals, *The American Political Science Review* and *PS*.

The *Review* is the scholarly journal of the Association and includes articles covering comparative and American government, administration, public law, international relations, and political theory. An extensive book review section is also included.

*PS* is the Association's news journal with information on professional developments, research and study support, and professional as well as Association activities. Articles and reports on the discipline and profession are also included.

---

Annual Institutional  
Membership

(includes subscription to two journals)  
Domestic Institutions Annually \$35.00  
Foreign Institutions \$36.00

---

# REPRINT AMERICAN JOURNAL OF INTERNATIONAL LAW

*Now available*

## Vols. 1-10. New York 1907-1916.

(Including Supplements and Special Supplements)

Cloth bound set .....	\$485.00
Paper bound set .....	430.00
Per volume, paper bound including Supplements .....	40.00
Per volume, paper bound without Supplements .....	35.00

### Regular Supplements to Vols. 1-10

Per volume, paper bound .....	10.00
-------------------------------	-------

### Special Supplements to Vols. 9, 10

Per volume, paper bound .....	20.00
-------------------------------	-------

## Analytical Index to Vols. 1-14, 1907-1920.

Paper bound .....	10.00
-------------------	-------

## Vols. 11-20, 1917-1926.

(Including Supplements and Special Supplements)

Cloth bound set .....	510.00
Paper bound set .....	460.00
Per volume, paper bound, including Supplements .....	45.00
Per volume, paper bound, without Supplements .....	35.00

### Regular Supplements to Vols. 11-20

Per volume, paper bound .....	10.00
-------------------------------	-------

### Special Supplements to Vols. 11, 20

Per volume, paper bound .....	20.00
-------------------------------	-------

## Vols. 34-44, 1940-1950, and Supplements 34-44.

Cloth bound set .....	560.00
Paper bound set .....	485.00
Per volume, paper bound .....	35.00

### Supplements to Vols. 34-44

Per volume, paper bound .....	10.00
-------------------------------	-------

## Vols. 45-54, 1951-1960, and Supplements 45-49, 1951-1955.

Cloth bound set .....	445.00
Paper bound set .....	400.00
Per volume, paper bound .....	35.00

### Supplements to Vols. 45-49

Per volume, paper bound .....	10.00
-------------------------------	-------

**ANALYTICAL INDEX TO AMERICAN JOURNAL OF INTERNATIONAL LAW AND SUPPLEMENTS, VOLS. 15 TO 34 (1921-1940), and PROCEEDINGS of the AMERICAN SOCIETY OF INTERNATIONAL LAW, 1921-1940. Paper bound \$20.00; Cloth bound .....\$22.50**

*Address all orders and inquiries to:*

## JOHNSON REPRINT CORPORATION

111 Fifth Avenue  
New York, N. Y. 10003

Berkeley Square House  
London, W.1, England

**Join—**

## **THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

*As a member of the Society, you will receive*

- five issues each year of the most distinguished journal in the field, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, including a special number reporting the *Proceedings* of the Society's Annual Meeting.
- the opportunity to buy other Society publications at reduced prices, such as the valuable bimonthly documentary, *INTERNATIONAL LEGAL MATERIALS*, and books published under Society auspices such as *THE VIETNAM WAR AND INTERNATIONAL LAW*.
- the Society's *NEWSLETTER*, which keeps you abreast of developments in the field.
- the opportunity to participate in significant, Society-sponsored meetings (the Annual Meeting, regional meetings, study panels).
- occasion to join with others in contributing to the development of international law through the Society's wide-ranging studies and publications.

If you wish to join the Society, please clip out this page, fill out the application on the reverse side, and mail it, together with your check, to the Membership Secretary, American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008. You will receive the *Journal* and *Newsletter* for the current year.

Members of whatever profession and nationality are welcome.

If you or your institution prefers to subscribe to the *Journal*, without joining the Society, please so indicate on the reverse side.

**Membership Secretary**  
**American Society of International Law**  
**2223 Massachusetts Avenue, N.W.**  
**Washington, D.C. 20008**

Please enroll me as a member of the American Society of International Law. My check, money order, UNESCO coupon, or payment in a convertible currency, is enclosed. I have checked the category of membership for which I am eligible:

- ☐ PROFESSIONAL MEMBERS (U.S. residents practicing law other than in government who have been members of the bar for more than 10 years) ..... \$ 40
- ☐ RESIDENT REGULAR MEMBERS—residing in the United States ..... \$ 25
- ☐ NON-RESIDENT MEMBERS—not residing in the United States ..... \$ 10
- ☐ INTERMEDIATE MEMBERS (first 5 years of membership for those under 50 years of age at time of application) .. \$ 15
- ☐ STUDENT MEMBERS ..... \$ 7.50
- ☐ CONTRIBUTING MEMBERS ..... \$ 50
- ☐ SUPPORTING MEMBERS ..... \$ 100
- ☐ ANNUAL PATRON ..... \$ 500
- ☐ LIFE ..... \$1,000

(Please Print)

Name .....

Mailing Address .....

..... Zip .....

Professional Affiliation: .....

Nationality .....

Particular professional interests: .....

Signature .....

PLEASE MAKE CHECKS PAYABLE TO *The American Society of International Law*. Contributions above obligatory dues, and all dues if membership is related to your work or profession, are tax deductible in the United States.

Please enter my subscription for the Journal at \$30 a year ..... ☐



# *American Journal of International Law*

**October 1971**

**Vol. 65 No. 5**



***Published by The***

***American Society of International Law***

## PATRONS OF THE SOCIETY

Honorable ARTHUR H. DEAN

Honorable HERMAN PHLEGER

MRS. BENJAMIN J. TILLAR (deceased)

MR. W. ROBERT MORGAN

### *In Memoriam*

DR. JAMES BROWN SCOTT

MR. HENRY C. MORRIS

MR. ARTHUR K. KUHN

MR. ALEXANDEE FREEMAN

## PATRONAGE, GIFTS AND BEQUESTS

Upon donation to the Society of \$5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$5,000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

## MANLEY O. HUDSON MEDAL

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visscher (1966), and Paul Guggenheim (1970).

# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 65

October, 1971

NO. 5 *9*

## CONTENTS

	PAGE
<b>The Travaux Préparatoires of the Vienna Convention on the Law of Treaties</b>	
<i>Herbert W. Briggs</i>	705
<b>The Declaration of Principles of International Law concerning Friendly Relations: A Survey</b>	
<i>Robert Rosenstock</i>	713
<b>The Grounds of Invalidity and Termination of Treaties</b>	
<i>S. E. Nahlik</i>	736
<b>Selden Redivivus—Towards a Partition of the Seas?</b>	
<i>Wolfgang Friedmann</i>	757
<b>Editorial Comment:</b>	
<b>The Obligation to Register Treaties and International Agreements with the United Nations</b>	
<i>R. B. Lillich</i>	771
<b>Notes and Comments:</b>	
<b>Further Thoughts on a New Source of International Law: Professor d'Amato's "Manifest Intent"</b>	
<i>N. G. Onuf</i>	774
<b>The Need for Revision of the Bustamante Code on Private International Law</b>	
<i>Kurt H. Nadelmann</i>	782
<b>The U. S. Treaty of Commerce with Germany and the German Constitution</b>	
<i>F. A. Mann</i>	793
<b>"Socialist International Law" or "Socialist Principles of International Relations"?</b>	
<i>W. E. Butler</i>	796
<b>Regional Meetings:</b>	
<b>Denver, Colorado, May 8, 1970, April 16, 1971</b>	
<i>Ved P. Nanda</i>	800
<b>New School for Social Research, April 2-3, 1971</b>	
<i>Nigel S. Rodley</i>	802
<b>Mexican-American Border Relationship Conference, San Diego, May 7-8, 1971</b>	
<i>S. Houston Lay</i>	803
<b>U. S. Contemporary Practice Relating to International Law</b>	
<i>Steven C. Nelson</i>	805
<b>Judicial Decisions Involving Questions of International Law</b>	
<i>Edited by Alona E. Evans</i>	812
<b>Book Reviews and Notes. Edited by Leo Gross:</b>	
<b>Cisneros, Cesar Diaz, <i>Derecho Publico Internacional</i></b>	836
<b>Green, L. C., <i>International Law Through the Cases</i></b>	837
<b>Kiss, Alexandre-Charles, <i>Répertoire de la Pratique Française en Matière de Droit International Public</i></b>	839
<b>Grzybowski, Kazimierz, <i>Soviet Public International Law</i></b>	840
<b>Oudendijk, J. K., <i>Status and Extent of Adjacent Waters</i></b>	841
<b>Matte, Nicolas Mateesco, <i>Aerospace Law</i></b>	843
<b>Fisher, Roger, <i>International Conflict for Beginners</i></b>	845
<b>Szasz, Paul, et al., <i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i></b>	846
<b>Lindberg, Leon N., and Scheingold, Stuart A., <i>Europe's Would-Be Polity. Patterns of Change in the European Community</i></b>	847
<b>Council of Europe Secretariat, <i>Manual of the Council of Europe</i></b>	849

# CONTENTS (cont'd.)

	PAGE
Weber, Hermann, <i>Der Vietnam-Konflikt—Bellum Legale?</i>	850
Behrman, Jack N., <i>National Interests and the Multinational Enterprise</i>	851
Dam, Kenneth W., <i>The GATT: Law and International Economic Organization</i>	853
Jackson, John H., <i>World Trade and the Law of GATT</i>	853
Gardner, Richard N., <i>Sterling-Dollar Diplomacy</i>	857
Tung, William L., <i>China and the Foreign Powers</i>	859
Maxwell, Neville, <i>India's China War</i>	859
Barros, James, <i>Betrayal from Within: Joseph Avenol, Secretary-General of the League of Nations, 1933-1940</i>	862
Parry, Clive, <i>Consolidated Treaty Series</i>	864
Briefer Notices: Amerasinghe, 865; Zotiades, 866; Andrassy, 867; Fahl, 867; Sobarzo, 868; Del Russo, 868; Gotlieb, 869; Walter, 870; Haas, 871; Dembiński, 872; Veiter, 873; Gelberg, 873; Krülle, 874; Slater, 875; Papacostas, 875; Colegio de Mexico, 876; Rodriguez, 876; Kutzner, 877; Woronoff, 877; Harbottle, 878; Boskey and Willrich, 878; Delcoigne and Rubinstein, 879; Holleaux, 880; Aguayo, 880; Kos-Rabcewicz-Zubkowski, 881; Dickie, 881; Verbit, 882; Görres-Gesellschaft, 883	
Books Received	884
<b>OFFICIAL DOCUMENTS</b>	
United Nations Educational, Scientific and Cultural Organization. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. <i>Paris, November 14, 1970</i>	887
Mexico-United States. Treaty of Co-operation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties. <i>Mexico City, July 17, 1970</i>	895
Organization of American States. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance. <i>Washington, February 2, 1971</i>	898
North Sea Continental Shelf: Federal Republic of the Germany-Denmark-The Netherlands. Protocol. <i>Copenhagen, January 28, 1971</i>	901
Federal Republic of Germany-Denmark. Treaty Relating to the Delimitation of the Continental Shelf under the North Sea. <i>Copenhagen, January 28, 1971</i>	904
The Netherlands-Federal Republic of Germany. Treaty on the Delimitation of the Continental Shelf under the North Sea. <i>Copenhagen, January 28, 1971</i>	909
United States-Spain. Treaty on Extradition. <i>Madrid, May 29, 1970</i>	914
United States. Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. <i>July 31, 1970</i>	922
International Legal Materials. Contents, Vol. X, Nos. 4 (July) and 5 (September), 1971	924
Index	928

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Manuscripts in triplicate may be sent to either the Acting Editor-in-Chief of the JOURNAL, Northwestern University Law School, 357 East Chicago Avenue, Chicago, Illinois 60611, or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$30.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$6.00 a copy; other available numbers at \$7.50 a copy.

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

U. S. POSTAL SERVICE		Page 1
STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION <small>(Act of August 12, 1970: Section 3685, Title 39, United States Code)</small>		SEE INSTRUCTIONS ON PAGE 2 (REVERSE)
1. TITLE OF PUBLICATION <b>AMERICAN JOURNAL OF INTERNATIONAL LAW</b>		2. DATE OF FILING
3. FREQUENCY OF ISSUE <b>FIVE TIMES: January, April, July, September &amp; October</b>		
4. LOCATION OF KNOWN OFFICE OF PUBLICATION <small>(Street, city, county, state, ZIP code; (Not printers)</small> <b>Prince &amp; Lemon Sts., Lancaster, Pa. 17604</b>		
5. LOCATION OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS <small>(Not printers)</small> <b>2223 Massachusetts Ave., N. W., Washington, D. C. 20008</b>		
6. NAMES AND ADDRESSES OF PUBLISHER, EDITOR, AND MANAGING EDITOR		
PUBLISHER <small>(Name and address)</small> <b>American Society of International Law, 2223 Mass. Ave., NW, Wash. D.C. 20008</b>		
EDITOR <small>(Name and address)</small> <b>Professor Richard R. Baxter, Harvard Law School, Cambridge, Mass. 02138</b>		
MANAGER EDITOR <small>(Name and address)</small>		
7. OWNER <small>(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given.)</small>		
NAME	ADDRESS	
<b>American Society of International Law</b>	<b>2223 Massachusetts Ave., N.W., Washington, D. C. 20008</b>	
8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES <small>(If there are none, so state)</small>		
NAME	ADDRESS	
9. FOR OPTIONAL COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES <small>(Section 132.121, Postal Service Manual)</small>		
<p>39 U. S. C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 4395 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates."</p> <p>In accordance with the provisions of this statute, I hereby request permission to mail the publication named in Item 1 at the reduced postage rates presently authorized by 39 U. S. C. 3626.</p> <p><small>(Signature and title of editor, publisher, business manager, or owner)</small></p>		
10. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES <small>(Section 132.122, Postal Manual)</small>		
<small>(Check one)</small>		
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes	<input checked="" type="checkbox"/> Have not changed during preceding 12 months	<input type="checkbox"/> Have changed during preceding 12 months <small>(If changed, publisher must submit explanation of change with this statement.)</small>
11. EXTENT AND NATURE OF CIRCULATION	AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS	ACTUAL NUMBER OF COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE
A. TOTAL NO. COPIES PRINTED <small>(Net Press Run)</small>	9,000	9,000
B. PAID CIRCULATION		
1. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES		
2. MAIL SUBSCRIPTIONS		
C. TOTAL PAID CIRCULATION	7,675	7,675
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS		
1. SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES	125	125
2. COPIES DISTRIBUTED TO NEWS AGENTS, BUT NOT SOLD		
E. TOTAL DISTRIBUTION <small>(Sum of C and D)</small>	7,800	7,800
F. OFFICE USE, LEFT-OVER, UNACCOUNTED, SPOILED AFTER PRINTING	1,200	1,200
G. TOTAL <small>(Sum of E &amp; F—should equal net press run shown in A)</small>	9,000	9,000
<p><small>(Signature of editor, publisher, business manager, or owner)</small></p> <p><i>Rosemary E. Corley</i></p>		
I certify that the statements made by me above are correct and complete.		

## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of each year, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$30 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$30 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$25 for residents of the United States, \$10 for non-residents; professional, \$40; intermediate, \$15; student, \$7.50. Application forms and further information may be obtained from Membership Secretary of the Society.

### OFFICERS OF THE SOCIETY, 1971-1972

<i>horary President</i> .....	PHILIP C. JESSUP
<i>resident</i> .....	HAROLD D. LASSWELL
<i>cutive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>e Presidents</i> .....	RICHARD A. FALK, JOHN N. HAZARD, WILLIAM D. ROGERS
<i>orary Vice Presidents:</i>	DEAN C. ACHESON,* WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, LEO GROSS, GREEN H. HACKWORTH, JAMES N. HYDE, HANS KELSEN, CHARLES E. MARTIN, BRUNSON MAC- CHESNEY, MYRES S. McDUGAL, OSCAR SCHACHTER, JOHN STEVENSON, ROBERT R. WILSON.
<i>etary</i> .....	EDWARD DUMBAULD
<i>asurer</i> .....	FRANZ M. OPPENHEIMER
<i>stant Treasurer</i> .....	JAMES C. CONNER

ceased Oct. 12, 1971.

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER  
Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. JILLICH  
University of Virginia Law School

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. MCDUGAL  
Yale Law School

STANLEY D. METZGER  
Georgetown University Law Center

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS KELSEN  
University of California

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY

# THE TRAVAUX PRÉPARATOIRES OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

(REVIEW ARTICLE) \*

By Herbert W. Briggs \*\*

The fundamental importance of the codification of the law of treaties by the International Law Commission and the Vienna Conference will gain increasing recognition as the rules and principles embodied in the 1969 Vienna Convention on the Law of Treaties are applied in the practice of states and the jurisprudence of international tribunals. Inevitably the records of this great codification will be searched and researched, by scholars as well as by legal advisers, and for a variety of reasons: What is the function of a particular rule? What rôle was it designed to play in the relations of states and in the international legal community? What does it require in the way of performance or abstention? Is it a residual rule, binding upon states if no other solution is agreed on? Why was the rule given the particular formulation found in the Vienna Convention, and what alternative formulations were rejected? Since the entry into force of the Vienna Convention will be delayed until after thirty-five states have ratified or acceded to it (Article 84), what assessment of the general acceptability of a particular provision can be gained from a study of the drafting record or from the number of affirmative or negative votes or abstentions?

Although the International Law Commission worked intensively on the law of treaties only during its 14th to 18th sessions from 1962 to 1966, the records prior to that period include a series of valuable reports on the law of treaties: four by Professor James L. Brierly, two by Professor Hersch Lauterpacht and five by Sir Gerald Fitzmaurice. There followed, during the years 1962-1966, half a dozen influential and well-balanced reports by Sir Humphrey Waldock who had succeeded them as Special Rapporteur on the Law of Treaties. All of these reports, as well as the official observations of governments on draft articles prepared by the Commission, and a carefully prepared summary record of discussions within the Commission, can be found in the *Yearbooks of the International Law Commission*.<sup>1</sup> The Commission's annual report and the draft articles on the law of treaties set forth therein were commented on each year by representatives of gov-

\* The book here reviewed is: *The Law of Treaties. A Guide to the Legislative History of the Vienna Convention*. By Shabtai Rosenne. Leiden: A. W. Sijthoff; Dobbs Ferry, N.Y.: Oceana Publications, 1970. pp. 443. Fl. 88; \$25.00.

\*\* Of the Board of Editors.

<sup>1</sup> A/CN.4/Ser. A, published in two annual volumes except for 1949, Vol. I containing the summary records of a particular session, and Vol. II, the supporting documents and the annual Report of the International Law Commission.



ernments in the Sixth (Legal) Committee of the General Assembly.<sup>2</sup> In addition to this documentation, it is essential to consult the *Official Records of the United Nations Conference on the Law of Treaties*.<sup>3</sup>

The *Guide* prepared by Ambassador Shabtai Rosenne is designed to facilitate ready reference to the *travaux préparatoires* bearing on any particular article of the Vienna Convention. As the author himself indicates in a note on "How to Use This Book," he has first set forth in four parallel columns the authentic text of each article of the Vienna Convention in the working languages of the Conference—English, French and Spanish—as well as the final English text of the International Law Commission's 1966 Draft Articles on the Law of Treaties, thus "enabling the reader both to observe at a glance the changes introduced by the Conference and, as a part of the process of interpretation, to compare easily the different language versions of the instrument." Commencing in 1964, the Drafting Committee of the International Law Commission has drafted its articles trilingually, instead of in one language with subsequent translations into others, and it found the method of presentation in parallel columns of great utility. Unfortunately, the Vienna Convention on the Law of Treaties has not been presented in such parallel columns in an official public document;<sup>4</sup> the Rosenne *Guide* fills this need.

After thus setting forth the trilingual text of an article and the corresponding article in the 1966 draft of the International Law Commission, the *Guide* presents citations to its legislative history, grouping citations under (a) *ILC* and (b) *Conference*, and, where needed, a third section on subsequent history in United Nations organs since 1962, under the rubric *Related discussion*. There are no page references, but citations are made exclusively to the number of a meeting and the paragraph numbers as they are set forth in the *Yearbooks of the International Law Commission*, the *Official Records* of the General Assembly, and the *Official Records* of the Vienna Conference on the Law of Treaties. This makes it possible to use the *Guide*—which appears here only in English—with any of the language versions or reprints in which the records are published.

<sup>2</sup> The Summary Records of the Sixth Committee should be examined in relation to the agenda items on the work of the International Law Commission.

<sup>3</sup> United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, *Official Records, Summary Records of the 1st to 83rd meetings of the Committee of the Whole, and of the 1st to 5th Plenary Meetings*. A/CONF.39/11. pp. xxxii, 493. \$6.50.

United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, *Official Records, Summary Records of the 84th to the 105th meetings of the Committee of the Whole, and of the 6th to 36th Plenary Meetings*. A/CONF.39/11/Add. 1. pp. xxiv, 350. \$4.50.

United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records, Documents of the Conference*. A/CONF.39/11/Add. 2. pp. viii, 303. \$4.00.

<sup>4</sup> The Chinese and Russian versions of the Vienna Convention are equally authentic "texts" with the English, French, and Spanish versions (Art. 85), but are in fact translations prepared by the secretariat, although there was always a Russian member on the Drafting Committee of the Commission and of the Conference. Cf. Rosenne, *op. cit.* 70.

Citations under (a) *ILC* include appropriate reference to Comments by Governments and comments by their representatives in the Sixth Committee as well as to the relevant Reports of the Special Rapporteur, Sir Humphrey Waldock, and the discussions, amendments and outcome. The same method is followed under (b) *Conference*; all votes are included and particulars of amendments submitted, with their sponsors, the renumbering of articles and the final vote on the adoption of an article are set forth.

Since Rosenne's book is a *Guide to the Legislative History of the Vienna Convention*, it is, of course, indispensable to have the *Yearbooks* and *Official Records* available. Once that condition is met, the beauty and the utility of Rosenne's *Guide* are apparent. As a participant in the drafting of the Vienna Convention on the Law of Treaties, both in the International Law Commission and in the Vienna Conference, this reviewer can testify both to the need for a guide through their extensive documentation and to the admirable skill, comprehensiveness and unerring accuracy with which Rosenne has constructed that *Guide*.

Lest those who presently lack the documentation or the will to explore it in detail write the book off as merely a *Guide*, attention should be called to the Introduction of some sixty pages in which the author discusses the background, organization, procedure, work and achievements of the Vienna Conference. With the wisdom and discernment of an experienced diplomatist and a trained legal craftsman, Ambassador Rosenne provides an informative account of the play of politics and diplomatic techniques on the solution of legal problems confronting the Conference, and points to a number of questions which will arise in the application of the Vienna Convention. In his Preface (page 5), the author hints that the *Guide* is the departure point for a more comprehensive study he is making of the modern law of treaties. Some portions have already appeared elsewhere, for example, his important and thought-provoking study of "The Temporal Application of the Vienna Convention on the Law of Treaties."<sup>4</sup> It is appropriate in this review to discuss one of the questions which will arise in the interpretation and application of the Vienna Convention.

#### RECOURSE TO TRAVAUX PRÉPARATOIRES

To what extent should the summary records of debate in the International Law Commission and, in particular, perhaps, the carefully approved official Commentary of the Commission on each article of its final draft, be regarded as preparatory work of the Vienna Convention to which appropriate resort might be made for the interpretation of the convention? In spite of a more cautious approach by Rosenne at the 872nd meeting of the International Law Commission in 1966,<sup>5</sup> the fact that his *Guide*, in citing references to the *travaux préparatoires* of the Vienna Convention, devotes at least equal attention to the records of the International Law Commission (and governmental response thereto) implies a conclusion on his part as to their value as an aid in interpretation of the Vienna treaty.

<sup>4</sup> 4 Cornell International Law Journal 1 (1970).

<sup>5</sup> 1966 I.L.C. Yearbook (I, Part II) 201, par. 35. Cf. Rosenne, *op. cit.* 37, note 19.

Assuming that the issue of the desirability of resort to *travaux préparatoires* for the interpretation of treaties has been determined by the Vienna Convention, a first question arises as to the extent to which the convention authorizes such resort. Inevitably, there follows the circular question whether it is appropriate to have recourse to *travaux préparatoires* in order to determine when such recourse is permissible.

If one looks to the Vienna Convention itself for aid in answering these questions, one finds in Article 31 a "general rule of interpretation" which calls for a textual, contextual and teleological approach.<sup>7</sup> What interpretation, then, is to be placed on Article 32, which is labeled "Supplementary means of interpretation," and reads as follows:

Recourse may be had to supplementary means of interpretation [Fr.: *des moyens complémentaires*], including the preparatory work [Fr.: *notamment aux travaux préparatoires*] of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.<sup>8</sup>

A rigid interpretation based on the fact that recourse to *travaux préparatoires* is labeled "supplementary" and appears in a separate article from that setting forth the "general rule of interpretation" would appear to relegate recourse to *travaux préparatoires*, both temporally and evidentially, to a rôle more minor than the jurisprudence of international tribunals currently accepts. This fact alone suffices to suggest some caution in placing upon the words of the text a narrow interpretation which might not be confirmed by further investigation of the legislative history of the article.

<sup>7</sup> Art. 31 reads as follows (Rosenne, *op. cit.* 214):

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

<sup>8</sup> *Ibid.* 216, Art. 32.

Leaving open for the moment the question whether it is appropriate to have recourse to the *travaux préparatoires* of Vienna in order to determine when such recourse is generally permissible, one commences by establishing that, except for renumbering, the text of Vienna Article 32 is taken *verbatim et literatim* from Article 28 of the 1966 draft articles of the International Law Commission, and that, despite a lively debate over the propriety of recourse to *travaux préparatoires*, the Conference unanimously adopted the article by a vote of 101 states to none.<sup>9</sup>

Pushing the inquiry further, consultation of the *travaux préparatoires* of both the International Law Commission and the Vienna Conference suggests that no rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by use of the word "supplementary." Thus, the Commission's Commentary to Article 28, after observing in paragraph (18) "that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation," adds:

Nevertheless, it felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in Article 27 [Vienna Art. 31] has disclosed no clear or reasonable meaning.

And in paragraph (19):

The word "supplementary" emphasizes that Article 28 [Vienna Art. 32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in Article 27.<sup>10</sup>

Turning now to the summary records of the Committee of the Whole of the Vienna Conference on the Law of Treaties, particularly at its 31st to 33rd meetings,<sup>11</sup> April 19–22, 1968, one finds the debate replete with references to the Commentary of the International Law Commission for the purpose of elucidating the meaning of the terms employed by the Commission in its Draft Articles on the Law of Treaties. The debate was conducted on a high level of juristic competence. Certain aspects should be noted. In arguing with great eloquence his well-known theme that the text of a treaty was only one factor among many in determining the shared expectations of the parties, Professor Myres McDougal (U.S.) seems, curiously, himself to have adopted a textual approach to the interpretation of Articles 27 and 28 of the International Law Commission's draft by exaggerating their "preclusionary hierarchy," their "rigidity and restrictions," by over-emphasizing the word "supplementary" in Article 28, by

<sup>9</sup> *Ibid.* 216, 219.

<sup>10</sup> I.L.C. Report on the Work of Its 18th Sess., 1966 I.L.C. Yearbook (II) 223; 61 A.J.I.L. 359–360 (1967).

<sup>11</sup> United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Official Records 166–185. Cf. also 74th meeting, May 16, 1968, *ibid.* 441–442.

overlooking the *travaux préparatoires* of the Commission quoted above, and by underestimating the basic textual approach found in the amendment he was introducing on behalf of the United States.<sup>12</sup>

On the other hand, Professor Eduardo Jiménez de Aréchaga (Uruguay), a member of the International Law Commission, opposed the United States proposal to combine the two articles on interpretation of treaties and denied that the Commission had set up a rigid hierarchy, observing, in part:

66. The separation of the two articles did not mean that the Commission had ruled out the preparatory work in matters of interpretation; it had not presupposed two distinct phases of interpretation; on the contrary, the procedures listed in the two articles would be applied concurrently. The rule in article 28 [Vienna, Art. 32] was extremely flexible, and did not create any hierarchy between methods of interpretation. Article 27 contained a very broad definition of "context" which included much of the material traditionally regarded as preparatory work, provided it was so agreed between the parties.<sup>13</sup>

Sir Humphrey Waldock, who had served with distinction as Special Rapporteur on the Law of Treaties for the International Law Commission over a period of five years and was serving the Vienna Conference as Expert Consultant, pointed out that "with regard to the use made in practice of preparatory work for purposes of interpretation, the differences of opinion were not very wide"; and that, while the Commission had decided that some distinction must be drawn between "elements of interpretation that had an authentic and binding character in themselves" and *travaux préparatoires*, "[t]here had certainly been no intention [in the Interna-

<sup>12</sup> *Ibid.* 167-168, pars. 38-50 (31st meeting, April 19, 1968). See also, for Professor McDougal's statement, 62 A.J.I.L. 1021-1027 (1968). Cf. Leo Gross, "Treaty Interpretation: The Proper Role of an International Tribunal," 1969 Proceedings, American Society of International Law 108-122; I. M. Sinclair, "The Vienna Conference on the Law of Treaties," 19 Int. and Comp. Law Q. 47, at 60-66 (1970).

The United States proposal (A/CONF.39/C.1/L.156, April 10, 1968, Vienna Conference, Official Records, III, p. 149) reads as follows:

"Amend article 27 to read as follows:

"A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

- (a) the context of the treaty;
- (b) its objects and purposes;
- (c) any agreement between the parties regarding the interpretation of the treaty;
- (d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
- (e) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally;
- (f) the preparatory work of the treaty;
- (g) the circumstances of its conclusion;
- (h) any relevant rules of international law applicable in the relations between the parties;
- (i) the special meaning to be given to a term if the parties intended such term to have a special meaning."

"Delete article 28."

<sup>13</sup> Vienna Conference, *loc. cit.*, Official Records, 1968, p. 170.

tional Law Commission] of discouraging automatic recourse to preparatory work for the general understanding of a treaty."<sup>14</sup>

Mr. I. M. Sinclair (U.K.) clearly saw that the United States proposal "placed primary emphasis on the text of the treaty," but, although not averse to "an amalgamation of the two articles, provided the proper balance between the general rule and the supplementary means of interpretation was preserved," nevertheless opposed the United States proposal because

it gave equal weight to a series of factors of greater or lesser significance in treaty interpretation and was likely to open the door to a never-ending stream of inquiry for would-be interpreters, and to encourage unnecessary disputes.<sup>15</sup>

Not all the delegates to the Vienna Conference appear to have appreciated as clearly as Mr. Sinclair that the United States proposal placed primary emphasis on the text of the treaty;<sup>16</sup> some appear to have thought that, by rejecting the United States proposal, they were voting against the approach (widely associated with the name of Myres McDougal)<sup>17</sup> to seek the intentions of the parties as a subjective element distinct from the wording of the text. To the extent that that misconception prevailed, the decisive vote in the Committee of the Whole against the United States proposal (66-8-10) is significant.

Returning now to the questions of the propriety of consulting the *travaux préparatoires* of the International Law Commission and the Vienna Conference in order to interpret the provisions of the Vienna Convention (including those which authorize recourse to *travaux préparatoires*), a number of submissions may be suggested.

Although the records of the International Law Commission set forth the views not of representatives of states but of its members in their individual capacities as "persons of recognized competence in international law," and although these records are not technically the records of the Vienna diplomatic conference, the text of the Draft Articles on the Law of Treaties in Chapter II of the 1966 Report of the International Law Commission (which included also the official Commentary of the Commission) was referred by the United Nations General Assembly to the Con-

<sup>14</sup> *Ibid.* 184, pars. 67-69.

<sup>15</sup> *Ibid.* 173, par. 10.

<sup>16</sup> The text of the United States proposal (above, note 12) appears to have been based verbatim (except for the addition of sub-paragraphs (d), (h), and (i)) on the proposal made by the writer to the International Law Commission at its 870th meeting on June 15, 1966. In introducing the proposal, the writer explicitly stated that it was "to the text that the interpreter should first look rather than to the intention of the parties, which was a subjective element distinct from the text itself"; adding: "If his suggestion were adopted, the text would retain its basic importance as the authentic expression of the intentions of the parties, but nothing that might throw light on the meaning of its terms would be excluded. . . ." 1966 I.L.C. Yearbook (I, Part II) 187, pars. 30, 35, 37; *ibid.*, 873rd meeting, June 20, 1966, p. 203.

<sup>17</sup> The October, 1967, issue of this JOURNAL, which contained, *inter alia*, McDougal's slashing attack on "The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*" (61 A.J.I.L. 992), had been distributed to all delegations to the Vienna Conference on the Law of Treaties.

ference as "the basic proposal for consideration by the conference."<sup>18</sup> It naturally followed that the better-prepared delegations to the Vienna Conference on the Law of Treaties had carefully studied, and frequently cited, the records of the International Law Commission.

Since many of the articles of the Vienna Convention are identical with those drafted by the Commission, and in most others the changes are relatively minor, the records of the Commission may, in particular cases, be an indispensable aid in elucidating the terms appearing in the Vienna Convention.

With reference to the interpretation to be placed upon the Vienna Convention's provisions regarding recourse to *travaux préparatoires*, it might be said that a legislative record denying rigid temporal or evidential limitations on such recourse was built at Vienna, closely based upon the Commentary and records of the International Law Commission. It thus appears likely that the International Court of Justice, other international tribunals, and the legal advisers of foreign offices will continue—as in the past—to have discriminating recourse to *travaux préparatoires* in order to throw illumination on the meaning of terms employed in the text of a treaty.<sup>19</sup> Such appears to have been the intention of those who drafted Article 32: its function is one of guidance rather than of prohibition. The elaborate care taken by Rosenne to provide a complete *Guide* to the *travaux préparatoires* of the Vienna Convention on the Law of Treaties is therefore most welcome.

<sup>18</sup> G.A. Res. 2166 (XXI), Dec. 5, 1966, par. 7; Rosenne, *op. cit.* 93.

<sup>19</sup> Cf. Leo Gross, *loc. cit.* 117; Richard D. Kearney and Robert E. Dalton, "The Treaty or Treaties," 64 A.J.I.L. 495, at 520 (1970). Cf. Surya P. Sharma, "The ILC Draft and Treaty Interpretation with Special Reference to Preparatory Works," 8 Indian Journal of International Law 367-398 (1968).

## THE DECLARATION OF PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS: A SURVEY

*By Robert Rosenstock \**

In 1963 the United Nations General Assembly established the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations<sup>1</sup> and instructed it to consider the following principles:

- (a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
- (b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- (c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
- (d) The duty of States to co-operate with one another in accordance with the Charter;
- (e) The principle of equal rights and self-determination of peoples;
- (f) The principle of sovereign equality of States;
- (g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

As this list of principles involves most of the fundamental areas of inter-state relationships, it is not surprising that the Committee has experienced many difficulties in reaching agreed formulations. The difficulties were all the greater as the Committee agreed to work in general on the basis

\* Adviser, Legal Affairs, U. S. Mission to the United Nations. The opinions expressed herein are those of the author and do not necessarily represent those of the Department of State or of the United States Government.

<sup>1</sup> The cumbersome title was the product of extensive negotiations. The Eastern Europeans wished to call the item "Principles of Peaceful Coexistence." The West opposed this title because the Charter contained no such concept, because the concept was a negative or passive one incompatible with the affirmative obligations of co-operation created by the Charter, and because it was desired to avoid having the subject become a vehicle for propaganda for the Khrushchev-sponsored doctrine of "peaceful coexistence." The term "friendly relations" is derived from the Charter. The phrase "in accordance with the Charter" was added in order to make it clear that an examination of existing Charter norms was being undertaken and not a revision of the Charter or an elaboration of new norms.

For an analysis of the early work of the Special Committee and of the General Assembly, see the excellent, balanced article by Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-operation among States," 61 A.J.I.L. 703 (1967); and E. McWhinney, "'Peaceful Co-existence' and Soviet-Western International Law," 56 *ibid.* 951 (1962), and "Friendly Relations and Co-operation among States: Debate at the Twentieth General Assembly, United Nations," 60 *ibid.* 356 (1966).



of unanimity.<sup>2</sup> It was thus necessary to find language which went beyond a mere restatement of the wording of the Charter and yet would be acceptable not only to the United States and the Soviet Union but also to the other states of Europe, Latin America, Africa, and Asia as well. The generality of the language used in the Declaration does not deprive this instrument of its significance as the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on these seven principles.

The Committee held six sessions between 1964 and 1970 and completed the elaboration of the Declaration on the final day of the 1970 session. It represented one of the major achievements of the Twenty-Fifth Anniversary Session of the United Nations.

There is some difference of opinion among Members of the United Nations as to whether the Declaration represents a mere recommendation<sup>3</sup> or a statement of binding legal rules.<sup>4</sup> The truth would appear to lie somewhere between these two extremes, but closer to the latter. Two considerations point to the more limited view as to the effect of the adoption of the text on the state of international law. The first is that there is no difference in United Nations practice between the terms "declaration"

<sup>2</sup> The decision to work on the basis of consensus was based on the view that any other approach would produce a far less useful document, which would record the level and degree of disagreement rather than set forth a body of norms to which all the states on the Committee could adhere and which could thus be regarded as an authoritative statement of key principles of the Charter. This agreement was strained nearly to the breaking point on several occasions, and at no time were the General Assembly Rules of Procedure suspended. Any delegation had at all times the right to insist on their application and consequently on having decisions taken by vote. It is the writer's view that the forbearance shown by the delegations in adhering to the consensus approach was well rewarded.

There are times when consensus is particularly useful, for example when there may be thought of creating "instant international law." Obviously it can be overdone and turned into a nightmare of vetoes. Working by consensus requires the same forbearance on the part of all concerned as is true in the case of the veto in the Security Council.

<sup>3</sup> See statement by Mr. Brennan (Australia), U.N. Doc. A/C.6/SR.1178 (1970).

<sup>4</sup> Cf. statement by Mr. Csatorday (Hungary) to the effect that the declaration would not have the status of a treaty and could not be considered *jus cogens*, but that it would fall into the category of "general principles of law." U.N. Doc. A/C.6/SR.1180 (1970). Mr. Yasseen (Iraq) went further and proclaimed the text to be *jus cogens*. U.N. Doc. A/C.6/SR.1180 (1970). The United States expressed the following view of the nature of the work at the mid-point of the Assembly's work on the principles:

"The significance of this gradual accumulation of areas of agreement can best be understood in light of the nature of the operation in which we are involved. For some years the Assembly has been engaged in formulating legal texts which will be authoritative interpretations of broad principles of international law expressed in the Charter. By the very nature of General Assembly action, the juridical value of such texts is directly dependent on the general support that they command. Obviously formulations representing the general agreement of the Membership of the United Nations have important juridical value. A formulation merely setting forth various highly controversial majority views, by contrast, is totally ineffectual as a declaration of international law. It is legally significant only as evidence of the extent of divergence of opinion within the international community."

and "recommendation." Secondly, statements accepted by the San Francisco Conference limit to some extent the efficacy of efforts at interpretation other than through the amendment route.<sup>5</sup> The principles involved, however, are acknowledged by all to be principles of the Charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the Charter.<sup>6</sup> The use of "should" rather than "shall" in those instances in which the Committee believed it was speaking *de lege ferenda* or stating mere *desiderata* further supports the view that the states involved intended to assert binding rules of law where they used language of firm obligation.

It was by no means clear in 1963, when the Special Committee began its work, that a declaration would be the end product. Some states argued that a study of the principles would be a useful and sufficient exercise. Others thought in terms of a number of separate declarations. The gradual personal commitment of the individuals involved contributed to the growth and acceptance of the idea of a declaration on the seven principles. It came to be expected, and all concerned recognized that anyone who could be blamed for frustrating that expectation would pay a political price.

A discussion of the nature of the international system within which these norms must operate is beyond the scope of this article. It is sufficient to observe that the continued existence of the world as we know it—a world in which there is no state capable of imposing an order of its choosing on the entire international community—requires a degree of willingness on the part of states to accept some common standards or rules of the road. The effort to draw up the Principles of Friendly Relations may, in large measure, be viewed, if nothing else, as an effort to clarify the standards and thereby to make more accurate the evaluation

<sup>5</sup> Report of Special Subcommittee of Committee IV/2 on the Interpretation of the Charter, 13 UNCIO Docs. 831-832. The final paragraph of that document reads as follows:

"It is to be understood, of course, that *if an interpretation* made by any organ of the Organization or by a committee of jurists *is not generally acceptable* it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment." (Emphasis supplied.)

<sup>6</sup> Under Art. 31 of the Vienna Convention on the Law of Treaties:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

\* \* \* \* \*

"3. There shall be taken into account together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretations;
- (c) Any relevant rules of international law applicable in the relations between the parties." U.N. Doc. A/CONF.39/27 (1969), 63 A.J.I.L. 875 (1969).

by states of how far they can go without provoking a reaction arising out of another state's view of what is acceptable. Any such effort conversely assists a state in understanding more precisely what sort of encroachments on its actions or interests it is expected to accept as a consequence of the interdependent nature of the world and how it may react to those which it is not expected to accept.

To regard the codification of the Principles of Friendly Relations solely in these terms, however, would be to ignore the other factors that went into the decision of the General Assembly to undertake this work. These factors, which are now of largely historical interest, ranged from nobility of purpose to a desire to engage in propaganda and included a felt need on the part of some of those who had not been present at San Francisco in 1945 to put their views on record. There was in addition a simple desire on the part of some to provide work for what was at the time an under-employed Legal Committee. Whatever relevance these motives may have to the appraisal of future efforts in this or related areas and however much they explain the behavior of some states during the process, they do not throw much light on the meaning of the Declaration itself.

It is the purpose of this article to relate some of the history of the matter and to provide a few brief notes and comments by way of an introductory guide to the text in light of some of its negotiating history. Such a brief paper on topics of such magnitude can be no more than an introduction.<sup>7</sup> The reader will find it helpful to have before him the text of the Declaration on Principles of International Law Concerning Friendly

<sup>7</sup> By calling this paper a survey, the writer hopes to avoid any disappointment at the lack of extensive analysis of the legal concepts involved outside the context of the Friendly Relations exercise, as well as the absence of extensive references to particular statements made by one delegation or another. The summary records of the Committee, set out in U.N. Docs. A/AC.125/SR.1 *et seq.*, and the six excellent Reports of the Committee, found in U.N. Docs. A/5746, A/6230, A/6799, A/7326, A/7619, A/8018, as well as the records of the discussion of the item in the General Assembly at the 17th through 24th Sessions are available and deserve close attention. Indeed, it is hoped that others with different points of view and a detachment lost to me as a result of extensive participation will also publish papers in this rich field. In doing so, it is suggested that they join the writer in bearing in mind, if not scrupulously following, the advice of Professor Riphagen who stated at the 114th meeting:

"... the draft declaration, despite its title, could not be interpreted as one would interpret a carefully drafted legal document. The method of work adopted by the Committee, according to which the wording of principles or parts of principles had been negotiated at different sessions and between different groups of members had inevitably led to overlapping, inconsistencies in wording, lacunae and redundancies. No opportunity had yet been given to review the draft declaration as a whole from a legal point of view, and it did not seem likely that such a review would be seriously undertaken. Consequently, one could not attach legal consequences to the fact that the same notions had often been expressed in the draft declaration in different wordings and that clauses which, once incorporated in one principle or part of a principle, should, in logic and law, also be inserted in another principle or part of a principle, had not been so inserted. In particular, any argumentation *a contrario*—already in any case a dubious process of reasoning in the interpretation of international legal documents—would be inadmissible in respect of the terms of the present draft declaration." U.N. Doc. A/AC.125/SR.114.

Relations and Co-operation among States in Accordance with the Charter of the United Nations.<sup>8</sup>

#### PREAMBLE

The length of the Preamble warrants our first consideration. Indeed, perhaps a Kiplingesque "Just So" story on how the monster got that way would be in order. For the most part, the length of the Preamble is attributable to the need to find a way to meet the favorite ideas of various members of the Special Committee without distorting the body of the text in a manner which would have made it unacceptable to other members, either because inclusion of the ideas would have distorted the balance of the text or because their inclusion would have appeared to signify acceptance as *lex lata* of statements which were acceptable to some delegations only as statements of goals to be sought. Some paragraphs of the Preamble reflect the view of the newer states which wished to emphasize that the world had changed since 1945 and that these principles should be understood as a reflection of that fact; others are responsive to the fear engendered by the Brezhnev Doctrine. Some embody the views of a state which is preoccupied with questions of sovereignty and self-determination as applied to a small island off its coast, while other paragraphs are an effort to underline one or another concept included in the body of the text. The recital of each of the principles in the Preamble itself was a compromise between Latin American insistence on special emphasis on non-intervention and the views of most of the rest of the members that all the principles were equal and interrelated. And that is how the monster got so lumpy.

#### PROHIBITION OF THE THREAT OR USE OF FORCE

The first paragraph of the formulation of the prohibition of the threat or use of force is essentially a restatement of Article 2, paragraphs 3 and 4, of the United Nations Charter. The only notable difference lies in the fact that the rule is addressed to "Every State" rather than to "All Members." This change, which is reflected throughout the Declaration with one or two minor exceptions, is based on the notion that, in light of Article 2, paragraph 6, of the Charter,<sup>9</sup> and the fact that almost all the states in the world are either Members of the United Nations or have pledged themselves to adhere to the basic rules of the Charter, the rules of the Charter can now be said to be binding on all states, which are by definition subjects of international law and derive their sovereign existence from that body of rules.

<sup>8</sup> General Assembly Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25th Sess., Doc. A/RES/2625 (XXV); 65 A.J.I.L. 243 (1971).

<sup>9</sup> "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." This is, of course, not the same as imposing obligations on third states. It is a statement of potential consequences, not a statement of legal obligations on third states.

The second paragraph, which asserts that a "war of aggression constitutes a crime," derives from the Kellogg-Briand Pact and the London and Tokyo Charters which established the War Crimes Tribunals.<sup>10</sup> It was inserted at the request of Czechoslovakia.<sup>11</sup> The utility of including such a statement in the absence of any decision as to what tribunal, if any, would ever deal with the question and on what basis it would do so is perhaps questionable. Actually, this statement is supererogatory in light of the endorsement in General Assembly Resolution 95 (I) of December 11, 1946, of the basic concepts of the Charter and Judgment of the Nuremberg Tribunal. Its inclusion can best be understood as one of several cases in which some delegates were of the view that it would look strange to omit any reference to a particular matter and others saw no harm in including such language. Other examples of this approach abound throughout the text. This practice is inevitable when many states participate in the drafting, and the occasional solecisms or redundancy that result are a small price to pay for international understanding and co-operation.

The third paragraph is a reflection of the understanding that for states to engage in war propaganda would be inconsistent with the Preamble of the Charter and the purposes of the United Nations as set forth in Article 1.<sup>12</sup> This paragraph was included in the declaration at the urging of the U.S.S.R. It was deemed a useful and acceptable addition by others in light of the rôle war propaganda played in the late 1930's and 1960's in exacerbating tense situations. But it appears in the text subject to the express understanding that what is prohibited is state action, not individual conduct, the latter of which would involve issues of free speech.<sup>13</sup>

The fourth paragraph is merely a special case of the general prohibition set forth in the first paragraph, and was inserted because of the historic importance of use of force across boundaries. The term "violate" in the first part of this sentence caused some difficulty at the first session of the Committee in Mexico City in 1964. The United States argued for the use of the word "change" instead of "violate." Subsequently, the United States decided that it could live with the term "violate." The United States Delegate to the Sixth Committee, Mr. William P. Rogers, is to be credited for this step; he explained the United States position as follows:

. . . The . . . difficulty in accepting . . . [violate] was based on apprehensions that [it is] a term which carries with it a legal conclusion of guilt, but which says nothing about the nature of the acts upon which that legal conclusion is to be based. . . . We urged that

<sup>10</sup> See also the Geneva Protocol of 1924 for the Pacific Settlement of Disputes, which contains the declaration that, "a war of aggression constitutes . . . an international crime."

<sup>11</sup> Czech draft Declaration, U.N. Doc. A/AC.125/L.16, par. 2, March 17, 1966.

<sup>12</sup> References to articles are always to articles of the U.N. Charter unless otherwise indicated.

<sup>13</sup> See statement by Mr. Gime: (U.S.), U.N. Doc. A/S.6/SR.1180 (1970). The U.S. repeated this assertion several times in the course of the work of the Committee and it was never challenged.

a formulation more nearly in the language of fact rather than legal conclusion be worked out.

He then explained the decision of the United States to accept the term "violate":

In so doing, we would wish to emphasize that it is our understanding that "to violate" a boundary does not encompass the lawful use of force. In our opinion, it is clear from the work of the Committee and the text of the statement on the use of force, particularly paragraph 3, that the employment of force across frontiers in the exercise of the right of individual or collective self-defense, or any other lawful use of force consistent with the Charter, is not a "violation" of that frontier.<sup>14</sup>

The fifth paragraph of the formulation represents a recognition of the fact that, since 1945, the main tensions between nations have occurred, not in areas where there were established frontiers or boundaries in the classic sense, but where the two sides were separated by international lines of demarcation, e.g., Germany, the Middle East, Korea, Viet-Nam. The United States was particularly insistent that this paragraph be included for this reason. The inherent complexity of any situation in which there are international lines of demarcation instead of established frontiers accounts for the somewhat tortured wording of the paragraph. Despite its complexity, the paragraph is particularly well drafted and covers the situations in which a state can be properly barred from using force: where it has agreed to the line in question, where the Security Council has ordered the states in question to accept the line, or other situations in which a state can be said to be bound to respect the lines.

The sixth paragraph, which deals with reprisals, is again an explication of the general language of the opening paragraph. This norm derives not only from the general language of Article 2, paragraph 4, but from an express decision of the Security Council in Resolution 188 of April 9, 1964,<sup>15</sup> and thus represents an interesting example of the development, or at least codification, of international law in the United Nations. The inclusion of this concept in the text is indicative of the fact that the Committee regarded the concluding phrase of Article 2, paragraph 4, as a limitation on state action and not an escape clause.

The seventh paragraph, which deals with self-determination, was included largely, though by no means solely, at the insistence of the African and Asian states which had recently emerged from colonial situations. Initially there was considerable reluctance on the part of many Western states to include an express prohibition of the use of force in connection

<sup>14</sup> U.S. Delegation Press Release 4706, Nov. 17, 1965.

<sup>15</sup> The resolution "Condemns reprisals as incompatible with the purposes and principles of the United Nations." U.N. Doc. S/5650 (1964). It is probably true that the Kellogg-Briand Pact had accomplished virtually the same end when it stated that "the settlement or solution of all disputes or conflicts . . . shall never be sought except by pacific means." See also the Corfu Channel case, [1949] I.C.J. Rep. 4. Nevertheless, the text on reprisals was a significant act of codification in the sense of making the general rule more specific.

with dependent peoples. The first step toward bridging the gap was taken by the delegations of The Netherlands, and Italy in a text wherein they sought to stress the obligation of administering authorities to permit the inhabitants to exercise their right of self-determination.<sup>18</sup> The agreed paragraph was the outcome of four years of negotiations, based in part on the initial wedge created by the Italian-Dutch proposal. The ambit of the agreed text is sufficient to cover all situations in which force is used to deprive peoples of the right to self-determination.

This statement covers such a use of force in a purely colonial context as well as actions in contiguous nominally independent states or against populations of the acting state itself, subject to certain limitations set forth in the self-determination principle. The paragraph refers to one type of use of force which is "inconsistent with the Purposes of the United Nations." Some states took exception to the inclusion of a prohibition of acts which might take place in other than an inter-state context. Article 2, paragraph 4, they asserted refers to the threat or use of force only in "international relations." Most states, however, took the view that the phrase "international relations" seemed not to be limited to strictly inter-state relations and that relations between an administering authority and a non-self-governing territory are international in character, in light of the international responsibilities imposed under Chapter XI of the Charter. Indeed, the action of the Security Council in 1948 in the Indonesian matter when it called upon the parties "to cease hostilities," was an implied recognition of the proposition that the relations between a state and a dependent territory can at some point be of sufficient international concern as not to fall within the scope of Article 2, paragraph 7. The paragraph is carefully drafted so as to avoid prejudicing in any way the duty of administering states to maintain order and to use force to that end.

The eighth and ninth paragraphs of the formulation recognized the rôle which indirect uses of force have played in the world since 1945. It was argued that to fail to mention such acts might give rise to the unwarranted conclusion that states could do indirectly what they were prohibited from doing directly. The last phrase of paragraph 9, "when the acts . . . involve a threat or use of force," was added in an effort to avoid states' asserting a right to exercise their inherent right of self-defense by way of pre-emptive attack before there had been any use of force against them. The expression reflected an effort to respond to the view sometimes asserted that anything that violates Article 2, paragraph 4, gives rise to rights under Article 51. Whether the addition adds anything but a degree of circularity to the text and what the function of the word "threat" was in the minds of the proponents of the addition are perhaps open to question. Indeed, once the notion of "threat" is included, it is difficult to perceive any limitation on what was previously set forth. Even "encouraging" is a threat.

The tenth paragraph, which deals with territorial inviolability, represented the generalizing on a global scale of a norm which has long applied

<sup>18</sup> U.N. Doc. A/AC.125/L.24, par. 4(c) (1966).

in the Western Hemisphere under Article 17 of the Charter of the Organization of American States—and by implication in the United Nations Charter. The last sentence with its (a) and (b) parts was included in order to insure that questions of the validity of prior treaties would be determined in accordance with treaty law, to take account of the situations covered by Article 107 of the Charter, and to preserve the rôle of the Security Council in light of Chapter VII and Article 25. As can be well imagined, the Article 107 aspect of the question, although minor in the eyes of the overwhelming majority of the members of the Committee, was a matter of considerable sensitivity so far as some of the main participants in World War II were concerned.<sup>17</sup> The inclusion of the phrase “as legal” in the third sentence was important for those states which maintain that recognition is essentially a factual question and that a state may be obliged to deal with an existing situation (*e.g.*, recognizing marriages or property transfers as valid), even though it may have been brought about by illegal means.

The eleventh paragraph on pursuing negotiations relating to a treaty on general and complete disarmament is self-explanatory and consistent with the obligations of the Charter and the Non-Proliferation Treaty.

The twelfth paragraph is a statement of the positive duty of states to co-operate in the maintenance of international peace and security, as contained in the Preamble of the United Nations Charter and Articles 11 and 24. While the extreme generality of paragraph 12 is certainly regrettable, the text does serve to impart some notion of positive duty into the formulation. Consequently it forms a foundation for the future work of United Nations committees which are directly concerned with questions such as peacekeeping and the financial crises of the United Nations caused by the continued refusal of some states to accept the obligations of Article 17.<sup>18</sup>

<sup>17</sup> Since 1945 there has been a significant difference of opinion on the scope and meaning of this article, with the Soviet Union on the one hand arguing that everything relating to the postwar peace settlements is beyond the competence of the United Nations, including all situations arising from the War. The Western states took the view that Art. 107 served to provide for peace settlements, which involved transfers of territory and to prevent the “enemy state” from using the organs of the United Nations to contest any decisions or actions of the Allied Powers. See Goodrich, Hambro, Simms, *Charter of the United Nations*, 633–637 (1969). The different situations of Japan, which is a Member and therefore has no fears of a prospective wording on the matter but has domestic political concerns about a retrospective reading, and that of the Federal Republic of Germany, which is not a Member of the United Nations and which was indirectly threatened by Soviet comments at the time of the invasion of Czechoslovakia in 1968, complicated the work of the Committee. The competing pressures on this point caused the U.S. Representative to state at the 114th meeting of the Special Committee: “the Charter of the United Nations does not contain any provision that would limit the application of the first three sentences of the tenth paragraph . . . with respect to the Federal Republic of Germany.” U.N. Doc. A/AC.125/SR.114 (1966).

<sup>18</sup> Reference to the work of the Committee on the Definition of Aggression has been deliberately omitted because it seems unlikely that the legal lacunae, if any, will ever be filled by a definition drafted by that body. No text dealing exclusively with the



While the failure of this paragraph to go beyond noting the need to make the system more effective does not affect the theoretical strength of the text as a whole, its effect on concrete situations, such as a state which feels imperiled but receives no succor from the United Nations, could be such as to weaken severely all that has gone before. The general tenor of the Charter; Article 2, paragraph 4; the Preamble, pursuant to which states undertake "to ensure . . . that armed force shall not be used, save in the common interest"; the requirement of Article 2, paragraph 3, that states settle disputes by peaceful means; and the content of Chapters VI and VII of the Charter all support the conclusion that the Charter prohibits any initiative in the use of force. As Judge Jessup has put it,

Under the Charter alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.<sup>19</sup>

After all, it takes very little time to request a meeting of the Security Council and even less time for the Security Council to act. The problem is that the system has simply not worked that way. The existence of the veto is a defect which was built into the system at the beginning. This defect was overcome to some extent by the "Uniting for Peace" Resolution. But it must be assumed that the term "breach of the peace" includes acts of such bellicosity as would cause a reasonable government to fear that, if it did not strike first, its very existence would be threatened. Action falling short of a use of force across the border (or boundary) but causing a state (particularly a small state or a state threatened with nuclear destruction) to fear for its existence might include the massing of troops near the border, statements that the threatening state intended war, and acts of minor harassment falling just short of "armed attack." Given this interpretation of "breach of the peace," the "Uniting for Peace" Resolution would appear to meet the situation caused by an exercise of the veto.

What, then, should the threatened state do if the Security Council fails to act but not "because of lack of unanimity of the permanent members"

---

rights and duties of states with respect to the use of force will ever solve the dilemma. The system of collective security must be made to function more effectively, and a definition of aggression is unlikely to make the system a more workable one.

<sup>19</sup> A Modern Law of Nations 166 (1948). See also K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality," in *Manual of International Law* 745-746 (Sørensen ed., 1968); L. Henkin, "Force, Intervention and Neutrality in Contemporary International Law," 1963 *Proceedings, Am. Soc. Int. Law* 147-150. But see the statement by President Kennedy on Oct. 22, 1962, in connection with the Cuban missile crisis, 47 *Department of State Bulletin* 715 (1962). Sir Humphrey Waldo has expressed the view, "It is enough if there is a strong probability of armed attack—an imminent threat of armed attack." "The Regulation of the Use of Force by Individual States in International Law," 81 *Hague Academy, Recueil des Cours* 500 (1952). Along the same lines are the views of W. Friedmann, *The Changing Structure of International Law* 258-259 (1964), and D. W. Bowett, *Self-Defence in International Law* 191 (1958).

or if the Security Council or the majority of the Members of the United Nations do not convene an emergency special session?

The situation in the Middle East in the period preceding the June, 1967, hostilities suggests an answer. The crisis was brought before the Council on May 29, 1967, at the request of Canada and Denmark.<sup>20</sup> The records of the debate from May 29 until the outbreak of hostilities on June 5 are a study in frustration, futility, and fecklessness.<sup>21</sup> It is not relevant for the purposes of this paper to seek to apportion blame for this failure. The current problem is the lesson which small states that are threatened may be tempted to draw from it, *i.e.*, that a pre-emptive strike, however, debatable such an action may be legally, is the only way to ensure a small state's continued existence. The problems leading up to this dilemma are not primarily legal. The machinery exists on paper. Until there is the requisite political will to solve the problem of peacekeeping and until states are prepared to accept and to abide by much more far-reaching obligations of co-operation, there is little that can be done to solve the dilemma of a seriously threatened state. Nor can it be said with confidence that only small states may be faced with such questions of survival. Nuclear missiles have raised the same apprehensions in the eyes of large and powerful states. Perhaps the most that can be said is, in the words of Professor Brierly:

The truth is that self-preservation is not a legal right but an instinct, and no doubt when this instinct comes into conflict with legal duty either in a state or an individual, it often happens that the instinct prevails over the duty. It may sometimes even be morally right that it should do so. But we ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore they have a right to behave in that way. Strong temptation may affect our judgment of the moral blame which attaches to a breach of the law, but no self-respecting system can admit that it makes breaches of the law legal; and the credit of international law has more to gain by the candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them.<sup>22</sup>

One thing the law can do, and has done, is to make it clear that a state which moves first will reap no positive benefits from such a move. Paragraph ten of the text emphasizes this point by asserting that a state may not acquire territory in such a manner.

The final paragraph is a general formulation which avoids the existing disagreements among the Member states. The text thus accommodates those who support and those who oppose the residual peacekeeping rôle of the General Assembly in cases in which the Security Council is unable to act, those who regard regional organizations as able to authorize the use of force under certain circumstances and those who do not, those who

<sup>20</sup> Letter dated May 23, 1967, from the Permanent Representatives of Canada and Denmark addressed to the President of the Security Council, U.N. Doc. S/7902 (1967).

<sup>21</sup> U.N. Docs. S/PV.1343 to 1346 (1967).

<sup>22</sup> Brierly, *The Law of Nations* 318-319 (5th ed., 1955). The passage has unfortunately been deleted in the sixth edition (1963) by Sir Humphrey Waldock.

subscribe to the notion of an inherent right of self-defense against colonialism and those who do not, those who read Article 51 restrictively and place their emphasis on the phrase "if an armed attack occurs," and those who do not. It cannot be gainsaid that the generality of this paragraph diminishes the utility of the text as a whole, since it leaves unanswered so many important questions relating to the use of force. The gaps between governmental positions on the matters in question are, however, so great that it was not possible to contemplate general agreement on any detailed language.

In spite of this limitation on the completeness of the formulation, the writer believes that the individual paragraphs, while incapable of providing a complete system, provide vital guidelines in a number of key situations. Certainly this formulation, as well as others, must be understood in the manner described by Professor Arangio Ruiz (Italy), when he said "... any principle of general international law and/or any principle of Charter law not embodied in the declaration was not, as a consequence, any less a part of international law. More precisely, it was no less fundamental than the principles actually embodied in the declaration. . . ." <sup>23</sup> None differed with this view.

A final word is necessary concerning the term "force" itself. There existed throughout the history of the Committee's consideration of the question a difference of opinion between those members who regarded the term "force" in Article 2, paragraph 4, as limited to armed or physical force and those who argued that it included "all forms of pressure, including those of a political and economic character, which have the effect of threatening the territorial integrity or political independence of any state." <sup>24</sup> The limited view of the term "force" was advocated by the Western states, several Latin American states, and one or two others. The Western argument was based on the drafting history and textual analysis of the Charter. Some proponents of this view urged that under the Charter any breach of Article 2, paragraph 4, gave rise to a right of self-defense in accordance with Article 51 and that it could not be said that the Charter intended to give rise to such a right in response to non-physical acts such as economic pressure. The majority of African and Asian states, some Latin American states, and the Eastern bloc argued that the purpose of Article 2, paragraph 4, was, *inter alia*, to protect the political independence of states and that this could be just as readily imperiled by economic and political pressure as by armed force. They argued that, since the Charter must be interpreted in the same contemporary manner that John Marshall had urged as the governing principle for the interpretation of the U.S. Constitution, it was wrong to be bound by the *travaux préparatoires* of the 1940's. Ostensibly the text on "force" does not answer this point. It was tacitly agreed to "paper over" this difference by elevating the text to a sufficient level of abstraction to hide the difference; it is therefore possible to read many of the paragraphs on the principle as consistent with either view. The nature of the specific

<sup>23</sup> U.N. Doc. A/AC.125/SR.114 (1970).

<sup>24</sup> U.N. Doc. A/6320, p. 23 (1966).

acts included in the text and the fact that such matters as coercion by other means are dealt with elsewhere in the text provide support for the view that a restrictive interpretation of the scope of the term "force" is called for.<sup>25</sup> This, however, does not affect the fact that those who stressed the importance of the need to protect states against economic pressures of a certain magnitude accomplished their goals as well. Evidence of this is found in the Preamble and the text on the principle of non-intervention. Thus, due regard was shown for the law and for the meaning of Article 2, paragraph 4, and other means were found to take care of the legitimate needs voiced by certain states.

#### PEACEFUL SETTLEMENT OF DISPUTES

This principle is the other side of the coin of the obligation not to use force. The paragraphs essentially repeat some of the relevant articles of the Charter.<sup>26</sup>

The phrase in the penultimate paragraph, "recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality," represents the only positive achievement of the Committee in formulating this principle.<sup>27</sup> Presumably it will lay to rest once and for all the retrograde notion that a state derogates from its sovereignty when it agrees to submit future disputes to binding third-party adjudication. The weakness of the formulation of this principle lies more in its errors of omission than those of commission.<sup>28</sup> It is by far the least impressive achievement of the Committee.

The proposals on which agreement was not possible may perhaps be read as a primer of first steps to be taken to provide alternatives to a world ruled by force. They included:

Legal disputes should as a general rule be referred by the parties to the International Court of Justice. . . . General multilateral conventions . . . should contain a clause providing that disputes relating to the interpretation or application of the convention . . . may be referred on the application of any party to the International Court of Justice. . . . Every State should accept the compulsory jurisdiction of the International Court of Justice.

The debates on this matter were another depressing example of the rigid, anachronistic doctrines of state sovereignty still adhered to by the Soviet Union and the curious tendency of some of the new states to prefer nego-

<sup>25</sup> In addition to the self-serving statements by a number of states that they regarded the term in the restricted sense, there were statements by those who would have preferred the broader view but expressed regret that the text supported the restrictive view. See statement by the delegation of Nigeria U.N. Doc. A/AC/125/114 (1970).

<sup>26</sup> For an excellent discussion of the drafting history of the text on this principle, see Heuben, *loc. cit.*, note 1, above, at 710-716.

<sup>27</sup> The persistent efforts of Professor Riphagen account for this achievement.

<sup>28</sup> The formulation of this principle must be read in light of Professor Arangio Ruiz' statement referred to on p. 724 above.

tiation and to eschew third-party settlement as contrary to their interests or beyond their means.<sup>29</sup> In the opinion of the writer, the failure of the international community over the years to make progress in this area (as the text reflects) is the main reason why so many disputes are allowed to fester for so long as they are not an immediate threat to world peace. If there were a wider acceptance of peaceful modes of settlement, much anguish and suffering, not to mention danger, could be avoided.

#### NON-INTERVENTION

The development of the text on this principle from 1964 until final agreement can be viewed as a paradigm of one of the ways in which legal norms are conceived, incubated, and born in the United Nations. Political realities, legal theory, and individual traits of stubbornness, pride, and eventually courage and determination were involved.

The principle was included largely at the insistence of Eastern Europe and Latin America. At the initial meeting of the Special Committee in 1964, the United States, for one, took the position that the only principle of non-intervention found in the Charter was Article 2, paragraph 7, which related to intervention by the United Nations. The U.S. Representative argued:

. . . in the United States delegation's view Article 2(7) of the Charter applied only to intervention by the United Nations, and the intervention by one State in the affairs of another was illicit under the Charter only when it was accompanied by the threat or use of force. Article 2(7) was the only provision in the Charter which made express reference to non-intervention, and the scope of State intervention was defined only in Article 2(4).<sup>30</sup>

The United States received relatively little support for its position. In addition to sniping commentary on motives, it was argued that the United States had accepted extensive obligations of this general character in the Organization of American States years earlier and therefore should have no difficulty in accepting the notion in the broader United Nations context.

The United States Delegation in the Special Committee was not insensitive to its relative isolation on this point and to the propaganda advantage which others were seeking to derive from the situation. Other factors were also at work to cause the United States to reconsider. The Soviet Union, following its established practice of introducing one propaganda item a year, proposed the following year at the 20th General Assembly that the Assembly consider, as an important and urgent matter, "The Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty."<sup>31</sup> The new item was sent to the First (Political and Security) Committee rather than to the

<sup>29</sup> Those of the newer states which refused to support a more progressive text on this principle can be only partially excused on the ground that they are following the example of the major Powers. More can be expected than an adherence to the lowest common denominator.

<sup>30</sup> U.N. Doc. A/AC.119/SR.32 (1964).

<sup>31</sup> U.N. Doc. A/5997 (1965).

Sixth (Legal), which is a notoriously poor forum for propaganda because of its traditionally high professional standards. The statements made by the Soviet Union in connection with the item as well as the nature of the draft they tabled drew a comment from Ambassador Goldberg expressing disappointment that the Soviet Union had used the United Nations to reopen the Cold War. Ambassador Goldberg pointed out that the Soviet draft, *inter alia*, ignored the types of intervention which had become most prevalent since 1945; *i.e.*, indirect uses of force, such as the promotion and organization of armed bands, terrorism, and the fomenting of civil strife.<sup>32</sup> The United States tabled a counter-draft in the form of a series of amendments.<sup>33</sup> The states of Latin America, Africa, and Asia then produced compromise texts which, after extensive negotiations among all concerned, resulted in General Assembly Resolution 2131(XX). The paragraphs of Resolution 2131 covering indirect uses of force were drawn directly from the draft of the Friendly Relations Committee on the Prohibition of the Use of Force which had been prepared in 1964.<sup>34</sup> The final text that was adopted was sweeping in character, and the United States representative, in explaining its affirmative vote in the Committee, stated:

I shall not elaborate on the law of non-intervention and self-defense—for two reasons: First, as I have suggested, we view this Declaration as a statement of attitude and policy—as a political Declaration with a vital political message—not as a declaration or elaboration of the *law* governing non-intervention. Second, a Special Committee of this Assembly on the Principles of International Law concerning Friendly Relations and Cooperation among States has been given the precise job of enunciating that law. Thus we leave the precise definitions of the law to the lawyers, and our vote on this resolution is without prejudice to the position on the definition of the law we shall take in the Special Committee.<sup>35</sup>

At the following session of the Friendly Relations Committee, the United States joined with Australia, Canada, France, Italy, and the United Kingdom in tabling a draft statement of the principle of non-intervention.<sup>36</sup> The sponsors of this proposal stressed the close connection between the prohibition of the threat or use of force and the principle of non-intervention. Thus a step had been taken away from the limitation of the doctrine to Article 2, paragraph 7, strictly construed. A number of other delegates, however, criticized the formulation because it was limited to the prohibition of the threat or use of armed force. This criticism, plus the strong pressure to find some way of meeting the felt need not to limit the text on the use of force to *armed* force, contributed to an eventual Western

<sup>32</sup> U.N. Doc. A/PV.1406 (1965).

<sup>33</sup> U.N. Doc. A/C.1/L.343/Rev.1 (1965).

<sup>34</sup> See Working Paper I (U.N. Doc. A/5746, par. 106) of Mexico City. This paper had not been finally agreed to at the Friendly Relations Committee meeting because of the problems with the term "violate," discussed above. The text nevertheless formed the basis for the core of Res. 2131 and the text ultimately agreed upon by the Friendly Relations Committee. See U.N. General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 11; 60 A.J.I.L. 662 (1966).

<sup>35</sup> Statement by Ambassador Charles W. Yost, U.N. Doc. A/C.1/SR.1423.

<sup>36</sup> U.N. Doc. A/AC.125/L.13 (1966).

recognition that some way had to be found to cover economic and political pressures of sufficient magnitude to affect political independence.<sup>87</sup>

Unfortunately, the Special Committee chose this moment, when there was every reason for a spirit of co-operation to prevail, to commit its greatest blunder. A number of the delegates insisted that Resolution 2131(XX) was the perfect embodiment of the principle and had to be accepted verbatim by the Special Committee. The representatives of Chile and the United Arab Republic successfully urged the Committee to adopt the following resolution:

*The Special Committee,  
Bearing in mind:*

(a) That the General Assembly, by its resolution 1966 (XVIII) of 16 December 1963, established this Special Committee to study and report on the principles of international law enumerated in General Assembly resolution 1815 (XVII),

(b) That the General Assembly, by its resolution 2103 (XX) of 20 December 1965, definitively fixed the structure of this Committee, granting it, *inter alia*, authority to consider the principle of non-intervention, and

(c) That the General Assembly, by its resolution 2131 (XX) of 21 December 1965, adopted a Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty which, by virtue of the number of States which voted in its favour, the scope and profundity of its contents and, in particular, the absence of opposition, reflects a universal legal conviction which qualified it to be regarded as an authentic and definite principle of international law,

1. *Decides* that with regard to the principle of non-intervention the Special Committee will abide by General Assembly resolution 2131 (XX) of 21 December 1965; and

2. *Instructs* the Drafting Committee, without prejudice to the provisions of the preceding paragraph, to direct its work on the duty not to intervene in matters within the domestic jurisdiction of any State towards the consideration of additional proposals, with the aim of widening the area of agreement of General Assembly resolution 2131 (XX).

The vote was 22 in favor, 8 opposed, with 1 abstention. The irony of adopting a resolution speaking of "the universal legal conviction" by a divided vote did not go unnoticed by the minority who commented publicly on it. The United States and the other co-sponsors of the five-Power draft were of the view that they had made an effort to move forward which had been arrogantly rebuffed. Some of the supporters of Resolution 2131 (XX) ignored Ambassador Yost's statement and argued that the Western states had used them in the General Assembly to blunt the Soviet

<sup>87</sup> This shift over a period of years is evidence that those who say the General Assembly is frustrated because a particular Permanent Member is taking a negative position may be allowing pessimism to blind them to the fact that even giants move when they are brought to perceive it to be in their interest to do so. For another example, see the history of the Charter amendments increasing the size of the Security Council and the Economic and Social Council, and compare the initial Soviet statements with its eventual ratification.

offensive but were now seeking to back off. In short, there was little good will on any side. From 1966 until 1970 there were virtually no substantive exchanges on non-intervention except a sterile fight as to whether and to what extent the Committee was bound by the General Assembly resolution. The Latin American states refused to consider any changes in the text of Resolution 2131 (XX), the United States doggedly quoted Ambassador Yost, and the United Kingdom reminded all who would listen that it had never voted for Resolution 2131 (XX) in the first place.<sup>38</sup>

Indeed, the matter aroused so much bitterness that serious consideration was given to deleting the principle from the list. Public statements by delegations from North and South America hinted at this as being the only way out. Fortunately cooler heads prevailed in the long run, and, with the quiet help of one Latin American jurist who shuttled between the two camps, an accommodation was eventually reached. Individual stubbornness played a rôle in creating the controversy and individual energy and determination helped to bring about a solution.

The United States and the Western European states reduced the extent of the changes which they had at first sought in Resolution 2131 (XX), and the Latin Americans responded by accepting the remaining requests.

The final formulation of the principle parallels very closely the relevant articles of the Charter of the Organization of American States and thus represents another example of the generalizing of norms long accepted in the Western Hemisphere. The final text is sweeping in scope, and the acceptance of it by at least the Western Powers should be understood in the light of the particularly well-phrased remarks of the United Kingdom delegate, Mr. Sinclair, at the 114th meeting.<sup>39</sup>

#### DUTY TO CO-OPERATE

The text on this principle accurately reflects the obligation under the Charter to co-operate and contains no apparent ambiguities requiring detailed clarification. It is an anodyne statement which accords a commendable importance to universal respect for and observance of human rights. The main difficulties encountered in the drafting of this text turned

<sup>38</sup> In part this entire dispute reflected philosophical differences as to the nature and rôle of General Assembly resolutions and, for the Latin American states, a fear that if they agreed to reopen the questions answered by Res. 2131 (XX), they would be weakening the importance of the resolution, which had been voted for by such disparate states as Cuba, the Soviet Union, the United States, and Syria, to name a few. Indeed, only the principled abstention of the United Kingdom prevented the unanimous adoption of that resolution.

<sup>39</sup> "In considering the scope of 'intervention,' it should be recognized that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples.

"The United Kingdom delegation wished to state its understanding that the concept of intervention in the 'external affairs' of States was to be construed in the light of that commentary." U.N. Doc. A/AC.125/SR.114.



on an effort by the Eastern European delegations to include some mandatory language on non-discrimination. The complexity of such questions as the problems of the relationship of state trading economies to GATT and the rôle of trade preferences for developing countries made it impossible for the Committee to move beyond the general language of the lead paragraph.<sup>40</sup>

#### EQUAL RIGHTS AND SELF-DETERMINATION

The achievement of an agreed formulation of this highly complex principle was one of the most difficult tasks the Committee faced. Initially there was a split between those who accepted a right of self-determination of peoples and the duty of states to grant it, and those who argued that under international law only states could have rights or be the beneficiaries of rights. There were those who argued that the principle was universal in its application and those who sought to limit its application to colonial situations of the salt-water variety. Additional difficulties were created by the insistence of some representatives that a failure to grant immediate independence gives rise to the right of the people to use force in self-defense against colonialism and created a duty on the part of other states to provide all possible assistance. Some even asserted doctrines which would have made Article 2, paragraph 4, subject to a class warfare exception.<sup>41</sup> It was also argued that colonialism was illegal *per se* and that the only legitimate means of exercising the right of self-determination was the achievement of full independence. Yet another source of difficulty was the question of the rôle and relevance of General Assembly Resolution 1514 (XV). This resolution, entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples" is the most frequently cited resolution in the United Nations.<sup>42</sup> Most of the African and Asian nations regard it as a document only slightly less sacred than the Charter and as stating the law in relation to all colonial situations. Other states, particularly those in the West, do not hold the resolution in like esteem and are inclined to regard some of its paragraphs as considerably overstated, even as statements of political desiderata. In the final analysis, the African and Asian states showed considerable forbearance in not insisting on an express reference to this resolution. Had they done

<sup>40</sup> This is a part of the general problem of how to take into account the differences in economic organization between state-trading and free-market economies. More broadly, Professor Hazard, speaking of most-favored-nation clauses, stated the problem in the following terms:

"The clause cannot operate to encourage expansion of trade by opening markets on a non-discriminatory basis to low-cost producers because factors other than cost and tariffs influence the decisions of state-trading buyers. In short, the most-favored-nation clause has proved itself to be no longer a sufficient desideratum for private-enterprise states in their commercial tariff concessions by private-enterprise states." "Commercial Discrimination and International Law," 52 A.J.I.L. 495 (1958).

<sup>41</sup> See Houben, *op. cit.* note 1 above, at 724, particularly note 116, for a discussion of Communist ideology on this point.

<sup>42</sup> U.N. General Assembly, 15th Sess., Official Records, Supp. No. 16 (A/4684), p. 66.

so, agreement would have been impossible. In return, the Western states made a considerable effort to include in one form or another as much of the substance of that important resolution as they could. One view of the Committee's approach to the problem was expressed by Mr. Lee of Canada as follows:

It [Resolution 1514] was a politically motivated expression which had persuasive force in the Committee's drafting of the legal elements of the principle.<sup>43</sup>

The ability of the Committee to resolve these deep divisions demonstrated both international co-operation and the creativity of the legal mind. Indeed, many of the solutions found in the drafting of the Principles of Friendly Relations speak well of the technical skill of the participants. Frequently these skills served merely to find devices to paper over differences. Here they produced agreements of considerable significance.

As can be seen from the initial paragraph of the formulation on this principle, the Committee recognized that peoples have the right of self-determination, that it is a universal right of all peoples, and that every state has the duty to respect this right. This represents a significant step in the progressive development of international law when compared with the positions taken in 1964. Many states had never before accepted self-determination as a right. Now it is recognized, as the second paragraph asserts, that states have an affirmative duty to promote the realization of the right. Instead of affixing labels of legality or illegality to existing colonial situations, the Committee in paragraph 2 affirmed "a speedy end to colonialism, having due regard to the freely-expressed will of the people" as a goal rather than an immediate obligation. This phrase, particularly with its emphasis on the "will of the people," reflected a realistic appreciation of the fact that some existing colonies would not be viable as independent states and that some colonial people have expressed a preference not to seek full self-government (and in some cases to remain colonies) rather than to be cut adrift without support or placed in danger of annexation by other less enlightened states.

The Committee in paragraph 4 clearly recognized that full independence was not the only mode of implementing the right of self-determination and expressly mentioned such alternative possibilities as "free association or integration with an independent State or the emergence into any other political status freely determined by a people."<sup>44</sup> At the same time, the Committee, in paragraph 6, expressly prohibited an administering state from seeking to terminate its responsibilities under the Charter by incorporating a colony or non-self-governing territory into the metropole without the free consent of the people and then by claiming the matter to be

<sup>43</sup> U.N. Doc. A/AC.125/SR.114, p. 33 (1970). Indeed, this terse statement describes how the Committee approached several resolutions in various of the principles about which there was disagreement as to the legal effect of the resolution *per se*.

<sup>44</sup> The inclusion of the last phrase at the suggestion of Mr. Engo (Cameroon) was a useful addition to the impliedly open-ended list contained in the Annex to Resolution 1541 (XV).

outside the legitimate concern of the United Nations. This is the function of the phrase "such separate and distinct states shall exist until . . . ."

The Committee also came forthrightly to grips with the application of the principle to people within an existing independent state. To have failed to deal with this problem would have been to diminish the universality of the principle. The effort to deal with the situation, however, created difficulties for states possessing different and distinct peoples and for states with potential secessionist groups within their territory. The Committee faced these problems and produced a reasonably satisfactory statement. Although paragraph 7 is drafted in a somewhat remote manner in the form of a saving clause, a close examination of its text will reward the reader with an affirmation of the applicability of the principle to peoples within existing states and the necessity for governments to represent the governed. The fact that these aspects of the principle must be extracted by an *a contrario* reading of the paragraph should not be misunderstood to limit the sweep and liberality of the paragraph. Moreover, paragraph 7 must be read in light of the state's duty to promote respect for an observance of human rights and fundamental freedoms in accordance with paragraph 3. The difficulties in applying these texts to specific situations are great indeed. This is particularly true where the matter is, in the view of the affected state, an internal matter within the meaning of Article 2, paragraph 7. The difficulty in applying the standards of this text in a given situation (*e.g.*, the situation in Pakistan) should not be permitted to detract from the merit of the formulation or the extent to which governments should be induced to adhere to them. In the short run, expediency may incline a government toward silence. In the long run silence is inimical to a just and lasting peace.

The problems of the use of forcible measures to deny peoples the right to self-determination and of the rights and duties of third states in such situations were handled with particular adroitness by the Committee in paragraph 5. States administering non-self-governing territories were not barred from using force to maintain law and order or otherwise carrying out their responsibilities under Chapter XI. With regard to the obligations of administering Powers, the paragraph restricts itself to a simple corollary of the duty to respect the right of people to self-determination, namely, that any forcible action which deprives people of the right is a violation of the duty owed. The right of response to such acts by the people concerned and the duties of third states in such situations were left sufficiently vague to permit acceptance by those who believe third states have a duty to send arms and men and those who believe third states should supply only moral and political support. Arguments in support of the right of response to such illegal uses of force by an administering state may be couched in terms of an inherent right of rebellion or the recognition of "peoples" as sufficiently subjects of international law to possess an inherent right of self-defense or in terms of the rules relating to the consequences of a breach of a multilateral treaty.<sup>45</sup> The first argu-

<sup>45</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 60, U.N. Doc. A/CONF.39/27 (1969); 63 A.J.I.L. 875 (1969).

ment is essentially an extra-legal doctrine which provides little guidance about the rôle that may be performed by third states. The third is a doctrine which, if broadly applied, can be dangerously destabilizing and lead to a rapid unraveling of the entire system. The best solution would seem to lie in regarding a use of force to deny a people its right of self-determination as a delict giving rise to rights on the part of the people concerned. This requires that the delict be reasonably defined. This task has been adequately accomplished by paragraph 5, if read in the context of the text on this principle as a whole, particularly paragraphs 7 and 8. This reading rules out the citation of paragraph 5 to support the type of radical revolutionary activity which the Castro regime in Cuba sought to export to such places as Venezuela. The highly sophisticated United States proposal of 1966, which formed the basis of the Western position, dealt with this problem in an extremely complex manner through a series of presumptions, rebuttable through their implications *a contrario*. Paragraphs 7 and 8, which derive from the initial American proposal and General Assembly Resolution 1514 (XV), meet the problem in a slightly less complex way. Like the earlier American proposal, the merit of the text lies in the fact that, while not condoning the export of revolution, it does not limit the scope of application of the principle of self-determination. This pragmatic approach falls just short of acceptance of the notion of self-defense against colonialism, which the writer believes, with Dr. Skubiszewski,<sup>46</sup> to be "debatable."

In sum, while the text of the principle of equal rights and self-determination contains some tortured phraseology and while it may not be set out in the most logical order, a careful reading of it will show it to be a moderate and workable text.

#### THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES

Though very short and simple, the formulation of this principle constitutes an important affirmation of Article 2, paragraph 1, of the Charter.<sup>47</sup> In particular, it underlines in clear terms the inconsistency with the Charter of any notion of limited sovereignty—the view that a state within a particular political or social system is not free from invasion or occupation by the armed forces of other states or is limited in its freedom to develop its own political, social or economic system. Indeed, the freedom of a state "to choose and develop its political, social, economic and cultural

<sup>46</sup> In *Manual of Public International Law*, 771–772 (Sørensen ed., 1968); cf. Professor Stone's comments on the Manual, 63 A.J.I.L. 157, 162 (1969).

<sup>47</sup> The term "affirmation" of Art. 2(i) was deliberately used in this case as the agreed text adds little to what was agreed in San Francisco in 1945 when the Technical Committee gave the following list of elements included in the notion of "sovereign equality":

- "(1) the states are juridically equal;
- "(2) that each state enjoys the rights inherent in full sovereignty;
- "(3) that the personality of the state is respected, as well as its territorial integrity and political independence;
- "(4) that the state should, under international order, comply faithfully with its international duties and obligations." 6 UNCIO Docs. 457.

systems" was the one significant addition to the 1945 formulation. The behavior toward Chile of the United States and other states members of the Organization of American States in recent months is a suitable example of the level of conduct demanded by this principle. Events in Czechoslovakia in 1968 were a clear case of violation of a number of principles of the Charter, including that of the sovereign equality of states.

Various provisions which were suggested for inclusion in the text on this principle, but were rejected for one reason or another, included the idea that all states have the right to join international organizations, the principle that Members of the United Nations are equally obligated to share the burdens of membership,<sup>48</sup> the fact that the sovereignty of each state is subordinate to international law,<sup>49</sup> and the right of states freely to dispose of their national wealth and natural resources. Indeed, an acceptable compromise was very nearly worked out on the question of natural resources as the result of intensive negotiations among the Western countries and Cameroon and Kenya.<sup>50</sup> The U.S.S.R., for reasons not apparent at that time or later, blocked agreement on the ground that the compromise text was too restrictive of the right freely to dispose of natural resources.

In relating the formulation of this principle to the world today, it is advisable to recall the words of Mr. Reis (U.S.): "that a legal text was clear and correct merely took the matter a few steps forward. It was necessary to hope, however, that in time there would come to be a greater acceptance of the right of each State to live its own life; cynicism and despair seemed the only alternative to the hope."<sup>51</sup>

#### GOOD FAITH FULFILLMENT OF OBLIGATIONS

The text of the principle is a direct and uncomplicated statement. While it may be argued that the principle is self-evident, it is a useful stabilizing development to have it spelled out to this degree. The principle is derived from Article 2, paragraph 2, but clearly extended here to cover the entire structure of international relations. Paragraph 3 was initially a source of some difficulty, as certain states sought to write in a selective list of bases

<sup>48</sup> U.N. Doc. A/AC.125/25 (1970). A United States proposal related to the failure of the U.S.S.R. and its allies and France to accept the financial burdens of membership.

<sup>49</sup> A doctrine long accepted by international lawyers in the West and supported by such Afro-Asian countries as Cameroon, Kenya, Japan, Lebanon, and Nigeria. The highly restrictive Soviet doctrine of state sovereignty made it impossible for the Soviet Union or its allies to accept even this theoretical limitation on untrammelled freedom of action by states.

<sup>50</sup> The compromise text which came so close to obtaining agreement was proposed by Kenya and read: "Each State has the right to freely dispose of its natural wealth and natural resources. In the exercise of this right, due regard shall be paid to the applicable rules of international law and to the terms of agreements validly entered into." Although such a statement is logically more a corollary of the principle than an element, it is unfortunate that this phrase, expressing the essence of Res. 1803 (XVII), the most authoritative General Assembly pronouncement on the matter, did not find its way into the declaration in some form or other.

<sup>51</sup> U.N. Doc. A/AC.125/SR.114 (1970).

for the invalidity of treaties.<sup>52</sup> They abandoned this effort eventually and relied instead on the Vienna Convention on the Law of Treaties and the current work of the International Law Commission on state succession with respect to treaties, to cover the subject.

#### CONCLUSION

The text of the Declaration on Friendly Relations is incomplete if viewed as a blueprint for world order. Too many issues are not covered; too many of those that are covered are dealt with in a vague manner. Moreover, there is room for debate as to the nature of the binding force of the Declaration among states. Finally, the text is largely oriented toward the preservation and protection of state sovereignty rather than the development of new norms and new mechanisms more suited to the increasingly interdependent world of today and of the future. It speaks of international co-operation but fails to deal meaningfully with such matters as increasing the mechanisms of the United Nations for peacekeeping and the peaceful settlement of disputes. One must hope that the efforts of the Peacekeeping Committee, future work on the Development Decade, and the current General Assembly item on the International Court of Justice will help to remedy these faults.

In spite of these *caveats*, the text represents a very substantial contribution to clarification of the key concepts of international law involved—so much so that a significant number of states pointed to the provisions in the course of recent debate in the United Nations as an example of the type of evolution which at this stage better served the needs of the international community than a formal Charter review. Once comparable progress is made on such matters as peacekeeping, dispute settlement, and economic development, the Friendly Relations Declaration will form an indispensable part of a very important whole.

One further benefit of the undertaking was the education of decision-makers. The enlightened perceptions of decision-makers who have been properly brought to see the issues have been regarded by some contemporary commentators as the best hope for an ordered, peaceful world. Certainly they are a necessary if not sufficient element of such a world. At least three current Foreign Ministers have participated directly to one degree or another in the give and take of the exercise—one from North America, one from Europe, and one from Latin America. In addition, the Legal Advisers to the Foreign Offices of a number of countries from all corners of the world have participated. It is inconceivable that their perceptions of the issues involved have not been clarified and sharpened.

<sup>52</sup> The arguments that were made dealt primarily with unequal treaties, particularly in their relationship to state succession.

## THE GROUNDS OF INVALIDITY AND TERMINATION OF TREATIES

*By S. E. Nahlik \**

### I

Many interesting articles have already been published on the preparatory work for the United Nations Conference on the Law of Treaties, on the Conference itself, and, of course, on the Convention signed at Vienna on May 23, 1969. The AMERICAN JOURNAL OF INTERNATIONAL LAW has printed a number of them, among the most important being the excellent study by Ambassador Richard D. Kearney and Mr. Robert E. Dalton.<sup>1</sup> The authors rightly referred to the Vienna Convention as the "Treaty on Treaties," its object being to codify all, or nearly all, legal problems that may arise in connection with treaties, and the very definition of a "treaty," as introduced by the convention, being much broader in scope than the traditional meaning of this term.

Indeed, when using the term "treaty" or its equivalent in practically every language, one had hitherto been inclined to think of an instrument both pertaining to a problem or group of problems of considerable importance and drawn up in a traditionally elaborate form. That is certainly why, when introducing for its member states the duty of registration, the League of Nations Covenant spoke of every "treaty or other international engagement,"<sup>2</sup> while the United Nations Charter mentioned in an analogous context "every treaty and every international agreement."<sup>3</sup> Both these provisions would seem tautological in the light of the Vienna Convention, according to which "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."<sup>4</sup> Fortunately, an additional paragraph explains that no provisions regarding the use of terms in the convention are to have any bearing on the meaning these same terms may have in the internal law of any state.<sup>5</sup> Otherwise, many states could be embarrassed or indeed have considerable difficulties, particularly when submitting the Vienna Convention to their competent organs prior to ratification, if the practice of such states had been to distinguish between "treaties" and "executive agreements" or "treaties" and "agreements in simplified form."

\* Professor of International Law, University of Cracow.

<sup>1</sup> 64 A.J.I.L. 495 ff. (1970).

<sup>2</sup> Art. 18 of the Covenant.

<sup>3</sup> Art. 102 of the Charter.

<sup>4</sup> Art. 2, par. 1, subpar. (a) of the Vienna Convention on the Law of Treaties, signed May 23, 1969. U.N. Doc. A/CONF.39/27 (all quotations of articles of the convention herein are taken from this document); reprinted in 63 A.J.I.L. 875 (1969).

<sup>5</sup> Art. 2, par. 2, of the Vienna Convention.

As it is, "treaties," in the meaning which was given to this term by the Vienna Convention, permeate all fields of international law and international relations on every level. They are both the source of rules of international law and of individual engagements of an ever increasing importance; they are the most generally employed means of peaceful co-operation between states.

No wonder, then, that the law of treaties as codified in the Vienna Convention, whatever may be its future fate as a formal instrument which must be either ratified or acceded to, will certainly engender many studies relating either to the convention as a whole or to some of its many aspects.

Among the important topics which before, at and after the Vienna Conference gave rise to much discussion and numerous controversies is the "Invalidity, Termination and Suspension of the Operation of Treaties" under Part V of the convention. Its very dimensions give it pre-eminence over other parts of the convention. Although only one among seven parts of the draft convention submitted to the General Assembly by the International Law Commission,<sup>6</sup> the number of articles it contained was exactly 40 percent of the total amount of all articles, thirty<sup>7</sup> out of seventy-five. This fact alone caused some anxiety: so many articles to restrict the binding force of treaties by making it possible either to impeach their validity, or to terminate them, or, at the very least, to suspend their operation? Besides, are there not in those articles provisions proclaimed as pertaining to the "progressive development of international law," which bring into international law some essentially new elements? And if such be the case, is not the very stability of treaty relations seriously jeopardized? Is it not then highly advisable, or even necessary, to accept some or all of the material provisions of Part V of the convention only if, at the same time, new procedural obligations are introduced which would make it compulsory for all states parties to the convention to have recourse to that procedure whenever a dispute arises as to a ground of invalidity or termination of a treaty?

Questions of this kind were raised many times whenever the subject matter of Part V of the convention, especially of its most important articles, was discussed.<sup>8</sup> In order to provide a general answer to these questions, it seems necessary to concentrate upon two issues: (1) Are there truly so many, even too many, grounds of invalidity, termination, or suspension of the operation of treaties? (2) Is there much, among those grounds, that should be regarded as essentially new?

<sup>6</sup> In the Report of the International Law Commission (further referred to as "I.L.C.") on Its Eighteenth Session, May 4-July 19, 1966, U.N. Doc. A/6309/Rev.1, Ch. II.

<sup>7</sup> They are Arts. 39-68. In the final text of the convention, as signed on May 23, 1969, Part V consists of thirty-one articles (42-72), i.e. it contains 36.47 percent of the total of eighty-five articles of the convention.

<sup>8</sup> See, especially, U.N. Conference on the Law of Treaties, First Session, Vienna March 26-May 24, 1968, Official Records, 39th-83rd meetings of the Committee of the Whole; also Second Session, Vienna April 9-May 22, 1969, Official Records, 16th-23rd plenary meetings, *passim*.



## II

Objections against the allegedly excessive *number* of provisions dealing with the various manners in which the binding force of treaties may be impeached seem to be partly based on a kind of "optical illusion." Part V of the draft convention, although indeed the most voluminous, was subdivided into five sections. Of these, three (Sections 1, 4 and 5) contained only general provisions. There were four articles in Section 1 of an introductory character, three articles in Section 4 dealing with procedures for settling disputes and, finally, four articles in Section 5 explaining the consequences of the invalidity, termination, or suspension of the operation of treaties. If all these general provisions are put aside, there remain but nineteen articles, instead of thirty, to deal with various ways in which the binding force of treaties can be in any way limited.

My remarks will thus be confined to these nineteen articles alone. It must be stressed, furthermore, that the grounds dealt with in them belong to two not only distinct, but also, from the legal point of view, entirely different categories having little in common. If anything in the distribution of the subject matter of the draft convention under various headings appears arbitrary and even to some extent controversial, it is certainly this very linking in one part of the draft convention of two such essentially different legal concepts as invalidity, on the one hand, and termination and suspension, on the other. Termination (and, to a lesser degree, suspension as being instrumental in producing only transitory effects) limits, as from a given moment, the effects of treaties which had hitherto been perfectly binding and whose initial legal force, even though now put to an end or temporarily suspended, cannot be doubted. The claim of invalidity, on the other hand, undermines the very legal roots of a treaty. It compels attention to the moment of the conclusion of the treaty, for, at that very moment, something already must have existed which stood in the way of the validity of the treaty. Termination (and suspension) on the one hand, invalidity on the other, thus belong to two entirely different realms. And it is their linking alone which inflated the bulk of Part V of the draft convention and led to the kind of "optical illusion" to which reference has been made.

Sir Humphrey Waldock, Special Rapporteur of the International Law Commission for the law of treaties, chose to speak about *invalidity* only, with hardly anything stated about *validity* of treaties. Consequently, the very conditions of such validity had *a contrario* to be deduced from an analysis of the grounds of the invalidity of treaties. Sir Humphrey's method can perhaps be referred to as a *negative* approach. But one could well conceive of a method of an exactly opposite character, where the whole stress would have been put on the *positive* approach to the problem. If drawn up from that perspective, the draft convention would have elaborated in great detail what were the conditions of a *valid* treaty and would subsequently have stated, perhaps in a single provision, that "treaties which do not fulfill the above-mentioned conditions are void." The adoption of any such method would have reduced the number of provisions

dealing with the grounds of *invalidity* of treaties to one brief article instead of the actual eight. I do not intend to suggest that the method employed when drafting what eventually became the Vienna Convention on the Law of Treaties was essentially wrong. The choice of the opposite method would have made it necessary, when impeaching the validity of a treaty in particular cases, to recur, perhaps to excess, to an *a contrario* reasoning. By that means, however, it *would* have been possible to avoid the "optical illusion"<sup>9</sup> which gave rise to so much discussion on how many provisions of the Vienna Convention would be likely to endanger the stability of treaty relations between states.

One further thing must be said about the draft on treaties submitted by the International Law Commission to the United Nations General Assembly in 1966: it is concise. It avoids anything that could be regarded as merely descriptive or as presenting in too much detail various possibilities among which the parties to a treaty would ultimately have a free choice. It emphasizes, instead, problems of some essential legal importance where any omission would lead to uncertainty.

That is also why the negative aspects of the binding force of treaties had to be drawn up in a possibly exhaustive way, with such precision as the codificatory character of the convention allowed. The positive aspects, in the concise style adopted by the International Law Commission on the basis of the draft articles prepared by Sir Humphrey Waldock, were summed up in only one article. Its heading significantly reminded the prospective parties to the convention of the ancient principle *Pacta sunt servanda*.<sup>10</sup> This brief provision, summarizing in one brief sentence the whole section of the convention dedicated to the *Observance of Treaties*,<sup>11</sup> thus became the very spine of the whole convention. The counterpart of this principle in Part V was to become its introductory article, according to which

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached *only* through the application of the present Convention.

And, further,

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place *only* as a result of the application of the treaty [itself] or of the present Convention. The same rule applies to suspension of the operation of a treaty.<sup>12</sup> (Emphasis supplied.)

The formulation of this article is equivalent to a presumption in favor of the validity and binding force of treaties. A treaty, *any* treaty, is pre-

<sup>9</sup> This was partly achieved by the former Special Rapporteur of the I.L.C. on the same subject, Sir Gerald Fitzmaurice; see his reports in the 1957 I.L.C. Yearbook (II) 18 ff., as well as 1958 *ibid.* (II) 20 ff. The very titles of the respective parts of his draft code are: "Temporary *validity* of treaties" and "Essential *validity* of treaties."

<sup>10</sup> Art. 26 of the Vienna Convention (Art. 23 of the I.L.C. draft).

<sup>11</sup> Another article belonging to this section (27) was only added during the Vienna Conference itself.

<sup>12</sup> Art. 42 of the convention (Art. 39 of the I.L.C. draft).

sumed to be valid and in force *unless* one of the grounds listed in the convention has occurred. Each of these grounds is thus an exception to the general rule and, as such, can neither be presumed nor be subject to any extensive interpretation. Each must draw its authority from some particular provision of the convention. Far from endangering the stability of treaty relations, this system is meant to serve the purpose of solidifying them, as it does not allow any ground for either invalidating, terminating, or even merely suspending the operation of a treaty to be in any way presumed or sought for anywhere else but in the convention itself. It is thus not only reasonable, but absolutely necessary for this very part of the convention to be as full of detail as possible. If we bear this in mind, the nineteen articles, out of which eight deal with various grounds of invalidity, nine with those of termination (in a few cases, also of suspension), and two with those of suspension only, can hardly be regarded as excessive.

### III

The grounds of invalidity of treaties dealt with in Section 2 of Part V of the convention, can be subdivided into three distinct categories.

1. The first category comprises two articles only. They cover situations in which the representative of a state, when expressing consent to be bound by a treaty on its behalf, either violated its internal law or exceeded his powers.

As a matter of principle, the very right to impeach the validity of a treaty by invoking one of these two grounds can seem somewhat doubtful. The other party could reply to the claimant, not without reason, that the action of a state's representative in any situation of this kind is of purely domestic concern and should not concern a foreign state, which is perfectly entitled to identify the action of the representative with the will of his state, provided his official position or the appropriate powers produced by him entitle the treaty partner to consider him in good faith as speaking for his state. However, in view of a number of historical examples, the International Law Commission, moved by political realism, felt that some margin should be reserved for particularly drastic cases falling in one of these two categories. It must be stressed, on the other hand, that the Commission was extremely cautious in formulating these provisions. The very possibility of having recourse to either ground of invalidity has been formulated as an exception to a general rule which, in the wording of both these articles, is directed against such a possibility.

In particular, three conditions must be fulfilled if a state is to be allowed to impeach the validity of a treaty because of the violation of a provision of its internal law by its representative: (a) the provision concerned must be one "regarding competence to conclude treaties"; (b) it must also be one "of fundamental importance"; whereas (c) the violation itself must be "manifest."<sup>13</sup> If all these three conditions are taken into account, it clearly appears that the violation of only one or two among the most im-

<sup>13</sup> Art. 46 of the convention (Art. 43 of the I.L.C. draft).

portant provisions of the constitution of the state can be invoked as the basis of such impeachment. No internal provision below the level of a constitutional law, regulating in detail either the competence of the state organs or the manner in which such competence is to be exercised, could claim to be "of fundamental importance." And any infringement of it must obviously be "manifest," not from the point of view of the state impeaching the validity of a treaty on this account, but from that of its partner.

The provision dealing with the possibility of invoking, as a ground of invalidity, the violation of his powers by the representative has been worded in a still more cautious way. The convention restricts this possibility to cases in which the restriction of the representative's powers had been previously notified to its partner.<sup>14</sup>

In view of the restrictions to which a claim of invalidity of a treaty on account of either its non-conformity with a rule of internal law or of its having been concluded by a representative who exceeded his powers has been made subject, it can certainly be said that practical cases in which either of the two articles concerned could be invoked will be extremely rare.

2. The field of application of some, at least, of the grounds belonging to the second category would seem considerably broader. The articles in question are five in number. The lack of proper consent on the part of one of the states concerned to be bound by a treaty is here the common denominator. The origin of this whole group of grounds is deeply rooted in the general principles of civil law. *Error, dolus, vis* can all be found in Roman law. They were introduced into the theory of the law of nations by those publicists who, like Gentili or Grotius, were brought up in the Roman law tradition.

The Special Rapporteur of the International Law Commission proved convincingly enough<sup>15</sup> that cases wherein the grounds of invalidity in their classical scope, could be invoked were little known in international practice; even if they had ever occurred, the lack of proper consent had never attained such a degree that it could be considered to invalidate the state's consent to be bound by a treaty. After an extensive study of both practice and doctrine, Sir Humphrey Waldock stated that error had been invoked in international treaty relations only a few times, that it had always been an error of the same kind (relating to cartography), and that in none of these extremely rare cases had it been found to constitute a sufficient ground for invalidating the state's consent to be bound by a treaty. Fraudulent conduct of its partner, according to Sir Humphrey, was invoked by a state in the preliminary stages of one dispute, without having been taken into account in the later stages of this matter. Finally, as far at any rate as modern history is concerned, practically all instances—even those found in textbooks—in which a direct threat or force had been exercised against the person of a representative at the very time when

<sup>14</sup> Art. 47 of the convention (Art. 44 of the I.L.C. draft).

<sup>15</sup> Sir Humphrey Waldock's Second Report on the Law of Treaties, 1963 I.L.C. Yearbook (II) 36 ff.

he expressed his state's consent to be bound by a treaty, seem to rest, to a greater or lesser extent, on a somewhat doubtful factual basis. Perhaps something of this kind could have happened in connection with the famous decisions taken in 1933, under Hitler's pressure, by President Hacha of Czechoslovakia, and Chancellor Schuschnigg of Austria. But even in those cases, it would seem that these politicians complied with Hitler's wishes because of their concern for the fate of their respective countries rather than out of fear for their own personal safety.

Although in the course of the Vienna Conference doubts were raised by a few delegates as to the practical necessity of listing in the convention all the causes of invalidity belonging to this category, the opposite opinion prevailed, that all these three classical grounds for invoking the invalidity of any legal act must be retained in the convention for two reasons: They serve as a kind of safety-valve for the case, however rare and unlikely, when any of them might appear. And, as seems perhaps even more important, their inclusion would negate any implication that the list of possible grounds of invalidity of treaties, as contained in the convention, is not exhaustive and that further such grounds can be sought for outside the convention: for example, among the "general principles of law recognized by civilized nations."<sup>16</sup> Once any such supposition were to be made, the door would be open to conjectures about other possibilities of this kind, perhaps far more dangerous to the stability of treaties than any of those listed in the convention.

For these reasons, three grounds for invoking the invalidity of a treaty, the origin of which can be traced to the Roman law tradition, found their place in the Vienna Convention.

The first among them is error<sup>17</sup> relating "to a fact or situation which was assumed by that State [*sc.*, state seeking to invalidate the treaty] to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty." Two important restrictions have been put on the right to invoke the invalidity of a treaty on this count. No state can claim a treaty to be invalid if either its own conduct or its negligence contributed to the creation of the error. An error relating to the mere wording of a treaty provision can never constitute a sufficient ground for invoking the invalidity of a treaty. It is to be corrected, as the case may be, either by the states concerned themselves or with the help of the depositary.<sup>18</sup>

Fraud,<sup>19</sup> or rather "the fraudulent conduct of another negotiating State," if such conduct "induced" the state invoking it to conclude the treaty, is a second ground of invalidity of a treaty belonging to the same group, while the third is the "coercion" of the representative of a state<sup>20</sup> to ex-

<sup>16</sup> In the meaning of Art. 38, par. 1, subpar. (c) of the Statute of the International Court of Justice.

<sup>17</sup> Art. 48 of the convention (Art. 45 of the I.L.C. draft).

<sup>18</sup> Art. 79 of the convention (Art. 74 of the I.L.C. draft).

<sup>19</sup> Art. 49 of the convention (Art. 46 of the I.L.C. draft).

<sup>20</sup> Art. 51 of the convention (Art. 48 of the I.L.C. draft).

press its consent to be bound by a treaty "through acts or threats directed [*sc.*, personally] against him."

Such are the three grounds for invalidating a treaty (or indeed any act in any system of law) which belong to a legal tradition of long standing. Two other such grounds can be regarded, to a certain extent, as *comparatively* new.

The first of them concerns corruption. A state may claim its consent to be bound by a treaty to be invalid if the expression of such consent "has been procured through the corruption of its representative directly or indirectly by another negotiating State."<sup>21</sup> This provision, which is not to be found in the original report of Sir Humphrey Waldock, owes its origin to a motion by those members of the International Law Commission who came from some of the newly created "Third World" countries. A few other members of the Commission dissented, fearing that the very notion of "corruption" might under certain circumstances be interpreted in a far too extensive manner. They were also of the opinion that the definition of "fraud," as already established in Sir Humphrey's report, would sufficiently cover a case of corruption. The sponsors of the amendment insisted, however, that a special provision to this effect would be particularly important for the developing countries, often exposed to temptations of this kind in their relations with economically stronger partners. That is why, they argued, it was advisable to mention this case in a separate provision rather than to leave it to be inferred from the general notion of "fraud." The majority of the Commission accepted this reasoning, and the new article was inserted into the draft, to find its way into the final text of the convention. The very use of the strong term "corruption" was meant to imply that only acts of a substantial gravity would be covered by this provision.<sup>22</sup>

The last article belonging to this group is by far the most important: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."<sup>23</sup> Some have tried to present this article as introducing an essentially new rule. However, it is "new" only to the extent that it differs from the so-called "classical" or "traditional" doctrine of international law, in the light of which the use of force in relations between states was perfectly normal and was not subject to any legal objection. This state of affairs, always rather dubious if judged from the moral point of view, became contrary to law by reason of the declaration in the Charter of the United Nations, as one of the fundamental principles which are to guide its Member States, that all Members shall

<sup>21</sup> Art. 50 of the convention (Art. 47 of the I.L.C. draft).

<sup>22</sup> The discussion which had taken place in the I.L.C. was summarized in its report on the 18th Session (1966), Ch. II, commentary to Art. 47. For the discussion at the Vienna Conference, see U.N. Conference on the Law of Treaties, Official Records, 45th-47th and 70th meetings of the Committee of the Whole, and 18th plenary meeting.

<sup>23</sup> Art. 52 of the convention (Art. 49 of the I.L.C. draft). This article was discussed at the 48th-51st and 57th meetings of the Committee of the Whole, and at the 19th plenary meeting.

forthwith "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."<sup>24</sup> [Emphasis supplied.] "International relations" comprise, of course, treaty relations as well, while "any other manner" necessarily covers the conclusion of treaties. It logically follows that, even if treaties concluded under coercion were legally binding in the eyes of past generations, they can no longer be considered as valid since almost all states of the world, with but a few exceptions, have joined the United Nations. The obligation under the Charter to refrain from any threat or use of force is worded in a way which covers *all* international relations of the Member States, with whomsoever such relations may arise, not merely their *inter se* relations with other Members. As far as treaties are concerned, the International Law Commission and then the Vienna Conference thus did nothing more than restate, in respect to treaties, a general principle by which all Member States of the United Nations were already bound under the Charter.

In the course of the Vienna Conference, a considerable number of states, particularly those from the so-called "Third World," desired to go one step further by stating expressly that the provision should cover coercion in all its forms, political and economic pressure included.<sup>25</sup> Some other countries, in particular those of the Western group, strongly objected to a formulation of this kind and went as far as to express their doubts that their respective governments would be able to accept the whole convention should the provision in question be so formulated. A compromise was reached: recourse to political or economic pressure was solemnly condemned in a formal declaration, included in the Final Act of the Conference,<sup>26</sup> while the article of the convention in question was limited to such cases as would fall under the prohibitions already found in the Charter of the United Nations.

3. A third, and final, category of possible causes of invalidity of treaties consists of one article only.<sup>27</sup> According to it, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The norm in question is further explained to be "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" and which can be modified only by another norm of the same character. This provision, contained in Sir Humphrey Waldock's original draft, aroused a particularly lively discussion. Some of the delegates saw in it elements which were not only entirely new, but also contrary to the essential char-

<sup>24</sup> Art. 2, par. 4 of the U.N. Charter.

<sup>25</sup> See amendment by nineteen states, U.N. Doc. A/CONF.39/C.1/L.67/Rev.1/Corr.1.

<sup>26</sup> Declaration on the prohibition of military, political and economic coercion in the conclusion of treaties, annexed to the Final Act of the Vienna Conference on the Law of Treaties. U.N. Doc. A/CONF.39/26.

<sup>27</sup> Art. 53 of the convention (Art. 50 of the I.L.C. draft). For discussion, see 52nd-57th meetings of the Committee of the Whole, and 19th-20th plenary meetings.

acter of international law, which purportedly left to negotiating states an unlimited freedom of contract. But this seems to be a misunderstanding. Some hierarchy of norms<sup>28</sup> is necessary in every legal system, including that of international law. The very concept of the Divine and then of the natural law was in fact meant to introduce a hierarchy of this kind, and it was only abandoned under the 19th-century positivist approach to the sources of international law. However, even then treaties were considered to be void if contrary to morals or equity, the principles of which were sometimes tantamount to the principles of natural law.

The International Law Commission's draft took a strictly legal position. There was not a word in it of either morals or equity, and no link was sought with the doctrine of natural law. But precisely *because* the Commission's draft was intended to be deeply rooted in the already existing positive law, it could not neglect the fact that, in contemporary international law, all rules of that law can no longer be placed on exactly the same level. The freedom of states in concluding treaties had *already* been restricted by the progressive development of international law. One can hardly imagine that any state or group of states, even in their *inter se* relations, would today be able legally to sanction acts of genocide or piracy, or abrogate the principle of the freedom of the high seas, or contract out of observing any of the principles of the United Nations Charter. This last statement is based not merely on the very character of these principles, which must be observed by states in all aspects of their international relations, but also on an express provision of the Charter<sup>29</sup> which requires that, in any case of conflict between an obligation resulting from the Charter and an obligation resulting from any other source, priority be given to the former. Although cautiously worded, this provision clearly establishes for all Members of the United Nations a definite hierarchy of norms which they are bound to observe.

Even though it may appear new to supporters of traditional doctrines, the provision of the Vienna Convention declaring void treaties which are contrary to a norm of international *jus cogens* is not an invention of either the International Law Commission or the Vienna Conference. It reflects a state of affairs which was slowly coming into being at a much earlier date and which, with the entry into force of the United Nations Charter, is no longer subject to any doubt.

The question of which particular rules of international law constitute norms of *jus cogens* is an entirely different matter. The content of international *jus cogens* is necessarily changeable, like the content of any group of rules either in international or in domestic law. That is precisely why, in a work of a codificatory character, an enumeration of such norms would have been entirely out of place.

<sup>28</sup> See, in relation to this problem, Conference on International Law, Lagonissi (Greece), April 3-8, 1966, Papers and Proceedings; The Concept of Jus Cogens in International Law (Carnegie Endowment for International Peace, Geneva, 1967) (for this writer's views, see pp. 97-98 and 109-110).

<sup>29</sup> Art. 103 of the U.N. Charter.



The causes of the invalidity of treaties as listed above are thus of two distinct kinds. Some of them, namely, non-observance of either certain rules of constitutional law of the state represented or of such powers as were given to the representative by his state and the limits of which had been made known to his partner, as well as error, fraud, and corruption, entitle a state to impeach the validity of its consent. The state may avail itself of this right or not, as it pleases. However, it loses such right<sup>30</sup> if it either expressly or impliedly agrees to consider the treaty as valid after it has become aware of the reason for challenging its validity. On the other hand, no affirmance of the treaty character is admissible in the case of a treaty which has been concluded under coercion, whether directed against the person of a state's representative or against such state itself. The same rule also applies to treaties the contents of which are in conflict with a norm of *jus cogens*. These three grounds make a treaty void *ab initio* and can be referred to as grounds of *absolute* invalidity, whereas all other grounds reflect a *relative* invalidity, which cannot be taken into account without the express initiative of the state concerned.

#### IV

Both the quantity and quality of the causes of termination of treaties, as well as the judgment whether and to what extent any of them can be considered as "new" presuppose some kind of classification of these causes. From a strictly logical point of view, each of them must fall under one of the following four headings: (1) objective circumstances specified in the treaty itself; (2) objective circumstances for which there is no provision in the treaty; (3) concordant action of the parties; (4) action of one party only.

All causes belonging to the first and the third category have one thing in common: far from limiting the principle *Pacta sunt servanda*, they support and reaffirm it.

In the first case, of which the convention makes only brief mention<sup>31</sup> but which comprises various alternatives (such as expiration of the time for which a treaty has been concluded or fulfillment of a dissolutive condition), the termination of a treaty is something to which the parties had agreed in advance by including in the text of the treaty a specific clause to this effect.

As to the third category, the concern of the convention was again to respect the concordant will of the parties to a treaty, even though it had not been expressed in the text of the treaty itself. This concordant sovereign will must be capable of putting an end to a treaty in the same way in which it had previously called the treaty into existence. The parties may manifest their will either expressly,<sup>32</sup> or impliedly by concluding another treaty on the same subject which differs from the old one to such an extent that the simultaneous performance of both treaties would be im-

<sup>30</sup> See, in this respect, Art. 45 of the Vienna Convention (Art. 42 of the I.L.C. draft).

<sup>31</sup> Art. 54, subpar. (a) of the convention (Art. 51 of the I.L.C. draft).

<sup>32</sup> Art. 54, subpar. (b) of the convention.

possible.<sup>33</sup> The latter possibility has been formulated in the convention in an extremely cautious way so as not to make too easy the presumption of the termination of a treaty on this account. Besides, in another part of the convention,<sup>34</sup> a somewhat complicated system has been provided for solving the problem of how to apply treaties similar in subject matter if the treaties were concluded at various times. It is necessary in such cases to inquire not merely into the identity of the subject matter of such treaties, but also into the identity of the parties. The latter question naturally arises only in connection with multilateral treaties.

The convention provides for three possible objective circumstances which, although not mentioned by the parties in the treaty itself, may be invoked as grounds for its termination.

One of these circumstances is a corollary of the *jus cogens* clause already listed among the grounds of the invalidity of treaties. If a pre-existing "peremptory norm of general international law" with which a treaty is in conflict causes it to be void *ab initio*, in similar fashion a treaty must be considered as terminated if a norm of this kind emerges after the treaty has already entered into force.<sup>35</sup> The inclusion of the *jus cogens* rule in the section dealing with the invalidity of treaties having already been much debated, a similar clause did not give rise to much further discussion<sup>36</sup> when it emerged again in connection with the termination of treaties; there was an obvious logical link between the two provisions.

There can hardly be any objection to the inclusion of "supervening impossibility of performance" among the causes of the termination of treaties.<sup>37</sup> Originating, like error or fraud invalidating a treaty, from a concept of ancient standing in the civil law, it has always been considered to be a principle admitted by the general law of nations. The Vienna Convention considers impossibility of performance to be a sufficient ground for terminating a treaty only if it results from the "permanent disappearance or destruction of an object indispensable for the execution of the treaty." The impossibility of performance cannot, however, be invoked by a party that was itself instrumental in causing it by a breach of its own international obligations.

<sup>33</sup> Art. 59, par. 1 of the convention (Art. 56 of the I.L.C. draft).

<sup>34</sup> Part III, Sec. 2 (Application of Treaties), Art. 30 of the Vienna Convention (Art. 26 of the I.L.C. draft).

<sup>35</sup> Art. 64 of the convention (Art. 61 of the I.L.C. draft); to emphasize its point, this provision declares that the treaty concerned "becomes void and terminates." But the legal consequences are those of the "termination" only, especially so as another article of the convention (71, par. 2), while saying that the occurrence in question "releases the parties from any obligation further to perform the treaty" (subpar. (a)), specifically adds that it, at the same time, "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that . . ." (subpar. (b)).

<sup>36</sup> See, for that matter, U.N. Conference on the Law of Treaties, Official Records, 66th meeting of the Committee of the Whole, as well as 22nd plenary meeting.

<sup>37</sup> Art. 61 of the convention (Art. 58 of the I.L.C. draft).

The only debatable cause of termination listed in this category is "fundamental change of circumstances" which had existed at the time when the treaty was concluded and which had constituted "an essential basis of the consent of the parties to be bound by the treaty."<sup>38</sup> The right to invoke such change as a ground for terminating a treaty was until recently somewhat controversial. According to the fervent supporters of the doctrine or clause *rebus sic stantibus*, it was meant to constitute an implied restriction of the binding force of *any* treaty. The clause had quite a number of opponents, who feared that, if too extensively interpreted, it would become a serious menace to the stability of treaties. However, the supporters of the doctrine, who did not necessarily accept it in its unqualified form, gradually grew in number.<sup>39</sup> They argued that one could not insist upon petrifying a state of affairs which had become anachronistic because based on a treaty which either did not contain any specific clause as to its possible termination or which even proclaimed itself to be concluded for all times to come (which latter clause sometimes appeared, for example, in older treaties of friendship or alliance). On the other hand, the moderate supporters of the principle were careful not to make it too easily accessible a weapon of revisionist policies, especially if directed against regimes meant to be permanent, such as those establishing frontiers between states.

In view of all the considerations of this kind, the article both as elaborated in the International Law Commission and as finally adopted at the Vienna Conference, admitted, as a matter of principle, the possibility of invoking a "fundamental change of circumstances" (without referring to it under the often compromised name of the *rebus sic stantibus* clause) as a ground for terminating a treaty. The formulation of the article, however, is particularly cautious. The principle, although admitted, is surrounded with far-reaching reservations. It can never be invoked in connection with a treaty which "establishes a boundary." No state can invoke it if the change has been brought about by a breach of its own international obligations either under the treaty concerned or any other international agreement.

The question of how far the will or action of one party to a treaty is capable of influencing its obligatory force is again one of the most difficult ones in the whole law of treaties. No wonder then that the convention is particularly cautious in this respect, although, perhaps, somewhat ambiguous in the terms employed.

<sup>38</sup> Art. 62 of the convention (Art. 59 of the I.L.C. draft). Discussion at the Vienna Conference, see Official Records, 63rd-65th and 81st meetings of the Committee of the Whole, and 22nd plenary meeting.

<sup>39</sup> See, e.g., opinions to this effect by L. Oppenheim-H. Lauterpacht, *International Law* 938 ff. (8th ed., London, 1955); I. Anzilotti, *Corso di diritto internazionale* 376 ff. (4th ed., Padua, 1953); V. M. Shurshalov, *Osnovanya deystvitel'nosti mejdunarodnogo dogovora* 128 ff. (Moscow, 1957); Ch. Rousseau, *Droit international public approfondi* 73 ff. (2nd ed., Paris, 1961). According to this last writer, "Introduite de bonne heure dans la doctrine, cette théorie est acceptée aujourd'hui par la plupart des auteurs."

The convention distinguishes between the "denunciation of a treaty" and "withdrawal from a treaty." It does not specify, however, in what this distinction consists nor does it explain why it became necessary to have recourse to both these terms. Moreover, it does not follow clearly from the text of the convention whether these two terms are covered by the "termination of treaties" or not. The very title of Part V,<sup>40</sup> in which no mention is made of either "denunciation" or "withdrawal," would speak for the first of these two possibilities, while the latter could be based on the use of either both these terms<sup>41</sup> or one only<sup>42</sup> concurrently with the word "termination." Among the "definitions" listed in Article 2 of the convention, only terms appearing in Parts I and II of the convention (*i.e.*, belonging to the first of Sir Humphrey Waldock's three reports) were deemed by the International Law Commission to require an explanation, although it could be argued that some of them are indeed self-explanatory. By contrast, a few of those which make their appearance only in Part V, the longest and generally considered to be the most difficult part of the whole convention, would better serve the aims of the convention if they had been clearly defined. The present writer tried to raise this point in the Drafting Committee of the Vienna Conference but with no success.<sup>43</sup>

As matters now stand, the only reasonable supposition can be that the word "termination," as used in the convention, has two different meanings, a narrower and a broader one. The narrower covers only such causes as put an end to the treaty in relation to all parties to it. The will of only one party would have this effect with regard to any bilateral treaty; here, indeed, the defection of one party deprives the treaty of its entire object. The case of multilateral treaties is different. Here, in most cases, the defection of one party does not necessarily involve the end of the treaty as between other parties to it. The treaty may continue its existence, albeit within a smaller group of states than before. It is only to this latter possibility that the term "withdrawal" can properly be applied, whereas the term "denunciation" seems to cover both cases. In these two instances, however, the juridical effect is different. "Denunciation" (which impliedly must take the form of an official notification) of a bilateral treaty puts an end to it; "denunciation" of a multilateral treaty only means that the number of parties to it will be diminished by one. As far as multilateral treaties are concerned, "denunciation" and "withdrawal" cover exactly the same situation. On the other hand, "termination" in its narrower, "absolute" meaning covers some cases of "denunciation," but none of "withdrawal."

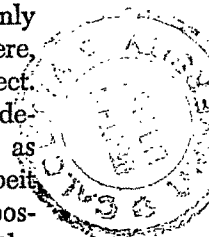
But "termination" seems also to have a broader meaning in which it covers cases of both the "absolute" (with regard to *all* parties) and the "relative" (with regard to only *one* party) extinction of juridical relations established by a treaty.

<sup>40</sup> See also titles of Secs. 3 and 5 of this Part, as well as Art. 70 of the convention (Art. 66 of the I.L.C. draft).

<sup>41</sup> See Arts. 42 and 43 of the convention.

<sup>42</sup> It is then, as a rule, the "withdrawal"; see Arts. 44 (par. 2), 45, 54, 61, 62, 65, 69.

<sup>43</sup> Namely, at the meeting of the Drafting Committee on May 7, 1969.



Whatever the case may be, both "withdrawal" and "denunciation" have been approached by the convention in an extremely cautious way. Leaving aside the possibility of either of the two being specifically referred to in the text of the treaty (in which case, they would simply be considered as resolutive conditions), both "withdrawal" and "denunciation" have been treated as rather exceptional.<sup>44</sup> Treaties, as a rule, are not subject to these actions unless it is established that such, indeed, was the intention of the parties, or else that the right "may be implied by the nature of the treaty." In the latter case the intention of the parties would also be inferable from the very fact of concluding a treaty of a particular kind.

But the action of only one party may influence the fate of a treaty in yet another manner. Violation of a treaty is an occurrence well known in the history of international relations. The problem is, and always has been, much debated: Does the violation of a treaty automatically entitle the other party or parties to declare the treaty terminated? The answer was often affirmative. However, a state might arbitrarily invoke this particular ground for terminating a treaty under some futile, let alone imaginary, excuse. For this reason the formulation of this ground in the convention is particularly restrictive.<sup>45</sup> The violation or "breach," to use the term introduced by the convention, must be, first of all, "material"; it must either apply to "a provision essential to the accomplishment of the object or purpose of the treaty" or else consist in the "repudiation" of the treaty, by which term the non-observance of the treaty as a whole is meant. All parties to a multilateral treaty, with the exception, of course, of the defaulter, must be unanimous in declaring the treaty to be terminated. If one or only some of the parties to a multilateral treaty claim the treaty to be violated or repudiated, they can take the initiative in having the treaty properly terminated only by the expedient of such means as are provided for in another section of Part V of the convention, dealing with procedures to be applied whenever a dispute arises between the parties to a treaty as to its invalidity or termination.

Not automatic termination, but merely the right to set in motion procedures under Section 4 of Part V<sup>46</sup> is stipulated by the convention in cases where the very existence of a sufficient ground for termination (including denunciation and withdrawal) may depend too much on the merely subjective judgment of the interested party. This is true not only of the consequences of a violation but also of impossibility of performance

<sup>44</sup> Art. 56 of the convention (Art. 53 of the I.L.C. draft).

<sup>45</sup> Art. 60 of the convention (Art. 56 of the I.L.C. draft).

<sup>46</sup> Arts. 65-68 of the convention and Annex to Art. 66 (Arts. 62-64 of the I.L.C. draft). The procedure prescribed may, in certain cases, comprise no less than three distinct stages: (1) the parties to a treaty endeavor to settle the matter as between themselves in direct correspondence; (2) the parties agree to choose one of the means for pacifically settling international disputes listed in Art. 33 of the U.N. Charter; (3) the parties are under obligation to submit the dispute to conciliation (in the manner provided for in the Annex) or, if the article under dispute is one of the two introducing the notion of *jus cogens*, to the International Court of Justice. See also below, Section VI of this article.

and of a fundamental change of circumstances. All these grounds for terminating a treaty are juridically similar to those grounds for invalidating a treaty which can only be invoked by a party through impeaching the validity of its consent and not by arbitrarily declaring the treaty to be *a limine* invalid.

In all such cases there is yet another means for safeguarding the observance of treaties, namely, that no such ground can be invoked by the party which was itself guilty of bringing about the circumstance concerned. *Nemo commodum capere potest de iniuria sua propria*. In yet another part of the convention, we find among other "Miscellaneous Provisions" a clause<sup>47</sup> eliminating the right of a state guilty of aggression to invoke the benefits of the convention, if measures relating to such aggression have been taken in conformity with the Charter of the United Nations.

Section 4 of Part V of the convention explicitly precludes any state from invoking two circumstances as sufficient grounds in themselves for terminating a treaty. The mere fact that the number of parties to a multilateral treaty has fallen below the number necessary for its entry into force is not in itself a sufficient ground for terminating the treaty.<sup>48</sup> Such is also the case of the severance of diplomatic or consular relations, unless, in the absence of such relations, the treaty cannot be applied.<sup>49</sup>

The list of grounds for terminating a treaty may perhaps, at first glance, seem to be rather ample. When analyzed, however, the list appears to be set up with precisely the object of safeguarding the application of treaties and the common will of all the parties to them, or else to restrict the possibility of termination to exceptional cases in which, moreover, the interested party does not enjoy any right other than to set in motion the procedure aimed at declaring the treaty to be terminated.

Most of the grounds are based on international custom of very long standing. The only ground where the practice and doctrine were somewhat doubtful, and where first, the International Law Commission, and then the Vienna Conference had to make a choice between two conflicting solutions seems to be the "fundamental change of circumstances." The choice, however, was made in favor of the solution which is now thought to have acquired the wider support.

## V

The "suspension of the operation of a treaty"—to use the term of the convention—does not raise as many complicated problems as does the invalidity or termination of a treaty. It appears as an independent institution in two articles. The operation of any treaty can be suspended, in any event, if either the treaty itself provides for it or all the parties agree to it.<sup>50</sup> In the case of a multilateral treaty, some of the parties can also

<sup>47</sup> Part VI of the convention, Art. 75 (Art. 70 of the I.L.C. draft).

<sup>48</sup> Art. 55 of the convention (Art. 52 of the I.L.C. draft).

<sup>49</sup> Art. 63 of the convention (Art. 60 of the I.L.C. draft).

<sup>50</sup> Art. 57 of the convention (Art. 54 of the I.L.C. draft).

suspend its operation in their *inter se* relations, if such suspension is not prohibited by the treaty, does not affect the rights and obligations of the remaining parties, and is not "incompatible with the object and purpose of the treaty."<sup>51</sup>

These two articles seem to be self-explanatory, but note must be taken of how the suspension of the operation of a treaty has been introduced into several articles of the convention as an institution subsidiary to that of termination. This is again one among several means by which the convention aims at maintaining, to the highest possible degree, the obligatory force of treaties. In many cases where, from the point of view of traditional international law, one would expect to be confronted with the termination of a treaty, the convention recommends the treaty merely to be suspended in operation, unless the gravity of the circumstances of the particular case requires recourse to this ultimate means of bringing an end to a treaty. The convention brings to the attention of the parties to any treaty the possibility of suspending its operation instead of acting to bring about its termination whenever either the very occurrence of a ground, or the appraisal of the extent to which it has occurred, may depend upon the subjective judgment of a party, or else the occurrence of such ground does not necessarily mean that it would become permanent and irrevocable. This applies particularly to three such grounds known to the convention, *i.e.*, impossibility of performance,<sup>52</sup> fundamental change of circumstances<sup>53</sup> and, above all, violation by a party of its obligations under a treaty.<sup>54</sup>

## VI

Article 42 does not restrict the grounds of invalidity, termination, or suspension of the operation of treaties to those listed in Part V. Its formulation clearly indicates an intention to take into account the convention as a whole. It does not follow, however, that there are *many* grounds that *can* be found outside of Part V of the convention.

The convention deals only with treaties between states.<sup>55</sup> In view of this fact, one has to consider as a possible ground for terminating a treaty not only objective impossibility of performance, but subjective impossibility as well. Such subjective impossibility would arise in the case of the extinction or disappearance of a state. The convention did not specifically mention this possible occurrence, it being too closely connected with the complicated problem of the succession of states. This problem has been, from the very beginning, a separate item on the agenda of the International Law Commission.<sup>56</sup> After having been studied within the Commission for some time, it was subdivided according to its various aspects.<sup>57</sup> Everything that concerns such succession questions as relate

<sup>51</sup> Art. 58 of the convention (Art. 55 of the I.L.C. draft).

<sup>52</sup> Art. 61 of the convention.

<sup>53</sup> Art. 62 of the convention.

<sup>54</sup> Art. 60 of the convention.

<sup>55</sup> It results from Art. 1 of the convention.

<sup>56</sup> See 1949 I.L.C. Report, Part I, Ch. II, item 2.

<sup>57</sup> See 1963 I.L.C. Report, Ch. V.A, and Annex (review of the Commission's programme).

to treaties is now in the experienced hands of Sir Humphrey Waldock. In view of this, the convention merely acknowledged the fact that the parties were aware of the succession problem by a perfunctory reservation included among the "Miscellaneous Provisions": "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States . . . ." <sup>58</sup> The same reservation also relates to the possible consequences of the "international responsibility of a State." However, some at least of such consequences are already mentioned in the convention, in particular in those articles which deal with the consequences of the breach of a treaty and with the special situation of an aggressor state. <sup>59</sup>

One important question was left out altogether by the International Law Commission, namely, the consequences for treaties of the outbreak of hostilities between the parties to such agreements. Some delegations considered this to be a serious gap and submitted to the Vienna Conference two amendments dealing with this matter. <sup>60</sup> These amendments resulted in the inclusion in the article dealing with the succession of states and responsibility of states of yet another reservation pertaining to the "outbreak of hostilities between states." In the present stage of development of international law, the question of the effect of war is not an easy one. <sup>61</sup> According to traditional doctrine and practice, the outbreak of a war had the effect of severing all treaty relations between the belligerent states, with the only exception of such treaties as were especially meant to apply in the event of war. It is true that comparatively recently "war" has been excluded from the arsenal of means to which states may legally have recourse. But armed conflicts, although not necessarily under their *classical* denomination and in their *classical* form, do arise. It would be impossible still to apply to them such criteria as had been admitted in times when war as such was considered to be perfectly legal. On the other hand, it would be closing one's eyes to obvious realities to pretend that the outbreak of hostilities has no effect whatever on treaty relations between belligerents (sometimes, not even on their *inter se* relations). Pending a possible re-codification (can one speak here about a "progressive development" as well?) of the whole body of the laws of war, the least one could do in the field of the law of treaties was to reserve the problem in a similar way to that in which the International Law Commission, in its draft articles, had already reserved its attitude towards the problems of the succession and responsibility of states.

<sup>58</sup> Art. 73 of the convention (Art. 69 of the I.L.C. draft).

<sup>59</sup> See, respectively, Arts. 60 and 75 of the convention.

<sup>60</sup> See Polish-Hungarian amendment contained in U.N. Doc. A/CONF.39/C.1/L.279, and (almost identical with it) Swiss amendment contained in Doc. A/CONF.39/C.1/L.359.

<sup>61</sup> See, in this respect, e.g., Ch. Rousseau (in support of the traditional concept), *op. cit.* 70 ff.; Lord McNair, *The Law of Treaties* 693 ff. (Oxford, 1961) (previously, by the same author, *War and Treaties*, Oxford, 1940); A. Curti Gialdino, *Gli effetti della guerra sui trattati* (Milan, 1959); and many others.



## VII

In conclusion, two things should be said:

Both the quantity and quality of grounds for invalidating or terminating or suspending the operation of treaties, as listed in the Vienna Convention, seem to correspond to the present state of international law and international relations. The list of such grounds does not contain any sensational novelties. A great majority of them are based on long-established rules of customary international law. Some have been formulated in an extremely cautious way so as clearly to stress their exceptional character. A few of them, especially those of invalidity, such as error, fraud, or personal coercion, are deeply rooted in the "general principles of law recognized by civilized nations." Two can perhaps be described as *comparatively* new in that they were not known to traditional international law, but are now based on the treaty law already in force. This is undoubtedly true of the coercion of a state and, to a great extent, of the *jus cogens* principle. They are thus not at all *new* in respect to the Convention on the Law of Treaties; their particular application to this branch of law is but a logical consequence of principles accepted elsewhere on a far more general basis. In one case only, that of "fundamental change of circumstances," the choice was made between two possible solutions, but the solution chosen seems to be one now almost generally accepted. The anxieties of those who may still be in favor of the opposing solution have been met in the many qualifications with which the possibility of having recourse to this particular ground has been surrounded.

The material clauses of Part V of the Vienna Convention thus serve their purpose well within the framework of the convention as a whole. They fix the limits of applicability of the principle, *Pacta sunt servanda*, in such a way that every treaty may operate within the limits of the consent of the parties to it, the principles of general international law, and international reality. Only if all these three aspects are kept in mind can treaties truly fulfill their essential functions as both a source of international law of ever increasing importance and an effective instrument of international co-operation.

On the other hand, the concern of those who stressed the pretended superabundance of grounds for the invalidity or termination of treaties, as well as the pretended novelty of some of them, seems to have been singularly misdirected. It found its principal outlet in several amendments submitted to the Vienna Conference which were directed to the introduction into the convention of the principle of compulsory third-party jurisdiction for settling *all* disputes which may arise in relation to invalidity, termination, or suspension of the operation of treaties.<sup>62</sup> Such amendments were, for the greater part, defeated. A solution, meant to constitute a compromise, moved in the very last hour by a group of delegations, mostly African and Asian,<sup>63</sup> and incorporated in the final text

<sup>62</sup> U.N. Docs. A/CONF.39/C.1/L.339, 345, 346, 347, 352, and 355.

<sup>63</sup> See amendment contained in U.N. Doc. A/CONF.39/L.47/Rev.1.

of the convention,<sup>64</sup> provides for the establishment of two procedures which were not to be found in the original draft convention prepared by the International Law Commission. In cases where a question of *jus cogens* is involved, whether as a ground of invalidity or of termination of a treaty, the parties are to submit the dispute to the International Court of Justice. In all other cases, they are required to employ a specially devised system of conciliation. Recourse to either of these solutions is obligatory, although, of course, the parties to a dispute submitted to the conciliation commission are not bound by the commission's recommendations. Both these possibilities have to play a subsidiary rôle to the free choice by the parties of one of the means of settling international disputes indicated in Article 33 of the United Nations Charter.<sup>65</sup>

This last clause was the most that the International Law Commission found realistic in view of the international situation existing then and now. The Commission said in this respect in its commentary to the appropriate article of its draft Convention:

The Commission concluded that the article, as provisionally adopted in 1963 [the one providing for the free choice by the parties of any of the means mentioned in Article 33 of the Charter], represented *the highest measure of common ground* that could be found among Governments as well as in the Commission on this question.<sup>66</sup> (Emphasis supplied.)

The situation has not changed since these words were uttered. Many states were and are averse to any form of compulsory adjudication. This aversion is clearly shown in the limited number of states which have accepted the compulsory jurisdiction of the International Court of Justice.<sup>67</sup>

One can hardly expect that a state refraining from the acceptance of that jurisdiction, although such acceptance can be limited both in time and in scope, would ever be likely to accept the principle of compulsory jurisdiction in relation to *all* disputes arising in the future over *any and all* treaties. This being as obvious as it is, one is inclined to doubt if some of those who, while advocating compulsory adjudication in the case of treaties, being themselves bound by the compulsory jurisdiction of the International Court of Justice only to the extent of their own respective declarations, acted in perfect good faith.

It is to be feared that the introduction of compulsory jurisdiction, even if limited to disputes arising out of the two articles on *jus cogens*, is likely substantially to limit the number of states ratifying or acceding to the Convention on the Law of Treaties. A state may, of course, protect itself through a reservation formulated in respect of the jurisdiction clause of the convention. The Final Clauses of the Vienna Convention do not include any special rule as to reservations. Both the depositary and the interested states can thus be guided only by those articles of the conven-

<sup>64</sup> Art. 66 of the convention (and Annex).

<sup>65</sup> See Art. 65 of the convention (Art. 62 of the I.L.C. draft).

<sup>66</sup> 1966 I.L.C. Report, pars. 3-6 of the commentary to draft Art. 62.

<sup>67</sup> According to 1969-1970 I.C.J. Yearbook 51 ff., forty-six states.

tion which contain general rules concerning reservations.<sup>68</sup> In such a case, clearly everything will depend, in the last analysis, on the meaning to be given to the "compatibility" of the reservation formulated by a state in respect of the compulsory jurisdiction clause of the convention with the "object and purpose"<sup>69</sup> of the Vienna Convention itself.

The future alone can show how many states will eventually ratify the Vienna Convention or accede to it. One can hardly be very optimistic in this respect. What then will be the rôle of the Vienna Convention? Will the efforts of so many years of strenuous work by the International Law Commission, and its four consecutive Special Rapporteurs, as well as of the two sessions of the general Conference specially convoked in order to give the convention its final shape, be entirely frustrated? This again would be too pessimistic an outlook. The acceptance of most articles of the convention by an overwhelming majority of the Conference is, after all, a clear indication of the essentially affirmative attitude of a great many states towards almost all of them and, at the same time, towards the convention as a whole.<sup>70</sup> Based to such a great extent on rules of either customary international law or on principles generally accepted in almost any system of law, and in some cases on multilateral conventions already in force, the Vienna Convention will at the very least play the rôle of a handy and useful manual of all such rules. If so, it will at least have achieved *one* of the two aims of the International Law Commission as well as of the task imposed on the General Assembly of the United Nations by Article 13, subparagraph 1(a), of the Charter: "codification" *sensu stricto*, i.e., compilation and restatement of such rules as are already in existence. The International Law Commission and the Vienna Conference certainly had greater ambitions. Perhaps at some later, not too distant date these ambitions will be satisfied as well.

<sup>68</sup> Arts. 19-23 of the convention.

<sup>69</sup> In the meaning of Art. 19, subpar. (c) of the convention.

<sup>70</sup> When, on May 22, 1969, the convention as a whole was put to the vote, one state only (France) voted against it. See U.N. Conference on the Law of Treaties, Official Records, Vol. II, 36th plenary meeting, par. 51.

## SELDEN *REDIVIVUS*—TOWARDS A PARTITION OF THE SEAS?

*By Wolfgang Friedmann* \*

The General Assembly Resolution of December 17, 1970,<sup>1</sup> has been widely acclaimed for its affirmation of the principles that

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

The resolution, which was adopted by 108 votes in favor, none against, and 14 abstentions (including the votes of the Soviet bloc), also affirmed in principle the establishment of an international regime for the seabed area beyond the limits of national jurisdiction.

Since it was doubtful up to the very last moment whether even as generally framed a resolution as this would find a majority, we must be grateful for this modest achievement, at a time when a growing number of states extend the area of their claims to the resources of the continental shelf and a swelling chorus supports the exercise of coastal sovereignty over the resources of the continental margin, while others, notably a substantial number of Latin American states, proclaim exclusive and total jurisdiction over a 200-mile zone from their coasts.

But the positive achievements of the General Assembly resolution should not be exaggerated. A declaration of principles is fine as far as it goes, but it does not commit anybody to any specific action. The first meeting of the enlarged U.N. Sea-Bed Committee following the resolution, held in Geneva in March, 1971, occupied itself for the first two weeks with procedural wrangles and then listened to a great many speeches and declarations, without any serious discussion of specific proposals, such as the United States "Draft United Nations Convention on the International Seabed Area,"<sup>2</sup> submitted in August, 1970. The second session (July–August, 1971) produced no decisions but several draft treaties and working papers which will be briefly discussed below. Meanwhile, it must be remembered that all the major industrial nations, *i.e.*, the actual and potential exploiters of the ocean bed's mineral resources, have refused to declare a moratorium on claims, pending the conclusion of an international treaty; that the present claim of a large group of Latin American states to an exclusive 200-mile jurisdictional zone may find growing support

\* Of the Board of Editors.

<sup>1</sup> U.N. Doc. A/RES/2749 (XXV); 10 Int. Legal Materials 220 (1971).

<sup>2</sup> 9 Int. Legal Materials 1046 (1970); summarized in 65 A.J.I.L. 179 (1971).

from other coastal states, though not the major maritime Powers; and that the postwar history shows beyond doubt that national claims, once implemented, will not be retracted. With every year or even month that passes without the establishment of an effective international treaty, national claims either to sovereignty over the seabed resources of the continental margin or to widening areas of total "ocean space" jurisdiction will become consolidated and subsequently be defended as vested interests. It would be tragic indeed if the euphoric language of the General Assembly resolution should lull the diminishing band of defenders of the regulated freedom of the seas into sleep. Nobody will be happier than the present writer if his prediction should be proved wrong that, within the next few years, a general consensus of nations will converge on either the substitution of the continental margin for the continental shelf under the disguise of a spurious interpretation of Article 1 of the Continental Shelf Convention of 1958,<sup>3</sup> or on a general extension of coastal jurisdiction over the "ocean space" at a distance of at least 100 miles, but more probably 200 miles from the base line of the coastal state. As the industrially advanced coastal states prefer limited territorial sea zones but unlimited freedom to explore the ocean bed resources, while the less developed states claim extensive ocean space jurisdiction in order to protect their fisheries or, in some cases, to prevent exploitation of seabed minerals that might compete with their land-based minerals (*e.g.*, copper in Chile and Peru), it is by no means impossible that we will end up with a combination of both these claims. This would mean that the overwhelming proportion of both exploitable fisheries and the mineral resources of the ocean bed would be partitioned among various national jurisdictions. The land-locked states would be left with whatever share they may secure from the seabed resources that would remain free to all or come under the jurisdiction of an international seabed authority. In addition, they might receive a probably modest proportion of the revenues to be derived from some of the areas to be exploited under national jurisdiction, should the relatively liberal ideas of the United States Draft of August, 1970, prevail.

It might be helpful to trace very briefly the developments since the spirited discussion between Professor Louis Henkin and his opponents in this JOURNAL.<sup>4</sup>

The stark conflict between a relatively restricted and an openly expansionistic and nationalistic interpretation of the Continental Shelf Convention is illustrated by the gulf that separates the Draft Convention submitted by the Department of State in August, 1970, in implementation of

<sup>3</sup> "For the purpose of these Articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; . . ." 15 U.S. Treaties 471, T.I.A.S., No. 5578, 499 U.N.T.S. 511; 52 A.J.I.L. 858 (1958).

<sup>4</sup> Henkin, "International Law and 'the Interests': the Law of the Seabed," 63 A.J.I.L. 504 (1969); Finlay, "The Outer Limit of the Continental Shelf. A Rejoinder to Professor Louis Henkin," 64 *ibid.* 42 (1970); Henkin, "A Reply to Mr. Finlay," 64 *ibid.* 62.

President Nixon's announcement on United States Oceans Policy of May 23, 1970,<sup>5</sup> from the Report of the Special Subcommittee on Outer Continental Shelf (the "Metcalf Report") of December 21, 1970.<sup>6</sup> The fatal flaw of Article 1 of the Continental Shelf Convention—surely one of the most disastrous clauses ever inserted in a treaty of vital importance to mankind—is, of course, that, by extending sovereign rights of the coastal state over the seabed and subsoil resources "to a depth of 200 meters, or, beyond that limit, to where the depth of the subjacent waters admits of the exploitation of the natural resources of the said areas," it left the limits of national jurisdiction open. The General Assembly resolution, by declaring that "the seabed and ocean floor . . . beyond the limits of national jurisdiction . . . are the common heritage of mankind," leaves the question unsolved. By contrast, the Department of State draft reestablishes a firm limit of 200-meters' depth for the continental shelf, while setting up an intermediate "trusteeship" zone between the limit of the continental shelf and the edge of the continental margin, to be administered by the coastal state but subject to international controls over standards of safety, pollution and technology, and an obligation to hand over at least 50 percent of the revenue derived from the exploitation of the intermediate zone to the international seabed authority, for aid to the developing countries. Although many of the developing countries, unquestionably influenced by the bad odor that attaches to the term "trusteeship" in the light of the lamentable history of the handling of mandated and trust territories (as exemplified by the *South West Africa* cases), have expressed skepticism of this approach, it stands out as by far the most concrete and enlightened attempt of any government to reconcile the conflicting claims of coastal states and the international community and above all to put a halt to the uncertainties created by Article 1. In the light of its stated objectives, the principal weakness of the Department of State draft is that it does not impose a moratorium on new claims, pending the conclusion of an international treaty, and that it would guarantee the protection of any leases granted and interests acquired by United States citizens prior to the coming into force of such a treaty.

How far this moderate and carefully balanced attempt to reconcile national claims and international community interests is from agreed U. S. policy, is shown by the Metcalf Report. The gist of the Metcalf Committee's approach and recommendations is contained in the following passage:

Whatever renunciation might be intended to be made through the adoption of a future seabed treaty, no renunciation should be permitted to be made which in any way encroaches upon the heart of our sovereign rights under the 1958 Geneva Convention. We construe the heart of our sovereign rights under the 1958 Geneva Convention to consist of the following:

<sup>5</sup> U.N. Doc. A/AC.138/22 (1970); 62 Department of State Bulletin 737 (1970); 64 A.J.I.L. 930 (1970); 9 Int. Legal Materials 806 (1970).

<sup>6</sup> Report by the Special Subcommittee on Outer Continental Shelf to the Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess. (Committee Print, 1970).

- (1) The exclusive ownership of the mineral estate and sedentary species of the entire continental margin;
- (2) The exclusive right to control access for exploration and exploitation of the entire continental margin; and
- (3) The exclusive jurisdiction to fully regulate and control the exploration and exploitation of the natural resources of the entire continental margin.

Returning to the President's proposal of May 23rd, as we interpret it, with respect to the entire seabed area to be governed by a future treaty, the regime should provide:

- (1) Requirements related to the protection of human life and the environment.
- (2) Rules prohibiting expropriation of investments and other measures designed to protect the integrity of investments, including full protection for investments made prior to the entry into force of a future seabeds treaty.
- (3) Guarantees that multiple uses of the high seas and ocean floor will be preserved.
- (4) Mechanisms establishing means for the peaceful and compulsory settlement of disputes.
- (5) The collection of funds for international community purposes.

With respect to the area beyond the submerged land continent, there should be international machinery which would administer resource development of the deep seabed.

We interpret these above listed features to constitute the essence of the President's proposal. Toward these ends the Subcommittee pledges its support.

Our only areas of initial difference with the President are his suggestions that the United States should renounce its sovereign rights to its continental margin in return for similar, but limited rights in an area designated as a trusteeship zone, and his suggestion that leases applying to areas of the Continental Shelf beyond the 200-meter isobath be issued subject to an international regime to be agreed upon.<sup>7</sup>

The ingenuity of the report in pretending that it is in basic agreement with the President's statement compels admiration. For it will be obvious even to the most superficial reader that the Committee's recommendations pluck the heart out of the President's proposals and the Department of State Draft that implements it. The Metcalf Report retains only the general requirements regarding protection of human life and the environment (which is like being against sin) and the rules prohibiting expropriation of investments. The Committee specifically recommends that, pending the entry into force of a future seabed treaty, United States leases beyond the 200-meter isobath should not be made subject to any future regime. In other words, the Metcalf Report demolishes the gist of the Nixon announcement, *i.e.*, the limitation of the continental shelf to a 200-meter isobath and the creation of an intermediate zone, in which the trustee-administrator would have certain responsibilities towards an international seabed authority. The latter is denounced in unequivocal terms:

<sup>7</sup> *Ibid.* at 29-30.

. . . The draft working paper, on the other hand, proposed the creation of an immense international agency and very complicated rules related to deep seabed resource exploration and exploitation. Such an arrangement would seem to encourage such bureaucratic and pseudo-legalistic obstructions that rational and equitable use of the wealth of the deep ocean floor would be deterred rather than encouraged.<sup>18</sup>

<sup>18</sup> Even though the international organization which would be created by the draft working paper is large, seemingly unwieldy, and may encourage rather than discourage creeping international bureaucracy, the organization, nevertheless, would be established separate from the U.N. General Assembly, and the organization could not itself carry on exploitation operations and would rely principally on the trustee state in the trusteeship zone, and the sponsoring state in the area beyond, for enforcement.<sup>8</sup>

In short, the Metcalf Report proclaims unlimited sovereignty over the resources of the continental margin as "the heart of our sovereign rights under the 1958 Geneva Convention." There is a grim humor in the Committee's assertion "that those who advocate a narrow Continental Shelf, or a narrow Continental Shelf coupled with an intermediate zone, do not do so on legal grounds, that is, on a reasoned interpretation of the legal doctrine of the Continental Shelf. Instead, it seems that their conclusions are grounded more on a policy preference." (P. 15.) Few of us are immune from adorning our policy preferences with legal justifications, but the assertion that the interpretation of a "continental shelf" as a "continental margin" convention and the suppression of those parts of the International Court's Judgment in *the North Sea Continental Shelf Case*<sup>8a</sup> which clearly contradict such an interpretation, are "law," while any differing interpretation is "policy," can only be described as breath-taking.

It would perhaps be better for the integrity of international law if contentions such as those of the Metcalf Report, which were supported by the evidence of the majority of witnesses representing the National Petroleum Council and other industrial interests, were put forward plainly and openly as what they are: as policy statements, justified by the prevalence of expanding national political and economic interests over those of an as yet weakly organized and dissonant community of nations. This is an arguable policy objective, although, as I have attempted to show elsewhere,<sup>9</sup> I believe it to be shortsighted even from a national point of view. But the report seeks to cement its recommendations essentially with two legal arguments: one is the interpretation of Article 1 of the convention in a way that totally displaces the concept of the continental shelf and replaces it with the entirely different concept of the continental margin. The former, on a world basis, covers roughly 7.5 percent of the oceanbed, the latter nearly 25 percent. Economically the difference is even more staggering. Compared with the biological and mineral resources of the continental margin, those that might one day come from the abyssal depths of the ocean (*i.e.*, at depths generally exceeding 4,000 meters) are neg-

<sup>8</sup> *Ibid.* at 32.

<sup>8a</sup> See below, p. 762.

<sup>9</sup> Friedmann, *The Future of the Oceans 79 et seq.* (1971). See also Henkin, "Seabed Pact Would Help U. S.," *Washington Post*, Aug. 8, 1971.



ligible, and the investment required to make it economically profitable, except in certain areas, notably sea shallows and seamounts, is astronomical.<sup>10</sup> As Professors Andrassy<sup>11</sup> and Henkin<sup>12</sup> have pointed out, the concept of the continental margin, which is oceanographically totally different from the continental shelf, nowhere appears in the convention.<sup>13</sup> It requires rather more than the customary robustness of special pleading to show that the one concept, radically different in its legal, economic and political aspects, can simply be substituted for the other.

The second prop is Professor Jennings' article of 1969 on the *North Sea Continental Shelf* Judgment of the International Court of Justice.<sup>14</sup> In the *North Sea Case*, the Court had stated:

... that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.<sup>15</sup>

From this statement Jennings deduced that "there would seem to be little room for doubt that the continental slope is just as much a part and a prolongation of the continental land mass as the continental shelf is." He felt less certain about the continental rise, which would complete the continental margin. Professor Jennings did not mention the crucial qualification by the Court that "by no stretch of imagination can a point on the continental shelf situated, say, 100 miles, or even much less, from a given coast, be regarded as 'adjacent' to it, or to any coast at all in the normal sense of adjacency . . . ." For the test of adjacency, specifically enunciated in Article 1 of the Continental Shelf Convention, Jennings substitutes that of "exploitability."

In 1955 Scelle<sup>16</sup> had predicted that the doctrine of the continental shelf would lead to ever-increasing claims on the high seas, both upward to embrace the superjacent waters and outward to expand the territorial

<sup>10</sup> The estimates of Frank LaQue, "Deep Ocean Mining: Prospects and Anticipated Short-Term Benefits," in *Pacem in Maribus* 22 (Conference sponsored by the Center for the Study of Democratic Institutions, June, 1970); F. T. Christy, Jr., "Marigenous Metals, Wealth, Regimes and Factors of Decision," in Symposium on the International Regime of the Sea-bed, Accademia Nazionale dei Lincei (Rome, 1970); and the report of the Commission on Marine Science, Engineering and Resources essentially concur in the conclusion that, with few exceptions, there is little likelihood of exploitation of the deep ocean minerals on a commercial scale for many years to come.

<sup>11</sup> J. Andrassy, *International Law and the Resources of the Sea* 169-174 (1970).

<sup>12</sup> L. Henkin, "International Law and 'the Interests': The Law of the Seabed," 63 A.J.I.L. 504 (1969); "A Reply to Mr. Filley," 64 *ibid.* 62 (1970).

<sup>13</sup> See B. H. Oxman, "The World Outlook for the International Law of the Sea," Statement before the Marine Technology Society, Feb. 19, 1971, at 3-4 (unpublished paper).

<sup>14</sup> "The Limits of Continental Shelf Jurisdiction," 18 Int. and Comp. Law Q. 819 (1969).

<sup>15</sup> *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 1 at 22, excerpted in 63 A.J.I.L. 591 at 602 (1969) and 8 Int. Legal Materials 340 at 347 (1969).

<sup>16</sup> *Plateau Continental et Droit International* (1955).

sovereignty of the coastal states. As the exploitation of the seabed resources progresses, the multiplication of fixed platforms, supported by piles fixed in the seabed; floating units which may be drilling vessels or semi-submersible platforms; underwater wells with wellheads located on the seabed; seabed laboratories and residences; seabed transport, and pipelines, will make the theoretically safeguarded freedoms of fishing and navigation increasingly precarious. In the more intensively exploited areas beyond territorial waters, primary rights will more and more tend to become secondary licenses. It is not therefore surprising that, once again following a lead of Arvid Pardo, the concept of "ocean space" is gradually coming to displace the distinctions between the legal status of the surface and of the seabed, and that more and more states are beginning to assert full jurisdiction over a portion of the ocean space measured from the coast, comprising the surface of the sea, the water column, and the seabed. This is in essence a return to the concept of the "closed sea," whose classical advocate was John Selden. It is the *Mare Liberum*, under the leadership of the major maritime Powers—first Holland, then Britain, France, the United States—that came to be accepted as one of the most basic principles of contemporary international law. This era may now be drawing to a close.

The contemporary movement towards "closed seas" may be dated to the Declaration of Santiago on the Maritime Zone of 1952,<sup>17</sup> in which Chile, Ecuador, and Peru proclaimed their sole jurisdiction and sovereignty over the area adjacent to and extending 200 miles from their coasts, including the sea floor and subsoil of that area. At the time, this move was largely seen as a response by states deprived of gradually descending continental shelves to compensate for their natural disadvantages. The Santiago states are, however, also countries that depend to a large extent on the yield of their fisheries. Even those who, like the present writer, are deeply concerned at the erosion of the freedom of the seas, must acknowledge that, quite apart from an understandable desire to counter the expanding claims of other coastal states to continental margin resources, the fishery practices of nations that fish the world over with modern equipment lend considerable justification to the protective measures of the Santiago states and the growing number of others that are following their example.<sup>18</sup>

<sup>17</sup> 4 Whiteman, Digest of International Law 1089 (1965).

<sup>18</sup> The dismal story of the depletion of marine life includes the virtual extinction of the blue whale and the humpback whale, for which the Soviet and Japanese whaling fleets are mainly responsible; the practices of the world-wide Soviet and Japanese trawler fleets, which fish just outside the territorial sea limits of coastal states, such as Canada and, after having exhausted supplies, move to another area; the intensive exploitation of tuna and shrimp by U.S. fishing fleets close to Latin American coasts; the gradual destruction of Atlantic salmon breeding grounds by the practice of Danish fishermen in catching the salmon just before they spawn; the practice of European Community trawlers—which are permitted to fish inside the territorial waters of the member states—in scooping up flat fish wholesale by mechanical shoveling techniques from the bottom, a practice that has greatly increased British opposition to entry into the Common Market; and many other signs of the short-sighted rapaciousness of modern industrialized nations regardless of political ideology.

In line with the almost unmitigated postwar tendency of expanding national claims in the sea at the expense of international freedoms, the Santiago Declaration states were soon joined by others, including states such as Brazil and Uruguay, which have profitable continental shelves. In May, 1970, in the Declaration of Montevideo on the Law of the Sea, nine Latin American countries declared that all nations have the right to claim as much of the sea and the seabed near their coasts as they deem necessary to protect their actual and potential offshore wealth.<sup>19</sup> Not surprisingly, only the two landlocked Latin American states, Bolivia and Paraguay, joined by oil-rich Venezuela, voted against this declaration, while the major Caribbean states, whose coasts are closely contiguous, abstained or left the conference.

A seemingly moderate application of this doctrine of total vertical jurisdiction over a zone defined in terms of distance from the baseline is the Brazilian decree of April 1, 1971.<sup>20</sup> It establishes two fishing zones "in Brazilian territorial waters": first, a strip of 100 nautical miles, measured from the low-water line of the continental and insular coasts of Brazil, in which fishing activities will be exclusively carried on by Brazilian fishing vessels; and a second strip extending to the limit of 200 nautical miles, where fishing activities may be carried on by both national and foreign vessels, except as to crustaceans and other living resources which are closely tied to the seabed, and are reserved for Brazilian fishing vessels.

It should be noted that the Brazilian decree abandons the pretense that there is a distinction between "territorial waters" measured from three to twelve miles, and the exclusive jurisdictional zones extending to 200 miles, as is still maintained by other Latin American states. While the decree excludes foreign fishing "only" from a 100-mile zone, the apparent equality of foreign and national fishing vessels within the outer 100-mile strip is in effect severely circumscribed. Foreign fishing vessels must, in order to obtain this privilege, be chartered by, and obtain certificates from, the competent Brazilian authorities. Such charters will be granted only upon documentary evidence to the effect that (1) the chartering fishing industry is predominantly financed by capital supplied by native-born Brazilians; (2) the crew will include the proportion of Brazilians specified by labor laws; (3) the vessel possesses valid papers as provided for in the international conventions to which Brazil adheres; (4) the vessel is in perfect operating condition for the fishing expedition it intends to make. It is furthermore provided that such charters to foreign fishing vessels will only be authorized "if it can be shown that the operation of the vessel will bring about an effective and indispensable increase in exports or in the supply of an area with a deficit in production." Charters will be granted only for limited periods. In short, it is possible at any time under this decree for Brazilian authorities to exclude foreign fishing vessels from any operations within the 200-mile zone.

There is perhaps no clearer indication of the recent trend than the

<sup>19</sup> 64 A.J.I.L. 1021 (1970); 9 Int. Legal Materials 1081 (1970).

<sup>20</sup> Decree Law No. 68459, Brazil, Official Gazette, April 2, 1971.

"Preliminary Draft Ocean Space Treaty" submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor by Dr. Arvid Pardo, whose celebrated speech of August, 1967, initiated the flood of debates and resolutions of the last few years, including the setting up of the Sea-Bed Committee of the United Nations. Since there is no doubt about Pardo's dedication to the principle of the freedom of the seas and the common heritage of mankind, it is particularly noteworthy that the draft treaty, foreshadowed by Pardo's speech at the March meeting of the Sea-Bed Committee, proposes that the jurisdiction of a state should extend to a belt of ocean space adjacent to its coast, to a breadth of 200 nautical miles.<sup>21</sup> The draft further provides that the coastal state may reserve to its nationals the commercial exploitation of the living and non-living resources of the national ocean space subject to its jurisdiction.<sup>22</sup> The absoluteness of these rights is qualified by the provision (far from easy in practical application, particularly with regard to the yields of fisheries) that the coastal state shall transfer to the international institutions responsible for the international sea, *i.e.*, the sea beyond 200 nautical miles from the coast, a proportion of the revenue obtained from the exploitation of the living and non-living resources of the "national ocean space."<sup>23</sup>

No doubt the Pardo Draft is intended to stem the tide of expanding national claims by conceding an outer limit designed to include the most extreme claims made until now. This writer very much doubts that such appeasement techniques will succeed. There is nothing sacrosanct in the 200-mile limit. For this or that reason, *e.g.*, because a particular current rich in living resources flows at a distance of 300 or 500 miles from the coast, states may proceed from a once established minimum limit of 200 miles to further-reaching claims. As it is, a 200-mile zone would comprise the bulk of exploitable living and non-living resources of the sea. In the Indian Ocean area, for example, where, under the auspices of the FAO and the recently established Indian Ocean Fisheries Commission, efforts are under way to systematize and co-ordinate the exploitation of fisheries by joint ventures between different states and fishing interests, national boundaries of 200 miles would make such efforts worthless. An international seabed regime left with control over the international seas outside a general 200-mile area from the coasts of the various oceans, would be left with potentially substantial but actually limited exploitable resources. Clearly, those exploiting mineral resources would concentrate their efforts on the more accessible reaches of the ocean bed. Nor is there any reason to believe that the interests reflected in the recommendations of the Metcalf Report, which might or might not become official United States policy, would forgo their "sovereign rights" to the exploitation of the continental margin in exchange for a 200-mile jurisdictional limit. Postwar history shows clearly that one set of exclusive national claims is more likely to be added to another set. The adoption by the

<sup>21</sup> Art. 35.

<sup>22</sup> Art. 54.

<sup>23</sup> Art. 58.

vast majority of the Latin American states of both the continental shelf doctrine and a 200-mile jurisdictional limit shows this clearly.

Apart from the Pardo Draft, several draft treaties and working papers were submitted to the second 1971 session of the Seabed Committee. It must suffice to summarize very briefly the principal features of these various documents, all of which build on the U.N. Resolution of 1970:<sup>23a</sup> A draft statute for an international seabed authority was submitted by the United Republic of Tanzania; a provisional draft treaty on the use of the seabed for peaceful purposes by the Soviet Union; a working paper on the régime for the sea and ocean floor and subsoil beyond the limits of national jurisdiction by thirteen Central and South American states; and a preliminary working paper by the regionally and ideologically rather diverse combination of Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands and Singapore. Four of these seven are landlocked states.

The common feature of these draft treaties and working papers is that they all provide for the establishment of an international seabed authority (under different names). The other—probably more significant—feature is that, with the exception of the Afghanistan group's working paper, the question of the limits of national jurisdiction is left open. The Tanzanian draft provides for the extension of the national jurisdiction of a coastal state to "an adjacent area of the seabed and the ocean floor, and the subsoil thereof, including its resources, to a water depth of . . . . . meters." The Soviet draft, Article III, simply notes: "Question of the limits of the seabed." The Latin American draft declares "the seabed and the ocean floor and the subsoil thereof *beyond the limits of national jurisdiction* . . . . . as well as its resources . . . . . the common heritage of mankind." In remarkable contrast, the Afghanistan group's working paper grasps the nettle. It defines the international area, which is subject to the jurisdiction of the International Authority, to be the seabed and subsoil outside the area of the territorial sea (the maximum breadth of which is twelve miles measured from the baseline) and beyond the submarine areas adjacent to the coasts of states. Adjacency is defined as either a depth not exceeding 200 meters or a belt of seas the breadth of which is forty miles measured from the baseline of the territorial sea, "according to the choice between the two methods of delimitation to be made by that particular state at the moment of ratification." In addition, within the international area, a belt of seabed and subsoil contiguous to the adjacent submarine area as defined before, and having a breadth of forty miles measured from the outer limit of such adjacent submarine area, shall constitute the "coastal state priority zone," *i.e.*, a zone in which the International Authority can operate directly or issue licenses only with the consent of the coastal state.

This—in all the circumstances courageous—attempt to define the limits of national jurisdiction is in accordance with the proposals of a number of writers—including Professors Andrassy, Henkin, and the present writer in

<sup>23a</sup> For a summary of the proceedings of the July–August meeting, and the text of the documents, see 10 Int. Legal Materials 973–1012 (Sept., 1971).

the books noted above—to determine the limits of national jurisdiction by providing an alternative between depth and breadth limits.

As regards the powers of the International Seabed Authority, all drafts except the Soviet draft give the International Authority exclusive jurisdiction over the international seabed area (the extent of which remains open, except in the proposals of the Afghanistan group's working paper). This includes specifically, or, in the Latin American draft by implication, the licensing of operations, the protection of the environment, including marine environment, and an equitable sharing of the revenues. On the details of revenue-sharing, the drafts are much vaguer than the U. S. draft of 1970, although some of them emphasize the needs of developing countries. The Soviet draft's Article IX simply lists the "question of licenses for industrial exploration and exploitation of seabed resources" without taking any position.

A few other notable features may be mentioned. The Tanzanian draft proposes the establishment of a distribution agency and a stabilization board as subsidiary organs of the International Seabed Authority. The distribution agency is to recommend to the Assembly the equitable sharing of income derived from the sale of raw materials, license fees, royalties, and any other charges or payments "among members according to the inverse ratio of their respective contributions to the annual budget of the United Nations." The Stabilization Board is to "investigate the current conditions of supply and demand and the price rates regarding raw materials obtained from the international seabed and those obtained on land." The Latin American draft reflects the concern of such major copper producers as Chile and Peru with rival exploitation of sea resources by providing that such exploitation shall "minimize any fluctuation in the prices of minerals and raw materials from terrestrial sources that may result from such exploitation and adversely affect the exports of the developing countries." The Latin American draft also establishes an organ called the "enterprise" which is empowered "to undertake all technical industrial or commercial activities relating to the exploration of the area and exploitation of its resources (by itself, or in joint ventures with juridical persons duly sponsored by states)." Similarly, the Afghanistan group's working paper would empower the Assembly, upon recommendation of the Council, "to establish a body charged with direct exploration, exploitation and marketing (including the direct licensing of a private or public enterprise, joint ventures and service contracts) of a specified part of the international area." The Soviet draft, which, as observed, leaves the questions of licensing powers and distribution of benefits completely open, is perhaps most remarkable for its proposals with regard to the executive board, to consist of thirty states, with five states each from (a) the Socialist countries; (b) the countries of Asia; (c) the countries of Africa; (d) the countries of Latin America; (e) the Western European and other countries not previously specified.

What emerges from these drafts and working papers, in conjunction with the earlier U. S. Draft Treaty (also submitted as a working paper)

and the British and French working papers, is: (a) a general consensus on the establishment of an international seabed authority; (b) considerable diversity on the executive functions of such authority, with predominant but not universal agreement on its power to license explorations; (c) proposals by an impressive though diverse number of states for granting to the Authority entrepreneurial, in addition to licensing, functions, to be exercised either directly or through joint ventures or through contract with public or private enterprises; (d) with the notable exception of the provisional working paper of the Afghanistan group and the very differently conceived proposals of the earlier U. S. draft, total evasion of the problem of the limits of national jurisdiction. Since, in the meantime, a growing number of states expand their exclusive zones of national jurisdiction, the prospects for consensus on either the U. S. or the Afghanistan group's attempts to define the limits of national jurisdiction below limits which would, in effect, partition the most productive ocean areas, recede from year to year.

Perhaps the foregoing brief survey will show how far the nations are from reaching effective international agreements on the status of the seas, surface as well as ocean bed, and how deceptive it would be to rely too much on the noble aspirations of the General Assembly resolution of December, 1970. Broadly, the following major clusters of interests may be discerned:

First, the major maritime Powers, and especially those with world-wide fishing interests, will continue to oppose greatly extended national jurisdictional limits beyond the twelve-mile territorial seas which have now in effect, though not yet in form, become the generally accepted norm.

Second, and by contrast, the smaller coastal states, and especially those for which fishing is a major source of livelihood, will insist on wide territorial limits. The 200-mile claims of the Latin American states are likely to be endorsed by a number of other coastal states in similar situations.

Third, the landlocked states are the only group generally favoring a strong seabed authority with extensive jurisdiction, including revenue-sharing.

Fourth, the major industrial and technologically developed coastal states are unlikely to consent to any revision of the Continental Shelf Convention, which would scale down the open-ended definition of the continental shelf to a fixed depth limit, even one considerably exceeding that of the Truman Proclamation or of the convention. Whether the concept of the United States Draft Convention, calling for a restriction of the continental shelf to 200 meters, coupled with trusteeship administration by a coastal state of an intermediate zone up to the edge of the continental margin, will prevail within the United States, is very doubtful. Even if it does, it is highly uncertain that it would be adopted by other industrial states.

Fifth, the Soviet bloc's opposition to the setting up of any international seabed authority with licensing and regulatory powers appears to be confirmed by its recent draft. The International Seabed Resources Authority proposed by the U.S.S.R. would essentially be confined to recommenda-

tions on the implementation of a general treaty by which the states will be responsible for peaceful uses of the seabed and its exploitation "for the benefit of mankind as a whole" and the prevention of pollution.

Meanwhile the depletion of vital marine stocks, such as whale, salmon, lobster, and certain species of tuna, proceeds, hardly checked by the hitherto scattered and weak efforts at organized international conservation. The growing threat to marine life is rapidly emerging as an even more urgent international problem than the jurisdiction over the mineral resources of the seas. Jean-Jacques Cousteau, after a 3-year survey, has estimated that marine life has already been reduced by 40%. Jacques Piccard predicts the extinction of *all* marine life within twenty-five years if the present trend continues (*New York Times*, Oct. 26, 1971).

In a speech delivered before the enlarged United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor on March 24, 1971, the Canadian delegate, Mr. J. A. Beesley, acknowledged the seriousness of the situation.<sup>24</sup> Canada's position is illustrative of the contemporary dilemma. It is a state with a fine record of international collaboration and participation in international organization, but it felt compelled in 1970 to declare a hundred-mile zone in the Arctic as an exclusive national pollution control zone and simultaneously to reserve the right to regulate shipping and fisheries in certain areas adjacent to its coast.<sup>25</sup> Canada is also one of the states that has suffered from excessive exploitation of its coastal fishery resources by Soviet trawler fleets equipped with modern gear and moving from zone to zone. While admitting the need to protect vital national interests, Mr. Beesley proposed that, as a first step, there should be a moratorium resolution calling upon all states to define their continental shelf claims within a specified time limit or, alternatively, specifying "that as of a named date already past, national claims would be deemed to have been fixed. . . . Thus, while the limits of the area beyond national jurisdiction could be expanded in the later negotiations, they could not be lessened since states would be estopped in practice if not law from claiming a greater area than that included in the claims or potential claims they had advanced as of the specified date." As Mr. Beesley admitted, a recognition of such claims would no doubt include a large number of 200-mile claims.

The conclusion must be that the creation of an International Seabed Authority with jurisdiction extending much beyond the abyssal depths is unlikely in the foreseeable future. Can we envisage any future other than one which will eventually lead to near-total partition of the oceans, with the major naval and technological Powers confronting each other in Orwellian fashion on the ocean bed as well as on land? The writer has elab-

<sup>24</sup> Ms. statement at 21. See also his remarks at the 1971 annual meeting of the Am. Soc. of Int. Law, 65 A.J.I.L. (September) 117 (1971).

<sup>25</sup> Arctic Waters Pollution Act, 18 & 19 Eliz. 2, c. 47 (1970); Amendment to the Territorial Sea and Fishing Zones Act, 18 & 19 Eliz. 2, c. 68 (1970); Amendment to the Canada Shipping Act, 19 & 20 Eliz. 2, c. 27 (1971); see also 9 Int. Legal Materials 543 (1970).



orated in more detail elsewhere<sup>26</sup> what appear to him to be constructive alternatives to a continuing competitive race, always bearing in mind that these are second-best alternatives to a functionally and geographically effective International Seabed Authority. Others are likely to follow. There should be, in matters of conservation and pollution, not only a widening of international agreements on standards, but the setting up, with the least possible delay, of an international conservation and pollution control authority. While its direct powers would be confined to the international seas beyond national jurisdiction, its standards could be extended to national jurisdictions by virtue of a series of agreements with the coastal states.

Failing any extension of effective international conservation and pollution controls in the foreseeable future, the further extension of national jurisdictional claims, *i.e.*, of national sovereignty, vertically extended from surface to subsoil, would appear inevitable. But between the various conflicting interests it may be possible to reach a compromise by which territorial waters are kept at the present generally accepted limit of twelve miles, while coastal states are given the power to extend pollution and conservation controls for a further 100-mile stretch. Such an agreement would be along the lines of the recent Canadian pollution and conservation control legislation. In the Indian Ocean area, Ceylon, India and Pakistan have also proclaimed 100-mile conservation zones. Perhaps the creation of such exclusive conservation and control zones would give some impetus to more energetic and effective international control measures and institutions.

Finally, the exploitation both of mineral resources and of certain fisheries should, subject to agreed conservation and pollution standards, be carried out by bipartite or multipartite joint ventures. Most of the states that now proclaim extended zones of exclusive coastal jurisdiction do not have the means of exploiting their resources. The pattern which has become increasingly predominant in the exploitation of the land resources of developing countries can be applied to the exploitation of the resources of the sea. There are many precedents for consortia, in the form of either contractual or equity joint ventures, between developed and developing countries, including both governmental organizations and private corporations. But in order to avoid ruinous over-exploitation, pollution, and exhaustion of resources, such ventures must be under the control of the competent national and international authorities, preferably following the standards laid down by a treaty of world-wide application.

<sup>26</sup> *The Future of the Oceans*, Chs. 7 and 8 (1971).

## EDITORIAL COMMENT

### THE OBLIGATION TO REGISTER TREATIES AND INTERNATIONAL AGREEMENTS WITH THE UNITED NATIONS

Under Article 102(1) of the United Nations Charter, it will be recalled, "[e]very treaty and every international agreement entered into by any Member . . . shall as soon as possible be registered with the Secretariat and published by it."<sup>1</sup> This provision, according to a report made to the Society some 20 years ago, "automatically brings in, for publication in the *United Nations Treaty Series*, most of the agreements made since the beginning of the United Nations. . . ."<sup>2</sup> Would that this optimistic assertion had proved true! In the course of recent efforts to collect for publication all the lump-sum settlements concluded between the end of World War II and January 1, 1971, this writer found to his surprise and dismay that only 56 of 126 such agreements, well under 50 percent, had been registered with, and subsequently published by, the United Nations.<sup>3</sup>

Behind Article 102(1) and its predecessor, Article 18 of the Covenant of the League of Nations,<sup>4</sup> lies "the principle of open diplomacy and the avoidance of secret pacts."<sup>5</sup> Failure to register not only undercuts this principle, first advocated by President Wilson in 1918,<sup>6</sup> but also ignores an equally important policy consideration, namely, the recording of contemporary trends in substantive international law. Hudson's description of the pre-Covenant state of affairs retains a good deal of validity today:

Scholars found it difficult to keep abreast of the development of conventional international law, and even specialists in particular fields did not have readily accessible the treaties which specially related to their work.

The serious consequences of this were that the world's treaty law came to lack unity . . . and the conventional side of international

<sup>1</sup> U.N. Charter, Art. 102, par. 1 (emphasis added).

<sup>2</sup> Eagleton, "The Handling of Treaties by the Secretariat of the United Nations," Report of the Committee to Study Legal Problems of the United Nations, 1951 Proceedings, American Society of International Law 139.

<sup>3</sup> See Authors' Introduction to 2 R. Lillich and B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (to be published by the Syracuse University Press during 1972 in the *Procedural Aspects of International Law Series*). Some states, of course, may contend that lump-sum settlements, which often contain a high content of commercial and economic matters, are not subject to the registration requirement. Most states have registered at least one such settlement, however, indicating that general practice regards them as treaties for purposes of Art. 102.

<sup>4</sup> League of Nations Covenant, Art. 18. While very similar to Art. 102(1), this article contains a final sentence not included in its successor: "No such treaty or international engagement shall be binding until so registered."

<sup>5</sup> Brandon, "Analysis of the Terms 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter," 47 A.J.I.L. 49, 69 (1953).

<sup>6</sup> Hudson, "The Registration and Publication of Treaties," 19 A.J.I.L. 273 (1925).

law came to be disregarded or neglected by writers and scholars and jurists.<sup>7</sup> . . .

One only can speculate, reading the above, whether the International Court of Justice's approach to the *Barcelona Traction Case*<sup>8</sup> would have been the same if the Court and counsel had had easy access to the 70 lump-sum agreements not yet published in the *United Nations Treaty Series*, almost all of which authorize, or have been construed to authorize, shareholder claims.<sup>9</sup>

Why the various states ignore their obligation to register treaties is hard to fathom. Lack of concern and carelessness perhaps are the major reasons. Another one frequently advanced is the alleged confidential character of certain agreements. It is common knowledge, for instance, that Cuba concluded a tentative settlement with Spain in May, 1967, yet the parties regard the agreement as "a classified document. . . ."<sup>10</sup> Why? Does Franco's Spain not wish to acknowledge that it does business with Castro's Cuba? Does the Revolutionary Government of Cuba wish to conceal from the Western world, especially the United States, that it is willing to settle nationalization claims? Surely the fact that the French-Cuban Claims Agreement of March 16, 1967, has been published in three sources,<sup>11</sup> albeit unhappily not in the *United Nations Treaty Series*, makes the non-publication of its Spanish counterpart appear somewhat whimsical.

Equally hard to fathom is how to encourage states to comply with Article 102(1). Unlike Article 18 of the Covenant, which required registration before treaties became binding,<sup>12</sup> the only sanction contained in the Charter is the one found in Article 102(2). A party to a non-registered treaty, according to this provision, may not invoke it before any organ of the United Nations, surely a "milder sanction" indeed for what arguably is a breach of the Charter.<sup>13</sup> Moreover, while "[p]ersistent failure may be construed as an offense against Article 2(2) and, theoretically, may entail expulsion, under Article 6,"<sup>14</sup> such action obviously would be disproportionate to the gravity of the obligation breached. For this reason, it never has been seriously considered as a sanction against non-complying states.

The upshot of the matter for the hapless international lawyer, whether academic, government or practicing, is not particularly promising. True, Article 80 of the Vienna Convention on the Law of Treaties reaffirms and extends the principle of registration by providing that "[t]reaties

<sup>7</sup> *Ibid.* at 288.

<sup>8</sup> *Barcelona Traction, Light & Power Co., Ltd. Case*, [1970] I.C.J. Rep. 3; 64 A.J.I.L. 653 (1970); 9 Int. Legal Materials 227 (1970).

<sup>9</sup> See Lillich, "The Rigidity of *Barcelona*," 65 A.J.I.L. 522 (1971). See also round table discussion in 65 A.J.I.L. (September) 333 (1971).

<sup>10</sup> Letter from Sr. Pedro Bermejo, First Secretary, Spanish Embassy, to the author, March 4, 1971.

<sup>11</sup> [1967] J.O. 9761; [1968] R.G.D.I.P. 299; 45 Journal du Droit International 172 (1968).

<sup>12</sup> See note 4 above.

<sup>13</sup> N. Bentwich and A. Martin, *A Commentary on the Charter of the United Nations* 178 (1950).

<sup>14</sup> *Ibid.*

shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication,"<sup>15</sup> but whether this provision will be any more honored by states parties than Article 102(1) remains to be seen. Hence countries like the United States, with an enviable registration record,<sup>16</sup> and scholarly organizations such as the Society, with its continuing interest in international law documentation,<sup>17</sup> must press strenuously for the prompt registration of *every* treaty if the goal of comprehensive coverage by the *United Nations Treaty Series* is to be achieved.

R. B. LILICH

<sup>15</sup> U.N. Doc. A/CONF. 39/27 at 42 (1969), reprinted in 63 A.J.I.L. 875, 901 (1969).

<sup>16</sup> Of the nine lump-sum settlements concluded by the United States since World War II, only the most recent, the United States-Canadian Agreement of Nov. 18, 1968, [1968] U.S.T. 7863, T.I.A.S., No. 6624, has not been published in the U.N. Treaty Series.

<sup>17</sup> See, e.g., Report of the Committee on Publications of the Department of State and the United Nations, 64 A.J.I.L. (September) 293 (1970).

## NOTES AND COMMENTS

### FURTHER THOUGHTS ON A NEW SOURCE OF INTERNATIONAL LAW: PROFESSOR D'AMATO'S "MANIFEST INTENT"

In a recent number of this JOURNAL, this writer examined Professor Richard A. Falk's position on the quasi-legislative competence of the General Assembly,<sup>1</sup> which turned out to be an amalgam of two rather contradictory positions.<sup>2</sup> On the one hand, Falk was disposed to view some General Assembly resolutions "as evidence of a general practice accepted as law," to use the familiar language of the Statute of the International Court of Justice referring to international custom (Article 38, subparagraph 1(b)). Yet, on the other hand, Falk simultaneously propounded a position that went far beyond the terms of Article 38 and most writings on the subject by positing the existence of a new source of international law to explain the apparent legal effect of certain General Assembly resolutions. Beyond illustrating the confusion in Professor Falk's work on this important and increasingly discussed topic, the point of the Comment was to show that the radical position, however appealing, was subject to one overriding difficulty. That difficulty was the absence of a legally expressed consensus of the world community on the existence of this new source of international law, a consensus of this overarching nature being requisite if any new source were to be brought into being. It is a matter of some irony that the problem is one of consensus, in view of Falk's argument that consensuses on specific issues give rise to new rules of law. There are two conceptually and empirically distinct levels of consensus that have to be taken into account.

In a subsequent number of the JOURNAL, Professor Anthony A. D'Amato, dealing with the seemingly unrelated question of the generation of customary international law through treaties,<sup>3</sup> has actually, if inadvertently, cast additional light on the possibility of a new source of law. In the present comment, D'Amato's principal arguments are summarized and then related to Falk's and this writer's views with an eye to drawing some more general conclusions.

Professor D'Amato has isolated from the recent Judgment of the International Court of Justice in the *North Sea Continental Shelf Cases* certain

<sup>1</sup> "On the Quasi-Legislative Competence of the General Assembly," 60 A.J.I.L. 782-791 (1966). For a more recent, quite elaborate presentation of this position, see "An Argument to Expand the Traditional Sources of International Law—With Special Reference to the Facts of the South West Africa Cases," in Falk, *The Status of Law in International Society* 126-173 (1970). The first essay cited is reprinted *ibid.* at 174.

<sup>2</sup> N. G. Onuf, "Professor Falk on the Quasi-Legislative Competence of the General Assembly," 64 A.J.I.L. 349-355 (1970).

<sup>3</sup> A. A. D'Amato, "Manifest Intent and the Generation by Treaty of Customary Rules of International Law," 64 A.J.I.L. 892-902 (1970).

identifying characteristics of treaty provisions which "generate customary law," or, in the Court's language, have "a fundamentally norm-creating character such as could be regarded as forming the basis for a general rule of law."<sup>4</sup> First, such norms are ascertainable by virtue of what we might call structural characteristics of the treaty containing them. Specifically, the provisions in question must be so cast as to be generalizable, and there must be signs of their being set apart from non-generalizable provisions of the same treaty.<sup>5</sup> Second, the identification of such norms does not depend on their meeting the traditional tests for determining the existence of a customary rule of law. Therefore, the number of parties to the treaty is irrelevant, as is the treaty's duration or the extent of subsequent state practice.<sup>6</sup> While it is not absolutely clear whether scholarly or juridical acknowledgment is required, the answer would seem to be no; the Court's acknowledgment that such norms might exist is important only in assisting theoretical appreciation of the phenomenon of general norms actually being generated through treaties.

Obviously, no little confusion arises when Professor D'Amato and the Court itself<sup>7</sup> describe general norms arising from treaty provisions as "customary." If the traditional requirements for the existence of customary law are irrelevant—and D'Amato faulted the Court for raising them as "make-weight arguments"<sup>8</sup>—then such law simply cannot be customary. If, however, the word "customary" is used synonymously with the word "general" because historically the only general rules we had were customary, then the usage is misleading albeit understandable. In theory, there is no *a priori* reason to suppose that all general norms are or must be customary in character, and to suppose this as an actuality obscures the very real difference between general norms created through treaty provisions and customary law as traditionally understood.

If general norm-creating treaty provisions are not customary, what are they? In his recent essay on the *North Sea Continental Shelf Cases*, Professor Wolfgang Friedmann suggested that they might be general principles of law.<sup>9</sup> On close reading, one finds that these are not general principles recognized by civilized nations, but "general principles of customary international law," which in turn are indistinguishable from ordinary rules of customary law.<sup>10</sup> Friedmann then imputed to the Court the view that the general norms on the continental shelf reflected in Articles 1 to 3 of the 1958 Geneva Convention on the Continental Shelf are

<sup>4</sup> Quoted *ibid.* at 895. The Court's Judgment is reprinted in 63 A.J.I.L. 591-631 (1969); 8 Int. Legal Materials 340-385 (1969).

<sup>5</sup> D'Amato, note 3 above, at 895-898.

<sup>6</sup> *Ibid.* at 898-899.

<sup>7</sup> Judgment cited note 4 above, pars. 71, 74.

<sup>8</sup> D'Amato, note 3 above, at 898.

<sup>9</sup> W. Friedmann, "The North Sea Continental Shelf Cases—A Critique," 64 A.J.I.L. 229 at 231 (1970).

<sup>10</sup> *Ibid.* But see p. 231, note 6, and p. 234, note 12, in which Friedmann seems to regard custom and general principles as distinct if not easily distinguished sources of law.

actually rapidly precipitated or "instant" custom.<sup>11</sup> This would mean that, in the Court's view, the traditional requirements for the existence of customary law are not at all irrelevant; on the contrary, they have been met with exceptional speed and uniformity. And if Friedmann is right in his interpretation of the judgment, then D'Amato's arguments, and the implications drawn from them here, are simply wrong. We will return to this problem at a later point.

As they are usually understood, general principles of law recognized by civilized nations might still be seen as figuring, at least implicitly, in the Court's judgment. In particular, the Court dealt with the equidistance principle articulated in Article 6 of the Continental Shelf Convention in terms of equity, naturalness, and reasonableness. Yet the Court was obliged to think in just these terms because it had specifically rejected Article 6, and the equidistance principle, as a general norm, in contradistinction to Articles 1-3 of the same convention.<sup>12</sup> The Court must be seen, then, as invoking general principles not as a source of law, but as an alternative to law.<sup>13</sup>

If general norm-creating treaty provisions are neither customary law nor general principles, however these two categories are construed, the question remains: What are they? The most appropriate answer is that they are akin to those resolutions of the General Assembly which manifestly are intended to have legal effect in themselves. Professor Falk has noted the importance of language in assessing the legal impact of General Assembly resolutions.<sup>14</sup> Operationally, a concern for language means verifying the presence of two structural characteristics which all general norm-creating resolutions must possess. The first is generality of language (obviously making such resolutions generalizable) and the second a declaratory format (differentiating them from other resolutions).<sup>15</sup> That these characteristics parallel those that D'Amato ascribes to general norm-creating treaty provisions goes almost without saying.

Additionally, Falk established certain contextual characteristics, that

<sup>11</sup> *Ibid.* at 232-233. See also the careful analysis of R. R. Baxter, "Treaties and Custom," 129 *Hague Academy, Recueil des Cours* 57-69 (1970). In his dissenting opinion, Judge *ad hoc* Sørensen expressly adopted the argument of rapidly emerging custom, while candidly admitting that "the word 'custom' with its traditional time connotation, may not be an adequate expression for the purpose of describing this particular source of international law." 8 *Int. Legal Materials* 422 at 427 (1969).

<sup>12</sup> Judgment, note 4 above, at pars. 60-73.

<sup>13</sup> This is Friedmann's opinion also, although the Court attempted to create a contrary impression. Friedmann, note 9 above, at 234-236.

<sup>14</sup> Falk, "On the Quasi-Legislative Competence of the General Assembly," note 1 above, at 785-786.

<sup>15</sup> Conventionally, writers have accounted for the existence of these characteristics by assuming that the General Assembly was merely restating existing law. See, for example, J. Castañeda, *Legal Effects of United Nations Resolutions* 168-171 (1969). While this position eliminates the need to attribute legal effect to resolutions directly, it ignores the fact that the content of many of these resolutions is deliberately innovative and could not possibly have acquired legal effect through the operation of custom. Thus, the position represented by Sr. Castañeda is little more than a doctrinal artifice to avoid the implications of recent trends.

is, characteristics relating to their adoption and subsequent reception, which these resolutions must equally possess.<sup>16</sup> They must be adopted overwhelmingly, or at least by a two-thirds majority with all major Powers and groups represented. And there must be some pattern of support subsequent to their adoption. This need not be the systematic and enduring practice required for the formation of customary law. Rather, the combination of frequent, favorable citation in forums such as the General Assembly and infrequent contrary practice would probably suffice.<sup>17</sup> Resolutions meeting these conditions express a consensus of the world community on specific issues which, to Falk's mind, is a source of obligation and thus of law.<sup>18</sup>

While Falk tried to relax the traditional requirements of customary law formation to embrace these consensuses,<sup>19</sup> he need not have bothered to do so. All norms emanating from a given source of law display a set of common characteristics which are not displayed by norms arising from any other source. If the legal effect of General Assembly resolutions can arise only from the operation of custom, then it is necessary to relax the requirements of customary law formation or, at best, only one or two of these resolutions will have the necessary characteristics to qualify. If, on the other hand, a new source of law is responsible for the legal effect of certain General Assembly resolutions, then the stringent, consent-oriented characteristics of customary law are simply irrelevant (unless one wishes to demonstrate that there also exist customary rules of identical content). Furthermore, the invocation of customary law requirements impedes the scholar's task of verifying characteristics whose presence is required by a new, consensus-oriented source of law.

Unlike Falk, D'Amato was not concerned with the problem of consensus.<sup>19a</sup> Yet the problem should not be ignored in the case of general norm-creating treaty provisions and can actually usefully be dealt with in Falk's terms. The forum for expression of community consensuses is not the General Assembly but rather *ad hoc* international conferences called for the purpose of concluding multilateral treaties. Such conferences frequently

<sup>16</sup> Falk, "On the Quasi-Legislative Competence of the General Assembly," note 1 above, at 787-790.

<sup>17</sup> For a quantitative survey of the citation of earlier General Assembly resolutions in later resolutions, see S. A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions," 63 A.J.I.L. 444-478 (1969). While Bleicher viewed re-citation in connection with the traditional sources of international law, he did say (at 477) that the "process of re-citation distinguishes those resolutions which express deeply-held, temporally stable convictions from those which are of only passing or mild concern."

<sup>18</sup> *Ibid.* at 784-785.

<sup>19</sup> Falk was quite explicit about doing this in "An Argument to Expand the Traditional Sources of International Law," note 1 above, at 153-161.

<sup>19a</sup> D'Amato has treated the problem of consensus elsewhere: "On Consensus," 8 Canadian Yearbook of International Law 104-122 (1970). This essay, as well as D'Amato's new book, *The Concept of Custom in International Law* (1971), were unfortunately not available for consideration during the preparation of the present comment.



involve dozens of states representing all segments of the community and have rules of decision comparable to those of the General Assembly. For decisions of conferences to generate law, they must have both the structural characteristics already discussed and, we can easily see, the additional contextual characteristics of participation of all major Powers and groups in their adoption and of subsequent favorable reception in the community.

When the "conditions of requisite formality and consensus"<sup>20</sup> are met either for General Assembly resolutions or treaty provisions (actually, conference decisions that become treaty provisions), we can rightfully say that one of two general requirements for a legal obligation to exist, namely, its effectiveness, has been met. This leaves, however, the requirement of legitimacy, through which a putative norm is related to the legal order as a whole. Neither Falk nor D'Amato touched on this matter at all.

The matter can be resolved, as indicated above, by asking if there is an overarching consensus of the world community that community consensus on substantive issues which display specified characteristics can have legal effect in themselves. Were an overarching consensus of this kind given a fully legal expression through an existing source of law, this would be a grant of legitimacy not for a given community action but for a class of community actions which can thus be said to constitute a source of law.

My argument in the case of General Assembly resolutions was that there is no such overarching community consensus because of the position adopted by Western states in the General Assembly.<sup>21</sup> In the case of what are claimed to be general norm-creating treaty provisions, however, the answer is not so clearly negative. This is because the authoritative voice of the International Court of Justice, speaking, as it were, for the international community, seems to have affirmed the legitimacy of these general norms created outside the conventional sources of international law. And this is another way of saying that the World Court is helping to legitimate a new source of law. This new source is seen in specific relation to general norm-creating treaty provisions, but it has been argued here that the latter are part of a generic class of community actions which also include certain General Assembly resolutions. Thus, the legitimating impact of the Court's judgment may be imputed to the class of actions as a whole, obviously including the specified General Assembly resolutions. If this were done, the problem that this writer raised in connection with Falk's work would be substantially solved—the consensus of the world community granting legal effect to consensus on substantive issues bearing certain attributes may actually have been articulated by the International Court of Justice.

This is not to say that the Court has created a new source of international law. Nor is it to say that a community consensus, as reflected by the Court in a given judgment, has created a new source all by itself. What we are saying is that a community consensus to the effect that there

<sup>20</sup> R. A. Falk, "The New States and the International Legal Order," 118 *Hague Academy, Recueil des Cours* 42 (1966).

<sup>21</sup> 64 A.J.I.L. 349 at 354 (1970).

should be a new source can create that new source if it is legally expressed. While the Court cannot give legal expression to a consensus of this kind, it can voice that consensus so persuasively and authoritatively that a truly legal expression is rapidly forthcoming through the operation of an existing source of law.

It is well known that the immediate affirmation of a landmark decision of the International Court of Justice can yield a new rule in a short period of time. One such rule of law is the straight baseline method of delimiting the point from which the territorial sea is measured, as propounded by the Court in its 1951 Judgment in the *Anglo-Norwegian Fisheries Case*.<sup>22</sup> There is no difference at all between this process as it relates to the generation of specific rules and the generation of a new source of international law, since the vehicle for a new source is a specific rule stating the nature and requirements of the new source in question.

It is not a foregone conclusion that a judgment of the Court, even when it deals with an unsettled area of the law, will have a decisive impact on the development of specific rules. It may happen that the Court's conclusions are significantly out of step with community preferences. If the Court has not stepped too far ahead, then it should be able to lead the community through the cogency and reasonableness of its arguments, so that a consensus is formed around the Court's judgment rather than simply reflected in it. In the instance of the *North Sea Continental Shelf Cases*, we might ask whether a split Court (11-6), in which only six judges are directly associated with the Judgment, can ever crystallize a community-wide consensus. Without answering the question in principle, it should be noted that none of the separate concurring or dissenting opinions openly questioned the radical implications of the Judgment.<sup>23</sup> On the contrary, the dissenting opinions of Judges Koretsky and Lachs reinforced the radical position.<sup>24</sup> Furthermore, in view of the conservative tenden-

<sup>22</sup> [1951] I.C.J. Rep. 116; 46 A.J.I.L. 348 (1952). In reconstructing an argument of Judge Sir Gerald Fitzmaurice, Professor Parry has stated that "it is fairly obvious in practice that a decision often is of considerably more consequence than the Statute of the Court would suggest. Thus, according to the latter, the United Kingdom alone is bound to accept that the extent of Norwegian territorial waters is as indicated by the straight base-line in issue in the *Anglo-Norwegian Fisheries* case. But it is unrealistic to maintain that other States would not be similarly bound, or that any State could, after the decision, successfully contest the application of a similar system of admeasurement in similar topographical and economic circumstances." C. Parry, *The Sources and Evidences of International Law* 93 (1965).

<sup>23</sup> There is an implicit rejection of the radical view in the dissenting opinion of Judge *ad hoc* Sørensen, cited note 11 above.

<sup>24</sup> 8 Int. Legal Materials 398 at 400-403 (Koretsky) and 416 at 419-421 (Lachs) (1969). Both held that Art. 6 of the Continental Shelf Convention was part of general international law. In so arguing, Lachs abjured use of the word "custom," while Koretsky said the following (at 400): "One may ask whether these principles are or have become an institution of international law either as general principles developed in relation to the continental shelf, or as an embodiment of international custom. There are sufficient grounds for considering them to qualify in both these ways, but I am inclined to consider them as principles of general international law, seeing that established doctrine lays much stress on the time factor as a criterion of whether a

cies of Western states in matters of international law, it is significant that three of the six judges associated with the judgment itself are from Western states.

In the *North Sea Continental Shelf Cases*, a more serious problem for the Court as consensus builder is the highly ambiguous character of crucial passages of the Judgment. We saw above how much at variance D'Amato's radical interpretation is with Friedmann's more conventional one. Possibly the Court itself was unclear on the doctrinal subtleties of its Judgment and so inadvertently gave support to both arguments, however contradictory, in successive sentences. A careful reading of the text is not persuasive one way or the other.<sup>25</sup> Friedmann does seem to be right in saying that the Court addressed the matter of sources "almost casually."<sup>26</sup> This alone weakens the authority and persuasiveness of the Court's Judgment and lessens the credibility of the radical doctrine that D'Amato adduces from that Judgment.

All of this means that the Judgment can only be viewed as the first small step toward the legitimation of a new source of law. The next step is a willingness on the part of legal scholars, and then state spokesmen, to accept D'Amato's interpretation and its implications, thus endowing the Judgment of the Court with a retroactive clarity and force. If there is a willingness to applaud the Court's Judgment while interpreting it in a radical sense, then eventually we may have an identifiable community consensus, expressed through an existing source of law (custom as precipitated by a landmark decision of the International Court of Justice) that all other consensuses of a certain character create general norms.

Any meaningful follow-up to the Court's first, tentative step in this direction is itself dependent on clearing up the present web of terminological confusion. Only then will there be a common perception of the issue as one even warranting a major response from the scholarly community. With this in mind, it is worth suggesting that an incipient new source of

---

given principle belongs to customary international law: by and large, customary international law turns its face to the past while general international law keeps abreast of the times, conveying a sense of today and the near future by absorbing the basic progressive principles of international law as soon as they are developed."

Friedmann, note 9 above, at 234, note 12, completely missed the point of these remarks of Koretsky's by taking them to affirm general principles of law recognized by civilized nations as a source of law. Friedmann rightly observed that such a position is highly incongruous for a Socialist legal scholar. On the other hand, affirming the existence of a new source of general norms is quite consistent with the Socialist position on the legal effect of certain General Assembly resolutions and indeed is predictable for all who chafe at the Western dominance of international law.

<sup>25</sup> See especially pars. 71-77. Actually, only the one sentence from par. 71 quoted by D'Amato (and above, at p. 775) is unambiguous in its language. It alone hardly gives credibility to D'Amato's claim that "the Court for the first time gave explicit, and indeed overwhelming, substantiation of the thesis that provisions in treaties can generate customary law, that they can be of a 'norm-creating character.'" D'Amato, note 3 above, at 894-895.

<sup>26</sup> Friedmann, note 9 above, at 232. But for a contrary view, see Baxter, note 11 above, at 53.

law deserves a name of its own, hopefully breaking the spell that custom seems to have on writers. The traditional, common sense meaning of "custom" has increasingly been stretched and distorted, first by the idea of its rapid, almost instantaneous creation and now by the idea of its creation through intentioned behavior. In order to accommodate these aberrations in the original concept, "a general theory of how customary law comes into being,"<sup>27</sup> becomes in fact a *partial* theory of law-creation in *general*, the consistency, clarity, and economy of which as a theory is severely jeopardized by an unnecessary attachment to the concept of custom.

If the new source, whether incipient or only imagined, deserves a distinctive name, D'Amato's notion of manifest intent seems to express the most distinctive feature of this source. If the new source is manifest intent, the law to which it gives rise also deserves a name, and one which refers as well to the other distinctive feature of this law—its origins in an organized community forum. Hence, we might call it "manifest community law."

Beyond this preliminary operation of acknowledging the distinctive character of a new kind of law with distinctive labels, an appropriate second operation might well be to inventory those rules which would constitute this new kind of law. Conceivably, some rules have been around a long time without their distinctiveness ever having been recognized. Examples might be the *règlement* on diplomatic ranks contained in the Protocol of the Congress of Vienna (1815), the Declaration of Paris (1856), or, less plausibly, the Geneva Protocol (1925).<sup>28</sup> Even Chapter XI of the United Nations Charter might be viewed this way, as might many of the formal emanations of the inter-American system, the latter being understood as manifest regional community law. D'Amato suggested that some provisions of the other three 1958 Geneva Conventions on the Law of the Sea might qualify,<sup>29</sup> as would some provisions of many other United Nations sponsored multilateral conventions. And, of course, most of those resolutions of the General Assembly which are entitled "declarations" would also qualify.<sup>30</sup>

The procedure for determining what are rules of manifest community law is simply the application of D'Amato's and Falk's checklists of characteristics. In practice, intent is not likely to be so manifest as D'Amato

<sup>27</sup> D'Amato, note 3 above, at 901.

<sup>28</sup> Although General Assembly Res. 2603A (XXIV), Dec. 16, 1969 (64 A.J.I.L. 393 (1970)), affirmed that "the Geneva Protocol embodies generally recognized rules of international law," with no specific mention of their customary character, the Geneva Protocol nonetheless fails the test of manifest intent. Widespread reservations stipulating reciprocity as a condition for the Protocol's operation effectively deny a generalizing intent. For details on these reservations, see R. R. Baxter and T. Buerghenthal, "Legal Aspects of the Geneva Protocol of 1925," *ibid.* 869-870.

<sup>29</sup> D'Amato, note 3 above, at 898.

<sup>30</sup> One exception would be Res. 1653 (XVI), Nov. 28, 1961, declaring against the use of nuclear weapons. Neither the United States nor the Soviet Union voted in favor of this resolution.

assumed.<sup>31</sup> Nor, as Falk wisely insisted, is the use of "mechanical requirements" always adequate for determining the existence of a consensus.<sup>32</sup> Yet none of the tasks for ascertaining the existence of manifest community law is likely to be as subjective as the ones associated with the identification of customary law. In the latter instance, the intervention of the scholar has been so characteristic that "the teachings of the most highly qualified publicists" have been institutionalized as a subsidiary source of law.

Once we get beyond the speculative stage and can point to a body of rules that could reasonably be manifest community law, we can legitimately begin to think that such law exists. After all, in the history of international law, only when concrete rules of customary law began to be identified, was it clear that international law was a reality and not just a metaphysical postulate.

N. G. ONUF \*

#### THE NEED FOR REVISION OF THE BUSTAMANTE CODE ON PRIVATE INTERNATIONAL LAW

For more than twenty years the legal organs of the Organization of American States have been concerned with possible revision of the Bustamante Code on Private International Law to make the Code more widely accepted in the Hemisphere.<sup>1</sup> After some progress made with the project, new difficulties have arisen. The revision of the Code seems to be the key to uniform conflicts rules in Latin America, a matter of interest to the United States. The developments therefore deserve attention.

The Bustamante Code was produced in 1928 at the VIth International Conference of American States held in Havana, Cuba.<sup>2</sup> Of the then existing twenty-one Latin American states, fifteen have ratified the Code Convention,<sup>3</sup> six with reservations.<sup>4</sup> A "general" reservation was used by Bolivia, Costa Rica, Chile, Ecuador, and El Salvador, providing in substance that the Code rules will apply only if they are not contrary to do-

<sup>31</sup> As the dissenting opinions of Eoretsky and Lachs, note 19 above, clearly indicate.

<sup>32</sup> Falk, "On the Quasi-Legislative Competence of the General Assembly," note 1 above, at 788.

\* Assistant Professor, School of International Service, The American University.

<sup>1</sup> Earlier stages were covered in Nadelmann, "A New Report of the Inter-American Juridical Committee on Revision of the Bustamante Code," 53 A.J.I.L. 652 (1959); *idem*, "The Question of Revision of the Bustamante Code," 57 *ibid.* 384 (1963).

<sup>2</sup> Text in 86 L.N.T.S. 111; The International Conferences of American States 1889-1928, p. 367 (J. B. Scott, ed., 1931); 4 Hudson, International Legislation 2279 (1931). See Lorenzen, "The Pan American Code of Private International Law," 4 Tulane Law Rev. 499 (1930).

<sup>3</sup> Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.

<sup>4</sup> Bolivia, Costa Rica, Chile, Ecuador, El Salvador, and Venezuela. Venezuela's reservations are discussed in J. Muci Abraham, Código de Derecho Internacional Privado (Código Bustamante) 37 (Caracas, 1955).

mestic law.<sup>5</sup> Mexico and four states parties to the Montevideo Treaties of 1889 on Private International Law,<sup>6</sup> namely, Argentina, Uruguay, Paraguay, and Colombia, are the states which, in addition to the United States, have not ratified the Code Convention. Bolivia and Peru are parties to both the Montevideo Treaties and the Code Convention.<sup>7</sup> The states newly admitted to the Organization of American States<sup>8</sup> as yet have not adhered to either of these documents.

To be a success, the revision of the Code would have to accomplish a variety of things. A substantial number of states not parties to the Code Convention, in particular the states from the Montevideo group, must ratify, and this without loss of states that are presently parties. As many as possible of the general reservations which make ratification almost meaningless must be withdrawn. The task to be accomplished is complex. On the other hand, the view exists that criticism of the Code centers on only a few points and that the necessary amendments could fairly readily be agreed upon. This view may, or may not, be over-optimistic.

As a result of the studies undertaken over the years by the Inter-American Juridical Committee, the Inter-American Council of Jurists recommended to the Organization of American States in 1965<sup>9</sup> that a specialized conference be convened to work on the revision of the Bustamante Code along the following lines: The revision should begin with the general principles and the rules on civil and commercial law (that is, omitting the parts on penal law and procedure); rules on labor law should be added. In the revision, the Montevideo Treaties of 1889 and 1940 as well as the general evolution of the law should be taken into account. Specialists in private international law should represent the participating states. The recommendation included a request addressed to the Department of Legal Affairs of the Pan American Union that it collect in one volume all documents produced in connection with the revision project. The volume would go to the Member States for comments, and the Inter-American

<sup>5</sup> Text of reservations collected in Comité Jurídico Interamericano, *Textos de los Documentos de la Organización de los Estados Americanos sobre la Posibilidad de Revisión del Código de Derecho Internacional Privado o Código Bustamante* 541-547 (Organization of American States, Washington, D. C., June, 1970, mimeo.) (CIJ-90, Rev., Spanish only). The reservations are discussed in a document, "Possibility of Revision of the Code of Private International Law (Bustamante Code)," prepared in 1961 by the Department of Legal Affairs of the Pan American Union, reproduced *ibid.* at 299, 312-334. For an analysis of the general reservation made by Chile, see A. Etcheberry Orthusteguy, *American-Chilean Private International Law* 12 (1960).

<sup>6</sup> On the treaties see 1 Ernst Rabel, *Conflict of Laws: A Comparative Study* 32 (2d ed., 1958); Bewes, "The Treaties of Montevideo," 6 *Grotius Society Transactions* 59 (1921). English translation of treaties in 2 *International American Congress, Reports of Committees and Discussions* 876 (1890).

<sup>7</sup> Because of the general reservation made by Bolivia, note 4 above, in the relations between the two states the Montevideo Treaties apply. See M. García Calderón K., *Derecho Internacional Privado* 25-26 (Lima, 1969).

<sup>8</sup> Barbados, Trinidad and Tobago, Jamaica.

<sup>9</sup> Res. II, "Possibility of Revision of the Bustamante Code," in *Final Act of the Fifth Meeting of the Inter-American Council of Jurists*, San Salvador, El Salvador, p. 12 (Pan American Union, March, 1965, mimeo.) (CIJ-77).

Juridical Committee would have the task of drafting amendments for the guidance of the conference to be called.

As an alternative to holding a specialized conference, the report of the Inter-American Juridical Committee on which the recommendation of the Council was based suggested a protocol with amendments to the Code, on which an Inter-American Conference could act.<sup>10</sup> A draft of such a protocol was presented, which would introduce into the Code the rule that questions of personal status and capacity should be governed by the law of the domicile of the person. A principal complaint about the Code has been its failure to choose between the national law and the law of the domicile by leaving the decision to the local law. While that compromise of non-election may have been justified in 1928,<sup>11</sup> support for application of the national law has faded away to such an extent, it is said, that agreement on a uniform rule has become possible.<sup>12</sup> If the specialized conference is called, obviously this subject will have high priority.

The volume with the documents to be prepared by the Pan American Union became available in 1967.<sup>13</sup> Included in the volume of some five hundred pages is a redraft of the first parts of the Bustamante Code, which the Inter-American Juridical Committee received in 1966 from its Colombian member, Professor José Joaquín Caicedo Castilla,<sup>14</sup> principal mover in the Code revision matter.

Work on revision of the Charter of the Organization of American States,<sup>15</sup> with emphasis on economic integration, was doubtless responsible for the failure of many member governments to reply promptly to a request of the General Secretariat for views concerning the proposed calling of a specialized conference.<sup>16</sup> Among the amendments to the Charter which

<sup>10</sup> See Opinion of the Inter-American Juridical Committee on Revision of the Bustamante Code (Pan American Union, Nov. 1961, mimeo.) (CIJ-62). Cf. Working Paper on Revision of the Bustamante Code (Pan American Union, Oct. 1964, mimeo.) (CIJ-73).

<sup>11</sup> See Bustamante, "The American Systems on the Conflict of Laws and Their Reconciliation," 5 Tulane Law Rev. 537, 535-569 (1931).

<sup>12</sup> Most importantly, in 1942 Brazil changed from nationality to domicile on the occasion of a major Code reform. See P. G. Garland, *American-Brazilian Private International Law* 25 (1959); H. Valladão *Direito Internacional Privado* 187 (1968); 2 Amílcar de Castro, *Direito Internacional Privado* 68 (2d ed., 1968). Cf. Gallardo, "The Law of Domicile—A Remarkable Connecting Link in Latin-American Conflict of Laws," 2 *Inter-American Law Rev.* 64 (1960). On the development in Europe, see references in Nadelmann, "Mancini's Nationality Rule and Non-Unified Legal Systems," 17 *A. J. Comp. Law* 418, 448-449 (1969), reproduced in K. H. Nadelmann, *Conflict of Laws: International and Interstate* 49, 81-82 (1971).

<sup>13</sup> Document cited note 5 above; original version produced in 1967.

<sup>14</sup> At page 391 of the revised version of 1970. Also in Work Accomplished by the Inter-American Juridical Committee during its 1966 Regular Meeting (Pan American Union, 1966, mimeo.) (CIJ-86).

<sup>15</sup> See "Postscript" in *Inter-American Institute of International Legal Studies, The Inter-American System* 296 *et seq.* (1966).

<sup>16</sup> Seven governments replied: Chile, Ecuador, Mexico, the Dominican Republic, Honduras, Guatemala, and Costa Rica, all favorably. The replies are in the document cited in note 5 above.

were agreed on at the Third Inter-American Conference held in Buenos Aires in February, 1967,<sup>17</sup> was the elimination of the Inter-American Council of Jurists and assignment of its jurisdiction to the Inter-American Juridical Committee,<sup>18</sup> the membership of which was raised from nine to eleven.<sup>19</sup>

The new emphasis on economic integration has made itself felt in the recent work of the Inter-American Juridical Committee. With an eye obviously on the work undertaken by the European Economic Community,<sup>20</sup> problems in corporation law were chosen as one of the topics to be studied.<sup>21</sup> At the annual session of 1968, the six members present concluded that, rather than waiting for the revision of the entire Bustamante Code, the subject of the mutual recognition of corporations should be covered by a separate convention of a few articles. A draft of such a convention, with a proposed revision of some articles in the Bustamante Code, was included in the Committee's Report on "Harmonization of the Laws of the Latin American States on Commercial Companies,"<sup>22</sup> which was submitted to the Permanent Council of the Organization of American States, along with a renewed request for the calling of a specialized conference.<sup>23</sup>

Pursuant to recommendations made by its Committee on Legal and Political Affairs,<sup>24</sup> the Council of the Organization of American States made the following decisions in May, 1969:<sup>25</sup>

(1) The 1968 Report of the Inter-American Juridical Committee on

<sup>17</sup> See Robertson, "Revision of the Organization of American States," 17 Int. and Comp. Law Q. 346, 359 (1968). Text of "Protocol of Buenos Aires" of Feb. 27, 1967, in T.I.A.S., No. 6847, 64 A.J.I.L. 966 (1970). Cf. Zanotti, "Regional and International Activities," 2 Lawyer of the Americas 229 (1970).

<sup>18</sup> New Art. 105 reads: "The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation." In old Art. 67, the second heading read: "to promote the development and codification of public and private international law." No substantive change seems to have been intended.

<sup>19</sup> New Art. 107. See Zanotti, note 17 above, at 435.

<sup>20</sup> Discussed in Stein, "Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market," 68 Mich. Law Rev. 1327, 1337 (1970). And see Goldman, "The Convention between the Members of the European Economic Community on the Mutual Recognition of Companies and Legal Persons," 6 Common Market Law Rev. 104 (1968). Translation of the Convention of Feb. 29, 1968, 1969 Unification of Law Year Book 210 (Unidroit, 1970). Cf. Vieira, "Le droit international privé dans le développement de l'intégration latino-américaine," 130 Hague Academy, Recueil des Cours 351, 395-418 (1970).

<sup>21</sup> See Work Accomplished by the Inter-American Juridical Committee During its 1966 Regular Meeting (Pan American Union, 1967, mimeo.) (CIJ-86).

<sup>22</sup> See Work Accomplished by the Inter-American Juridical Committee During its 1968 Regular Meeting (Pan American Union, Feb., 1969, mimeo.) (CIJ-96).

<sup>23</sup> *Ibid.*

<sup>24</sup> The Report, dated May 2, 1969, is in Doc. C-i-882, Rev. 2, of May 7, 1969, reproduced in Comité Jurídico Interamericano, Textos, etc., note 5 above, at 485.

<sup>25</sup> Decision of May 7, 1969, reproduced *ibid.* at 493.



"Harmonization of the Laws of the Latin American States on Commercial Companies" should be sent to Member States.

(2) Governments should be reminded to express their views on the proposed calling of a specialized conference, as proposed by the Inter-American Council of Jurists in 1965.

(3) Governments in favor of the conference should be invited to say whether they desired the conference to deal with the subjects recommended by the Council of Jurists in 1965 or whether they preferred that the conference deal through special conventions with aspects of international commercial law which the governments considered urgent.

(4) Governments which cared to do so might present observations on the draft of an Inter-American Convention on the Mutual Recognition of Corporations found in the 1968 Report of the Inter-American Juridical Committee.

In the Committee on Legal and Political Affairs, members, not identified in the Report to the Council, had argued that "in accord with modern trends" the best way of making revisions was through special conventions on specific questions. A number of drafts in the commercial law field, it was emphasized, were ready: one of 1967 on international commercial arbitration, one of 1968 on the mutual recognition of corporations, and another on negotiable instruments, done at the request of the Council. Revision of the Bustamante Code in one session would be difficult. A more practical approach would be for the specialized conference to revise those parts urgently requiring revision, as in the field of commercial law, and to set up a program for continued work on revision of the Bustamante Code through the medium of the Inter-American Juridical Committee.

The reference to "modern trends in revision work" is somewhat puzzling. The Hague Conference on Private International Law since the end of the second World War has dealt with topics in the commercial law field, among others, but it has also worked on replacement of the old conventions on status matters.<sup>26</sup> As regards regional endeavors, the Benelux states have concentrated on improvement of their 1951 draft of a uniform law on private international law.<sup>27</sup> The work of the Common Market has been on specific questions in fulfillment of its obligations under its Charter;<sup>28</sup> work has recently been extended to exploration of the possibility of preparing uniform rules on conflict of laws for the Common Market states.<sup>29</sup> The alleged trend is difficult to discern.

<sup>26</sup> See survey in Nadelmann, "The United States Joins the Hague Conference on Private International Law," 30 *Law and Contemporary Problems* 291, 297 (1965), reprinted in Nadelmann, note 12 above, at 99, 105.

<sup>27</sup> See Nadelmann, "The Benelux Uniform Law on Private International Law," 18 *A. J. Comp. Law* 406 (1970).

<sup>28</sup> Primarily, Art. 220 of the Treaty of Rome of March 25, 1957, 298 *U.N.T.S.* 3; 51 *A.J.I.L.* 930 (1957).

<sup>29</sup> See European Communities, Fourth General Report on the Activities of the Communities 61 (1970). For work on unification of private international law undertaken by the Instituto Hispano-Luso-Americano de Derecho Internacional, see Comment,

A few governments have answered the Permanent Council's inquiry about their preferences with respect to the agenda of the specialized conference.<sup>30</sup> Ecuador, which ratified the Bustamante Code Convention with a general reservation, favors work on special conventions in the commercial law field.<sup>31</sup> Mexico, not a party to the Code Convention and probably not in favor of general codification of the rules of conflict,<sup>32</sup> prefers work on specific conventions in the commercial law field, provided duplication is avoided with work undertaken by other competent organizations as, for example, the United Nations Commission on International Trade Law (UNCITRAL).<sup>33</sup> Guatemala is in favor of treatment of questions of commercial law by way of special conventions.<sup>34</sup> Costa Rica, another state with a general reservation added to its ratification of the convention, supports use of special conventions for the regulation of matters of commercial law.<sup>35</sup> The same position is taken by Venezuela, a state which has ratified the convention with specific reservations.<sup>36</sup> Argentina, one of the Montevideo group of states which have not ratified the Code Convention, expresses its preference for an agenda with the most urgent questions; commercial law should be one of the subjects to be given first priority.<sup>37</sup>

The reply filed by the United States Government in a note dated September 15, 1969, was:

The United States is in favor of holding an inter-American specialized conference to revise the Bustamante Code. It appears preferable to have the conference deal, through specific conventions, with the aspects of international commercial law that are deemed most urgent by the American Governments rather than to undertake a total revision of the Bustamante Code in a single conference.

The United States takes no position at this time on the draft of the Inter-American Convention on Reciprocal Recognition of Companies and Juridical Persons. Because of the federal system established by the United States Constitution, it is improbable that the United States would be a signatory to such a Convention. The United States, however, will continue to give whatever support it can to the

---

"El VII Congreso del Instituto Hispano-Luso-Americano de Derecho Internacional en Buenos Aires 1969," 22 *Revista Española de Derecho Internacional* 599, 614 (1969).

<sup>30</sup> The answers are collected in Comité Jurídico Interamericano, Textos, etc., note 5 above, at 496 *et seq.* (from CP/Doc. 17/70).

<sup>31</sup> At 499. For an Ecuadorian view on the revision, see Valencia Rodríguez, "La revisión del Código de Bustamante," *Revista de Derecho*, No. 5, p. 29 (Quito, 1965).

<sup>32</sup> On differing views in Mexico, see Siqueiros, "Private International Law and the United States: A Brief Comparative Study," 6 *Calif. Western Law Rev.* 257, 265 (1970) (from his contribution in: *Colégio de Abogados de México, El Pensamiento Jurídico de México en el Derecho Internacional* 209, 225 (Mexico, 1960); Helguera, "El Derecho Internacional Privado y el Código Bustamante," in *Comunicaciones Mexicanas al VI Congreso Internacional de Derecho Comparado* 29 (1962). Cf. Ritch, "Codification of Private International Law of the American Countries," 7 *Inter-American Law Rev.* 395, 409 (1965) (from a Mexico Lic. Thesis, 1964).

<sup>33</sup> *Ibid.* at 502.

<sup>34</sup> *Ibid.* at 506.

<sup>35</sup> *Ibid.* at 508.

<sup>36</sup> *Ibid.* at 508 a.

<sup>37</sup> Note of Sept. 4, 1970 (CP/Doc.15/70 Add.2).

task undertaken by the Latin American Governments to bring about the economic integration of Latin America.<sup>38</sup>

Reference to the Federal system of the United States in the second part of the above note (directed to the elaboration of a convention on the legal status of foreign corporations) will mystify the non-initiated, in particular, foreigners. The note meant to recall, it must be assumed,<sup>39</sup> that legislative jurisdiction over corporations lies with the States of the Union and not with the United States Congress; and, according to the note, in such cases United States acceptance of an international agreement is improbable. This type of reply reflects a cliché which was first employed in the eighteen-seventies and which successive Administrations have used in such situations.<sup>40</sup> Recourse to it in 1969 once again illustrates the difficulties that a government experiences in keeping all desks, even within one and the same department, in line with changes in policy.

Under the policy of "non-co-operation" the interests of the States, as well as of the nation, were left unprotected—an unsound position, obviously. Mounting criticism<sup>41</sup> led the Eisenhower Administration to a change in policy. In 1956, and again in 1960, an Observer Delegation was sent to the sessions of the Hague Conference to look after American interests, State and national. The situation was regularized under the Kennedy and Johnson Administrations. Authorized by the Congress, in 1964 the United States joined the Hague Conference and the International (Rome) Institute for the Unification of Private Law.<sup>42</sup> Practical results of the change in policy have been noticed. In 1967 the United States ratified a Hague Conference convention, the Convention on Service Abroad of Documents which produces effects on both State and Federal law.<sup>43</sup> Last year the United States accepted, as to awards rendered in commercial matters, the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>44</sup> Ratification had been recommended by the Secretary of State's Advisory Committee on Private International Law on which the leading national organizations, including the National Conference of Commissioners on Uniform State Laws, are represented. The conventions were held to be in the interest of the nation in its foreign relations.

<sup>38</sup> Council Series Doc. C-d-1358 Add.7, Sept. 24, 1969. Translation in Comité Jurídico Interamericano, Textos, etc., note 5 above, at 507.

<sup>39</sup> Compare U.S. Memorandum of March 7, 1955, on the question of adherence to the Bustamante Code, filed as a Comment on the Committee's Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws (CIJ-21, note 58 below), reproduced in Comité Jurídico Interamericano, Textos, etc., note 5 above, at 273; also in 53 A.J.I.L. 655 (1959).

<sup>40</sup> See Nadelmann, "Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law," 102 U. Pa. Law Rev. 323 (1954).

<sup>41</sup> References in Nadelmann, note 40 above, at 339 *et seq.*

<sup>42</sup> The data are collected in Nadelmann, note 26 above, at 304 and 114 respectively.

<sup>43</sup> See Amram, "United States Ratification of the Hague Convention on Service of Documents Abroad," 61 A.J.I.L. 1013 (1967).

<sup>44</sup> Public Law 91-368, 91st Cong., 2d Sess. (1970), 85 Stat. 692, T.I.A.S., No. 6997; Domke, "The United States Implementation of the United Nations Arbitral Convention," 19 A.J. Comp. Law 574 (1971).

In the absence of a thorough study of possible United States interest, speculation, as in the note, on United States adherence to a convention concerning recognition of the legal personality of foreign corporations is gratuitous. The Advisory Committee was not consulted. If it is, under established procedures experts from the legal field involved will be heard on whether a convention as contemplated would be to the advantage of American corporations in their foreign operations and what its effects would be on domestic law, State and Federal. Parallel events in Europe have been duly noticed by our experts,<sup>45</sup> and domestic precedents are not lacking. The United States promoted and, in 1940, ratified a protocol on the juridical personality of foreign corporations which experts of the Pan American Union had drafted under a resolution adopted by the 7th International Conference of American States at Montevideo in 1933.<sup>46</sup> It was stated by the participants that the "declaration" in the protocol is in harmony with domestic doctrine. In the absence of an American interest, the United States would not have taken the trouble to ratify the protocol. And, of course, the United States has dealt with the status of corporations in its more recent treaties of friendship, commerce, and navigation.<sup>47</sup>

On the subject of holding a specialized conference for the revision of the Bustamante Code, the note follows the line set by the recommendations of the Committee on Legal and Political Affairs.<sup>48</sup> A false issue is raised and answered. Revision of the Bustamante Code in one session was never suggested, and no consideration is given to the obvious possibility of dealing with more than one topic at one session. Hague Conference practice has demonstrated the advantages of an agenda with more than one topic. If "recognition of the legal personality of foreign corporations" is adjudged urgent<sup>49</sup> and chosen for consideration, a suitable companion matter to work on could be the Code provisions which deal with the law applicable to status and capacity of individuals.<sup>50</sup>

<sup>45</sup> See Stein, note 20 above.

<sup>46</sup> T.S. No. 973, 55 Stat. 1201 (1940), 161 U.N.T.S. 217. Text also in 7 Hudson, *International Legislation* 355 (1941). Cf. 2 Rabel, *Conflict of Laws: A Comparative Study* 146-147 (2d ed., 1960). The protocol was signed by Chile, Ecuador, El Salvador, the Dominican Republic, Nicaragua, Peru, the United States, and Venezuela. The last two countries ratified the protocol, the United States reserving the right to terminate the obligations arising under the Declaration at any time after twelve months' notice given in advance.

<sup>47</sup> See Walker, "Provisions on Companies in U.S. Commercial Treaties," 50 A.J.I.L. 373 (1956) (Federal problem discussed at 390).

<sup>48</sup> See text to note 24 above.

<sup>49</sup> Urgency is a matter of degree. Looking at the European precedent, proof of urgency may be difficult. See writers cited note 20 above. As for the Hague Convention of June 1, 1956, concerning Recognition of the Legal Personality of Foreign Corporations (1 A.J. Comp. Law 277 (1952)), it received only three ratifications, not enough to put it into effect. The need for the convention has been questioned. Its contents are discussed in Offerhaus, "The Seventh Session of the Hague Conference on Private International Law," 79 *Journal du Droit International* 1071, 1091-1113 (1952).

<sup>50</sup> The subject was given special attention by the United States member, George H. Owen, in his separate vote at the 1952 Meeting. See Second Opinion of the Inter-

The language of the United States note leaves the impression of a negative attitude toward the Code revision project. Lack of United States interest seems to be implied. Not having been a participant in the preparation of the Code, the United States is not likely, it is true, to accept a revised Code either. General codification of the rules of conflicts is anathema to most American lawyers. Work on revision of the *Restatement of the Law of Conflict of Laws* has once again demonstrated the difficulties in formulating satisfactory black-letter rules. However, the question is more complex. Interests of American parties are in ever growing numbers litigated in foreign courts. The United States thus cannot be indifferent to the status of the rules on conflicts in other countries.

The Bustamante Code Convention provides that the Code's rules shall apply only in the relations between "Contracting States."<sup>51</sup> In fact, however, in the absence of statutory provisions, courts in Code states tend to look to the Code for guidance,<sup>52</sup> in much the same way as, in the United States, courts may in international cases follow rules developed under a Constitutional provision on the interstate level. The United States is an interested bystander in the Code revision.

Like all codifications, the Bustamante Code of 1928 has hampered the development of the law. To an even greater degree this is also true of the Montevideo Treaties of 1889, the basic rules of which were not touched by the 1940 revision of the treaties.<sup>53</sup> Because of the codifications, developments elsewhere were given little attention in local literature. While there were notable exceptions,<sup>54</sup> only in more recent treaties have modern developments in the field been better reflected.<sup>55</sup> Work on revision of

---

American Juridical Committee on the Possibility of Revising the Bustamante Code (Pan American Union, 1953, mimeo.) (CIJ-13A), reproduced in Comité Jurídico Interamericano, Textos, etc., note 5 above, at 52, 68-72. And see Valladao, note 12 above, at 201. Cf. Barnes, "Revision of the Bustamante Code," 6 Academia Interamericana de Derecho Comparado e Internacional, Cursos Monograficos 393, 412 (1957). For an up-to-date statement of the American law, see Restatement, Second, Conflict of Laws, §198 (1971).

<sup>51</sup> Bustamante Code Convention, note 2 above, Art. 2.

<sup>52</sup> See, e.g., Garland, note 12 above, at 18; R. S. Lombard, American-Venezuelan Private International Law 26 (1965). The same seems to be true with respect to the Montevideo Treaties in the treaty states. See Ph. Eder, American-Colombian Private International Law 16 (1956).

<sup>53</sup> Peru tried, but it did not succeed in obtaining changes. See J. L. Bustamante i Rivero, *El Tratado de Derecho Civil Internacional de 1940* (1942). For a translation of the new treaties see 37 A.J.I.L. Supp. 109 (1943).

<sup>54</sup> Notably, the writings of the Brazilian jurist, Haroldo Valladao, collected in H. Valladao, *Estudos de Direito Internacional Privado* (1947).

<sup>55</sup> The change seems to have begun with the treatise of 1955 by the late Uruguayan jurist, Quintin Alfonsin, in which a work published in 1954 in Spain by the Belgian lawyer, Julian Verplaetse, was used. The recent Spanish literature is much up to date. See, e.g., M. Aguilar Navarro, *Derecho Internacional Privado* (3rd ed., 1970). One of the difficulties has been the absence of Latin American states from the Hague Conference on Private International Law, identified originally with the nationality law principle, and quite correctly. But things have changed. See Nadelmann, "Habitual

the Bustamante Code is likely to accelerate this process. While a regional approach to codification can be desirable, thought about resolution of conflicts must be on the broadest possible level.

The twenty years spent by the legal committees on the Code revision without tangible results suggests that there is something wrong with the procedure. Organizational problems have been left unresolved. The Inter-American Juridical Committee is not an expert body on conflict of laws. Under the Organization's Charter, it has jurisdiction over questions of public and private international law, as well as unification of law. Concern about serious issues in the public international law field has led to election to the Committee of, primarily, diplomats and specialists in public international law. Names of specialists in private international law appear rarely on the national panels from which the elections are made,<sup>56</sup> and their chances for election are poor. The Committee has had the good fortune of having among its members from the beginning an authority on Latin American treaties on private international law,<sup>57</sup> and most of the work on the project has come from him;<sup>58</sup> but successful preparation of the revision is by no means a one-man job. Eventual favorable action by the governments involved can only be expected if the amendments proposed have the backing of the top specialists in the key states.

Like all work of the Inter-American Juridical Committee, the Code revision project has received poor publicity. Even in states which have nationals on the Committee, its work is little noticed. Elsewhere the situation is still worse. Few articles have appeared in law reviews.<sup>59</sup> The annual reports on the sessions do not seem to reach the persons who would be interested. The informative *Inter-American Juridical Yearbook* is no longer published.<sup>60</sup> The valuable volume with the documentation

---

Residence and Nationality as Tests at The Hague: The 1968 Convention on Recognition of Divorces," 47 Texas Law Rev. 766 (1969).

<sup>56</sup> Members are elected from panels of three candidates presented by Member States. Art. 107 of the Charter as revised in 1967.

<sup>57</sup> Professor José Joaquín Caicedo Castilla of Colombia, whose treatise covers the Montevideo Treaties as well as the Bustamante Code. J. J. Caicedo Castilla, *Derecho Internacional Privado* (6th ed., 1967) (account of the revision project at 44-52). For a critical analysis of some parts, see Nadelmann, "Literature in Latin America on the Law of Conflict of Laws in the United States," 4 *Inter-American Law Rev.* 103 (1962). In the Montevideo Treaty states all major works have comparative references to the rules of the Bustamante Code; in the Bustamante Code states, references to the Montevideo Treaties are less frequent.

<sup>58</sup> In particular, the Comparative Study of the Bustamante Code, the Treaties of Montevideo, and the Restatement of the Law of Conflict of Laws, prepared by the Colombian member of the Inter-American Juridical Committee (Pan American Union, March, 1954, mimeo.) (CIJ-21), reproduced in *Comité Jurídico Interamericano, Textos*, etc., note 5 above, at 73.

<sup>59</sup> But see, e.g., Colombo, "La proyectada reforma del Código Bustamante," 72 *Revista Jurídica Argentina La Ley* 905 (1953); Valencia Rodríguez, note 31 above. The volume with the documentation, note 5 above, lacks a bibliography of writings on the Code revision, an omission which should be corrected.

<sup>60</sup> Publication ceased in 1957.

on the Code revision project has not been reviewed, so far as can be seen. This is an undesirable situation. Proper publicity should be the joint responsibility of the Committee and of the Organization.<sup>61</sup>

In thinking about Code revision, it will be well to remember how the Bustamante Code came about. The Conferences of American States had set up commissions for the codification of public and private international law, but the commissions made little progress. Matters began to move only after recourse was had to outside groups of specialists. The American Institute of International Law was requested to prepare drafts for the benefit of the Commission of Jurists. For private international law a committee of four was set up, which included the Cuban jurist, Antonio de Bustamante y Sirven.<sup>62</sup> Thanks primarily to Bustamante, a draft was produced which the Commission accepted with minor changes. That draft, with but a few changes, was approved at the VIth International Conference of American States held in Havana in 1928. The lesson to be drawn from this record is clear. Amendments to the Code should be prepared by a body of experts on private international law from the principal states for consideration by the Inter-American Juridical Committee.

The American Institute of International Law has ceased its activity. In 1963 the Inter-American Institute of International Legal Studies was created by a round-table of Western Hemisphere International Law Scholars held in San José, Costa Rica, under the sponsorship of the Carnegie Endowment for International Peace.<sup>63</sup> Among the Institute's objectives as expressed in the By-Laws is "to contribute to the progressive development of both private and public international law and to its systematization and codification."<sup>64</sup> Provided the necessary funding can be obtained, the Institute should be in position to bring leading experts together for work on amendments to the Bustamante Code. The merit of the project is beyond doubt. It should not be affected by the political turmoil of our times, and the intellectual challenge should attract the experts. Most of the preparatory work needed has been done.<sup>65</sup> That labor must not be wasted.

The matter has now reached a certain degree of urgency. At its meeting of April, 1971, in Costa Rica, the General Assembly of the Organization of American States decided to convolve an Inter-American Specialized Con-

<sup>61</sup> Survey-like notes by the chief of the Codification Division of the Department of Legal Affairs of the Organization of American States have begun to appear in "Lawyer of the Americas," a U. of Miami periodical started in 1969; see note on this periodical in 63 A.J.I.L. 797 (1969).

<sup>62</sup> See Bustamante, "The Progress of Codification under the Auspices of the Pan American Union," 1926 Proceedings, American Society of Int. Law 108.

<sup>63</sup> See note in 58 A.J.I.L. 122 (1964).

<sup>64</sup> By-laws, Art. 3A, in Pamphlet, Inter-American Institute of International Legal Studies, Report of the General Secretariat 26 (1964).

<sup>65</sup> It is the volume with the documents on Code revision. Whatever the organizational defects in the operation of the Inter-American Juridical Committee, the volume is living proof of the valuable effort made over the years by Professor Caicedo and other members of the Committee, as well as the Pan American Union, toward achievement of greater uniformity in the rules of conflicts in the Hemisphere.

ference on Private International Law to be held before 1974.<sup>66</sup> The task of drafting an agenda for the Conference has been entrusted to the Organization's Permanent Council. The member governments have been asked to submit suggestions as to matters that ought to be included in the agenda. Under the resolution, the Inter-American Juridical Committee would prepare studies, reports, and draft conventions for use by the specialized conference. No success of the conference can be expected if the preparation is not by specialists of the topics on the agenda.<sup>67</sup>

The United States should continue "to give whatever support it can to the task undertaken by the Latin American Governments."

KURT H. NADELMANN

#### THE U. S. TREATY OF COMMERCE WITH GERMANY AND THE GERMAN CONSTITUTION

According to Article 19 (3) of the Constitution of the Federal Republic of Germany the fundamental rights guaranteed by the preceding Articles 1 to 18 enure for the benefit of "domestic juristic persons to the extent that the nature of such rights permits." The wording leaves no doubt about the exclusion of non-German legal persons from the Constitutional protection of Articles 1 to 18. It follows, further, that non-German legal persons cannot, on account of a violation of these articles, petition the Federal Constitutional Court whose function it is to safeguard the observance of Constitutional rules, for the right of petition exists only for the purpose of enforcing substantive rights, and if, *ex hypothesi*, the petitioner does not enjoy them, he cannot have any *locus standi* before the Federal Constitutional Court. This was recently so held in a case involving a Delaware corporation with its head office in New York. Its application for a patent for transistors was rejected by the Patent Tribunal and, on appeal, by the Federal Supreme Court.<sup>1</sup> A petition based on the alleged violation of Articles 2, 3 and 14 of the Constitution was rejected by the Federal Constitutional Court as inadmissible.<sup>2</sup> These articles provide, respectively, for everyone's right to develop his personality, for the equality of all persons before the law and for the taking of property only in the public interest pursuant to a law and against the payment of equitable compensation.

As a matter of German Constitutional law the decision seems to be wholly persuasive. The question which it is proposed to raise here is whether, as a matter of public international law, Article 19 (3) is consistent with the provisions of the Treaty of Friendship, Commerce and Navigation which the United States of America concluded with the Fed-

<sup>66</sup> O.A.S. General Assembly meeting in Costa Rica, April, 1971, Res. AG/RES. 48. On specialized conferences see Arts. 128 and 129 of the O.A.S. Charter, note 17 above.

<sup>67</sup> For an illustration of the working method of the Hague Conference (drafting committees meeting in advance of the session), see Nadelmann, note 55 above, at 768-771.

<sup>1</sup> BGHZ 44,263 (Nov. 25, 1965).

<sup>2</sup> BVerfGE 21,207 (March 1, 1967).



eral Republic on October 29, 1954,<sup>3</sup> and which was duly incorporated into German law by a statute of May 7, 1956;<sup>4</sup> under German Constitutional law it has the force of an ordinary statute, so that the treaty could not override conflicting provisions of the Constitution.

In three material respects the treaty sanctions the standard of national treatment.<sup>5</sup> Article V guarantees the right of property and prohibits the taking of property except for a public purpose, in accordance with due process of law and upon payment of just compensation. In respect of these matters, "Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment. . . ." Under Article VI, "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." Finally, by Article X, "Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to obtaining and maintaining patents of invention. . . ." The term "national treatment" is defined by Article XXV. It means "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies . . . of such Party."

Article VI, which may seem to be most directly relevant, in truth has no bearing upon the point under discussion. It is not open to doubt that a national of the United States, whether an individual or a corporation, may petition the Federal Constitutional Court and has the same access to that tribunal as a German. But the United States corporation's petition is inadmissible when it is not made for the purpose of prosecuting a vested substantive right. The corporation's lack of *locus standi* results, not from a procedural disability to apply to the Federal Constitutional Court, but from the absence, on account of Article 19 (3), of a Constitutional right which can fairly be said to have been infringed. The decisive question, therefore, is whether the treaty purports to protect such a right. If the answer is in the affirmative and if Article 19 (3) excludes the right so protected, a conflict would arise.

Article V of the treaty very clearly confers rights which the Constitution also protects; for it is co-extensive with, and may go beyond,<sup>6</sup> Article 14 of the Constitution. It is the right of property which by virtue of Article 19 (3) a Delaware corporation cannot assert before the Federal Constitutional Court. The Constitution, therefore, infringes the corporation's right to national treatment under Article V. The discrimination lies in the fact that, notwithstanding the terms of Article V (and possibly

<sup>3</sup> 7 U.S.T. 1839, T.I.A.S., No. 3593, 273 U.N.T.S. 3.

<sup>4</sup> Bundesgesetzblatt 1956, II, 487.

<sup>5</sup> Art. III would seem to be inapplicable. It only covers "nationals" and according to the terminology of the treaty this term includes only natural persons.

<sup>6</sup> Art. V requires the payment of "just compensation" and thus adopts a higher standard than Art. 14. See the immediately following text.

Article X) of the treaty, the Delaware corporation is not allowed the benefit of Article 14 of the Constitution which a German national enjoys.

Against this conclusion it cannot be argued that at the date of the treaty the Federal Constitution had been in force for five years, that it was adopted under the auspices and guidance of the then Occupying Powers, of which the United States was one, and that its terms, including Article 19 (3), must have been known to the United States. In the absence of an express provision to that effect it is, however, impossible to suggest that the treaty was concluded subject to the terms of the Constitution. It is clear that a state is precluded from invoking its own municipal, albeit Constitutional, law to avoid its international obligations.<sup>7</sup> If the United States and Germany had contemplated the total or partial elimination of this rule, they would have said so. This would have been the more necessary, as any such deviation from the rule could not conceivably have been for Germany's benefit only, but would have been mutual. Since it is well known that, according to the firmly established practice of the United States Supreme Court,<sup>8</sup> aliens, whether physical or legal persons, may rely on the protection of the Constitution of the United States, mutuality would have required a fundamental change in the law of the United States. Such a change cannot be implied.

The discrimination, which the treaty seems to forbid but the Federal Constitution prescribes, has been justified by a German author<sup>9</sup> on the ground that the treaty demands equivalence rather than equality, that the United States national enjoys the benefit of diplomatic protection by his Government, that this is denied to a German citizen and that the absence of Constitutional protection is thus compensated. A process of comparing, weighing and balancing is, however, contrary to both the wording of the treaty and the idea of national treatment. *Prima facie* the treaty demands equality, and national-treatment clauses have, it is believed, always been so understood.<sup>10</sup> As Professor Bishop has said,<sup>11</sup> "the essence of national treatment is equality with the nationals of the receiving State, no better treatment, and no worse." Moreover, diplomatic protection could only be a substitute for the right to petition the Federal Constitutional Court. It cannot be an adequate substitute for the substantive right enshrined in Article 14.

Another argument by the same German author is to the effect that after an initial period of ten years the treaty may at any time be terminated by one year's written notice (Article XXIX), that the parties must therefore have considered an amendment of the Constitution for a very short period as out of place and that the inconsistency (if any) between treaty and

<sup>7</sup> See, for instance, *Treatment of Polish Nationals in Danzig*, P.C.I.J., Series A/B, No. 44, p. 24; *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J. (1932), Series A/B, No. 46, p. 167.

<sup>8</sup> *Russian Volunteer Fleet v. United States* (1931), 282 U.S. 481.

<sup>9</sup> Meessen, *Aussenwirtschaftsdienst des Betriebsberaters* 1970, p. 491 (494).

<sup>10</sup> See, however, in regard tax treatment *Miniature Vehicle Leasing Corporation v. United States*, 266 F. Supp. 697 (1967).

<sup>11</sup> 115 Hague Academy, *Recueil des Cours* 372 (1965, II).

Constitution was accepted. Such reasoning is unconvincing. No waiver can possibly be implied into the treaty or inferred from its duration.

Finally, with a view to the special case decided in 1967, it might be suggested that Article V protects only "property," that is to say, a vested and existing right, and that a right which the Federal Supreme Court has denied and which it is intended to assert before the Federal Constitutional Court is too uncertain, speculative and illusory to constitute property within the meaning of Article V. Such reasoning would place far too narrow an interpretation upon the term "property." The existence or non-existence of a proprietary right is the very point to be decided. To suggest that in the absence of a judicial decision the right does not exist is opposed to both logic and reality. If the Delaware corporation had been able to invoke the protection of Article 14 before the Federal Constitutional Court and had been successful, it would have been granted the protection of Article V of the treaty. The opportunity or chance of securing that protection is a sufficiently identifiable right to bring both articles into operation.

The conclusion would thus seem to be that Article 19 (3) of the Federal Constitution, as interpreted by the Federal Constitutional Court, is liable to lead to violations of the terms of the Treaty of 1954.

F. A. MANN

#### "SOCIALIST INTERNATIONAL LAW" OR "SOCIALIST PRINCIPLES OF INTERNATIONAL RELATIONS"?

Professor Tunkin's recent volume, *Theory of International Law*, already has been the subject of comment in this JOURNAL.<sup>1</sup> His recent lead article in the 1969 *Soviet Yearbook of International Law*, devoted to Socialist international relations and published after the volume on theory, provides additional insight into discussions of the place of international law in the "world Socialist system."<sup>2</sup> Tunkin's concept of Socialist international legal principles as set forth in these publications is highly complex. At the risk of over-simplification, it may be summarized as follows:

The highest principle of relations between workers of different countries is that which is an essential condition for the victory of the proletariat, the principle of proletarian (or Socialist) internationalism. After the October Revolution of 1917, the defense of the Socialist fatherland became an internationalist duty of the Russian working class and the "common cause of the international working class." At this point, proletarian internationalism also became a principle of domestic and foreign state policy of the Soviet Union. The "basic content" of the principle, as ap-

<sup>1</sup> G. I. Tunkin, *Teoriia mezhdunarodnogo prava* (1970); commented upon by John N. Hazard, "Renewed Emphasis upon a Socialist International Law," 65 A.J.I.L. 142 (1971), and reviewed *ibid.* 416. Tunkin's book was signed to press on Sept. 26, 1969.

<sup>2</sup> G. I. Tunkin, "V. I. Lenin i printsipy otnoshenii mezhdru sotsialisticheskimi gosudarstvami," *Sovetskii ezhegodnik mezhdunarodnogo prava* 1969 (1970), pp. 16-29. The Yearbook was signed to press on Nov. 17, 1970.

plied among Socialist states, is defined as the construction of Socialism and Communism and the defense of the achievements of Socialism in the course of the struggle of the two systems, Socialist and capitalist.

From the principle of proletarian internationalism are derived specific rights and duties for each Socialist state in its relations with other Socialist states. Among these is the duty to pursue close co-operation and mutual assistance in all spheres of the construction of Socialism and Communism, particularly the economic sphere. Specific reference is made to Socialist economic integration.<sup>3</sup>

The principle of proletarian internationalism also affects several *subordinate* principles, all of which are said to have become Socialist international legal norms and to comprise a new unified system of international legal principles of proletarian internationalism. The subordinate principles listed are:

- (1) respect for the sovereignty of Socialist states, on the basis of which peoples exercise the right to self-determination; (2) non-interference in the internal affairs of another state, which reflects respect for the national peculiarities and expectations of each people; (3) full equality of Socialist states, which reflects the Marxist-Leninist thesis of the equality of nations and of workers' parties.<sup>4</sup>

The above principles are distinguished from those operative in general international law. In their Socialist form, such principles are said to embrace the obligation of ensuring that such rights may be exercised; for example, "the Socialist principle of respect for sovereignty obliges Socialist states not only to respect the sovereignty of other Socialist states, but also to defend Socialist sovereignty in accordance with the demands of proletarian internationalism."<sup>5</sup> The Czechoslovak events of 1968 are considered by Tunkin to have been in full accord with the principle of proletarian internationalism.

Tunkin's exposition makes it clear that Soviet jurists are not attempting to justify the Czechoslovak events as being consistent with general international law. However, the formulation of the three subordinate Socialist principles of international law contains significant qualifications in comparison with their previous definition in Soviet doctrine. All three are made subject to the desires of the "people," who always are assumed to identify with true proletarian internationalism. If the "people" were to accuse their own party or governmental leadership of following policies inconsistent with proletarian internationalism and to appeal for assistance from fraternal Socialist countries, as forty Czechoslovak party members were alleged to have done, then presumably such assistance might be forthcoming. It could even be said that the fraternal Socialist countries

<sup>3</sup> Cautioning against "poisonous nationalism," Tunkin writes: "The events of 1968 in Czechoslovakia have shown how dangerous for the cause of socialism can be manifestations of nationalism in conditions of the activization of anti-socialist forces in a country together with the active support of imperialist reaction." *Ibid.* 25.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* 27.

were under a legal obligation to furnish such assistance. Similarly, "respect for national peculiarities and expectations of each people" refers to cultural and ethnic traditions, not to independent nationalist policies pursued to the detriment of the interests of the Socialist bloc.

To Western jurists the doctrine outlined above will appear to be nothing less than an open-ended justification for interference in the affairs of any Socialist country whose domestic or foreign policies threaten "Socialist achievements." A network of agreements authorizing collective intervention to combat an external or internal subversive threat does not exist in the Socialist bloc, as it does for some other regions of the world. The Warsaw Pact plainly contemplated armed attack only from the outside, unless one were to resort to methods of treaty interpretation which have been anathema to Soviet doctrine. Intervention by invitation also failed when the leadership of the then Czechoslovak Government and Communist Party promptly denied that any such invitation had been extended. International legal doctrine, because it lacks the binding character and the precision of customary or conventional international legal norms, is not a particularly reliable instrument for defining limits which, if exceeded, may give rise to intervention. But doctrinal ambiguity also can have a deterrent effect, unless states which disagree with the doctrine are willing to risk an immediate test of its limits.

As Tunkin himself notes, a question is often asked about the principle of proletarian internationalism in connection with Soviet relations with the People's Republic of China. By describing proletarian internationalism as a *moral and political* principle of the international workers' movement with regard to the PRC, Tunkin has seemingly excluded any prospect that the Socialist countries have a Socialist legal obligation to intervene against the Chinese leadership, although the fundamental interests of the peoples of China and the other Socialist countries are said to coincide.<sup>6</sup>

On the other hand, and in contrast to the impression which may have been left by Professor Hazard's editorial, Tunkin is most circumspect in his use of the phrase "Socialist international law." In fact, the expression is seldom used. Indeed, Tunkin appears to go to some lengths to make clear that he is not suggesting the existence of a separate system of "Socialist international law." The Socialist principles of international law to which he refers are said to be "the basis of a new type of international law, a Socialist international law of the future."<sup>7</sup> The distinction between

<sup>6</sup> *Ibid.* 28. The "subjects" of proletarian internationalism in its legal aspect are left open, except for the exclusion of China. The Communist-Party states of Eastern Europe obviously are included, but the status of Yugoslavia, Mongolia, North Korea, North Viet-Nam, Cuba, and perhaps Albania is unclear. However, the doctrine of Socialist internationalism would not appear to be applicable to non-Communist-Party states.

<sup>7</sup> *Ibid.* In the volume on theory, this point was not made so carefully: "The principles of proletarian internationalism and other socialist norms arising in relations between countries of the socialist camp are international legal principles and norms of a new, higher type of international law—a socialist international law—the fundamental principles of which are being formed in relations among states of the socialist system and which are going to replace contemporary general international law." Tunkin, *Teoriia mezhdunarodnogo prava* 503.

Socialist principles of international law as themselves comprising a separate system of international law (which Tunkin implies is not yet the case) and as principles of Socialist international relations is an important one in Soviet doctrine, for it emphasizes the political responsibilities of members of the Socialist bloc without raising all of the theoretical dilemmas and practical implications which the posited existence of mutually exclusive systems of international law unquestionably would have.

Even the present formulation is not without its perils, however. In his article Tunkin briefly addresses the problem of the relationship between Socialist principles of international law and *jus cogens*. He argues that *jus cogens*

cannot be understood as not permitting the progressive development of international law and the creation, on the basis of equality and good will, of local international legal norms which go farther than the norms of general international law in the development of friendly relations and the ensuring of peace, reflecting a higher degree of international integration than general international law.

Also, as the law of peaceful coexistence of states with different social systems, contemporary general international law cannot obstruct the creation of local international legal norms, which are distinguished from norms of general international law by their own social content. In relation to general international law, the international legal principles of proletarian internationalism are just such local norms.<sup>8</sup>

Tunkin's view of *jus cogens* is a considerable revision of that which he expressed in the six-volume Soviet treatise on international law. In the latter, Tunkin referred to "... norms possessing the character of *jus cogens*, i.e., norms from which states shall not lawfully deviate in their bilateral or group relations."<sup>9</sup> Indeed, in an article published in the same issue of the *Soviet Yearbook of International Law*, L. A. Aleksidze does not distinguish between Socialist and general international legal principles of *jus cogens*. Aleksidze mentions as generally recognized norms of contemporary international law having an imperative character "principles strengthening the fundamental sovereign rights of states and peoples, equality and self-determination of peoples, respect for state sovereignty and territorial integrity, non-interference, sovereign equality of states. . . ." <sup>10</sup> It may be doubted that many jurists will find the labeling of a particular local norm "higher" than *jus cogens* to be persuasive when the local norm seems intended to permit what *jus cogens* would proscribe.

The debate over the substance and significance of Socialist principles of international relations is far from closed. The suggestion that the principles of proletarian internationalism have less than legal force with respect to the People's Republic of China, the extent and direction of

<sup>8</sup> Tunkin, *loc. cit.* note 2, p. 28. There is presently much emphasis in Soviet media upon Socialist integration, but Tunkin's formulation of *jus cogens* seems to contemplate a body of local norms among states and not, at least at this stage, norms of a municipal character within a federation.

<sup>9</sup> I V. M. Chkhikvadze *et al.* (eds.), *Kurs mezhdunarodnogo prava v shesti tomakh* 23 (1967).

<sup>10</sup> L. A. Aleksidze, "Problema *jus cogens* v sovremennom mezhdunarodnom prave," *Sovetskii ezhegodnik mezhdunarodnogo prava* 1969 (1970), p. 144.

integration within the bloc, and other factors must influence doctrinal views. Eastern Europeans, of course, may derive scant satisfaction from discussions over whether Socialist internationalism is policy, doctrine, or law, for under each notion there remains a residual possibility that intervention may occur. But as international lawyers we must and do constantly distinguish between policies which states may pursue in their discretion, justifications which may be advanced to support their actions, and legal norms said to be mutually binding upon actors. These distinctions are made for a variety of reasons, but partly because the future implications of each position may be different. Socialist jurists do the same. Since the policy, doctrinal, and legal consequences of the Czechoslovak events are not well defined, and in fact are in the process of formulation, Soviet jurists in particular are bound to explore all of them. If their discussion is to be understood, terminological nuances must be followed closely. Much as we would deplore any doctrinal or legal developments which would impair the integrity of general international law, we ought to refrain from announcing the arrival of Socialist international law prematurely when its arrival *qua* law appears to be controversial.<sup>11</sup>

W. E. BUTLER \*

#### REGIONAL MEETINGS

##### *Denver, Colorado, May 8, 1970*

"International Regulation of Environment" was the theme of the Regional Conference in Denver on May 8, 1970. Both legal and scientific aspects of ocean, air, and space pollution were explored in an interdisciplinary setting by lawyers, social scientists and physical scientists. The luncheon was attended by 160 registrants. The keynote speaker, introduced by Robert B. Yegge, Dean of the University of Denver College of Law, was Dr. John Middleton, Director of the National Air Pollution Control Administration, Department of Health, Education and Welfare, who discussed the enormity of world-wide air pollution and its grave consequences.

The first panel on "The Ocean Ecology" explored both existing and foreseeable problems in ocean pollution and some possible solutions. The chairman was John A. Moore, partner, Holland & Hart, Denver. The

<sup>11</sup> On June 24, 1970, the Department of the Theory and History of State and Law and the Department of International Law of the Law Faculty of Leningrad University held a joint meeting to discuss Tunkin's *Teoriia mezhdunarodnogo prava*, the author himself being present. Most of the reported criticisms and comments related to general international law, but it is clear that Tunkin also was faulted for devoting insufficient attention to the international legal relations of Socialist states. Taking Tunkin's side on this point, Professor Bobrov noted that two chapters of the book, "replete with the necessary materials," were devoted to the question, but Tunkin's approach or views were not expressly endorsed. See V. L. Iushchenko, "Obsuzhdenie problem teorii mezhdunarodnogo prava," *Pravovedenie*, No. 6 (1970), pp. 132-134.

\* Reader in Comparative Law, University of London.

speakers were: Professor Samuel Bleicher, University of Toledo College of Law; Major Gordon Schieman and Captain Joseph Delfino, U. S. Air Force Academy; Dr. Edward Miles, Graduate School of International Studies, University of Denver. Commentators were: James Roberts, Denver; Kenneth Stiles, Denver; Professor Ved P. Nanda, University of Denver College of Law; and Jonathan Cox, Secretary, ASILS, and President of the International Law Society in Denver.

Between the two panels the conference was addressed by a special guest, Oscar Schachter, past President of the Society, who addressed the conference on the rôle of the United Nations in meeting the contemporary needs of the international community.

The second panel was on "Air and Space Pollution." The chairman was Donald Hoagland, partner, Davis, Graham & Stubbs, Denver, former Deputy Administrator, Agency for International Development, Washington, D. C. The speakers were: Major Alan Herman, Director, International Law Program, U. S. Air Force Academy; Professor Frederic Kirgis, School of Law, University of Colorado; and Dr. Malcolm A. Lillywhite, Research Scientist, Martin-Marietta Corporation, Denver. Commentators included: Gary Hart, Denver attorney, formerly with the Department of the Interior, Washington, D. C.; Harley Shaver, attorney, Denver; and Dennis Grimmer, student, University of Colorado School of Law.

After the conference the speakers and the organizing committee were the guests of the University of Denver Law Center at a banquet.

Among the co-sponsors of the conference were: The University of Denver College of Law, The University of Colorado School of Law, The Graduate School of International Studies of the University of Denver, The International Law Society of the University of Denver; the International and Comparative Law Committee of the Colorado Bar Association and the Colorado Division of UNA-USA, UNESCO.

The conference officers were: Co-Chairmen, Ved P. Nanda and Donald W. Hoagland; Treasurer, John A. Moore.

#### *Denver, Colorado, April 16, 1971*

One hundred and seventy registrants attended the Sixth Regional Conference of the Society in Denver on April 16, 1971. The topic of the program was "Implementation of the United Nations Human Rights Program." The Conference was opened by Robert B. Yegge, Dean, University of Denver College of Law in the College auditorium. John A. Moore, Esq., Chairman, International and Comparative Law Committee of the Colorado Bar Association, presided over the morning session at which the keynote speaker was Professor Frank Newman, University of California School of Law at Berkeley.

Professor Newman traced the history of the U.N. Human Rights program and suggested possible means and procedures to effectuate it. He especially noted the widespread fallacy prevalent even among international lawyers in relying almost exclusively on the adjudicatory processes to accomplish their objective. He proceeded to outline various national, regional



and international outlets—agencies, legislative bodies and informal settings—which should be more usefully employed to further international human rights. A reactor panel consisting of Professor Stephen Schwebel, Executive Director of the Society; Dr. George W. Shepherd, Director, Center on International Race Relations, University of Denver; Professor Ved Nanda, Director, International Legal Studies, University of Denver College of Law; and Britt Anderson, Secretary, Denver International Law Society, commented on Professor Newman's remarks.

The luncheon session was presided over by Donald Hoagland, Esq., of Davis, Graham & Stubbs, Denver. The speakers were His Excellency Chief Linchwe II, Ambassador of Botswana to the United States, and Professor Stephen Schwebel. Chief Linchwe reflected on the meaning of human rights to developing states and the progress achieved to date in their implementation in Botswana. Professor Schwebel cautioned against confining the thrust of the U.N. Human Rights Program to mere denunciation of *apartheid* and colonialism. He suggested a positive approach toward the program.

During the afternoon session, the meeting broke up into several workshops: Viet-Nam and Nuremberg; U.S. attitude toward the U.N. Human Rights Program; Race and International Law; and Human Rights in Developing Countries. Workshops were led by Dr. George Shepherd; Dr. Tilden J. LeMelle, Assistant Director, Center on International Race Relations, University of Denver; Dr. Richard Berkey, Department of Sociology, University of Denver; Major Gordon Schieman and Major Lee Nunn, of the U.S. Air Force Academy; and Harley Shaver, Esq., of Denver. Each workshop had a student rapporteur.

The program concluded with an evening banquet. The speakers and the conference committee members were guests of the Denver International Law Society. Vice Chancellor Wilbur C. Miller of the University of Denver thanked the speakers for their participation.

The conference was co-sponsored by the American Society of International Law; the International and Comparative Law Committee of the Colorado Bar Association; University of Colorado School of Law; University of Denver College of Law; University of Denver Graduate School of International Studies, Center on International Race Relations; University of Denver International Law Society and UNA-USA/UNESCO, Colorado Division.

VED P. NANDA

### *The New School for Social Research, April 2-3, 1971*

A Regional Conference of the Society, co-sponsored by the Graduate Faculty of the New School for Social Research, was held on April 2 and 3 in New York. The theme of the conference was "Problems of International Law in the Western Hemisphere." The first session, chaired by Professor Louis Henkin, of the Board of Editors of this JOURNAL, was concerned with "Problems of Maritime and Non-Maritime Water Resources Exploitation." Dean Robert D. Hayton of Hunter College pre-

sented a paper entitled "Non-Maritime International Water Resources: Development and Conservation in the Americas." This was followed by a paper on "The Outer Limit of the Continental Shelf" given by Dr. José María Ruda, Argentine Under Secretary of Foreign Affairs and member of the International Law Commission. The final paper of the session was that of Atwood C. Wolf, Jr., of the New York Bar, whose topic was "The U.N. Declaration of Principles Governing the Deep Sea Bed: A Preliminary Study." Professor Douglas M. Johnston, of the University of Toronto and Dr. F. V. García-Amador of the Organization of American States acted as commentators.

The second session, under the chairmanship of Professor Richard B. Lillich, also of the Board of Editors, dealt with "Problems of Armed and 'Economic' Intervention." Dr. Thomas M. Franck, Professor of Law and Director of the Center for International Studies at New York University, delivered a paper on regional armed intervention, entitled "Words and Acts: The False Dichotomy." "The Nationalization by Peru of the Holdings of the International Petroleum Company" was the title of a paper presented by Nigel S. Rodley of the Graduate Faculty of the New School and N.Y.U. Center for International Studies. Commentators were Professors Detlev F. Vagts of Harvard Law School and Arthur W. Rovine of Cornell University.

The final session was devoted to "Human Rights" and chaired by Dr. Egon Schwelb, who is currently consultant to the U.N. Office of Legal Affairs. Professors A. J. and Ann Van Wynen Thomas, Jr., presented a study on "Human Rights and the Organization of American States," which was then commented on by Dr. C. Neale Ronning, Professor of Political Science at the New School and co-organizer of the conference. The major papers and comments of the conference are expected to be published.

NIGEL S. RODLEY

*Mexican-American Border Relationship Conference, San Diego,  
May 7-8, 1971*

A Mexican-American Border Relationship Conference on Land Title Acquisition and Border Industrialization was held at the Royal Inn in San Diego, May 7 and 8, 1971. The conference was sponsored by the California Western School of Law and its International Law Society; by the American Society of International Law as a Regional Meeting; the San Diego County Bar Association; the ABA through the International and Comparative Law Section; the Bank of America National Trust and Savings Association; the San Diego World Affairs Council; the International Developments Committee of the Texas Bar; and others.

On Friday, May 7, the topic of discussion was the acquisition by Americans of interests in real property located in the Constitutionally forbidden border and coastal zones of Mexico and the April 30, 1971, Mexican Executive Decree authorizing thirty-year leasing of such lands through bank trust arrangements. Saturday, May 8, was devoted to the Mexican Bor-

der Industrialization Program, under which partially fabricated products are moved across the border into Mexico, where further fabrication takes place. After the work in Mexico is completed, the products are returned to the United States subject only to the U. S. value-added customs duties, items 806.30 and 807.00 of the U. S. tariff schedules. Without these provisions and special Mexican customs provisions, the Mexican program could not exist.

Outstanding speakers from Mexico City were Lic. Jose Luis Siqueiros; Lic. Julio C. Trevino; Lic. Fausto C. Miranda; and CPA-CPT Sr. Guillermo Anchondo Wanless of Tijuana. American speakers included Dr. Carl Q. Christol of the University of Southern California; Ross Provence of San Diego; Mark B. Feldman, Assistant Legal Adviser, U. S. Department of State; Bruce Koppe, Vice President, Tax Manager, Bank of America; Charles Marshall, Assistant District Director of Customs; Professor M. J. N. Dellman, Thunderbird Graduate School of International Management; John Campbell, Assistant General Counsel, United Rubber Workers; California Assemblyman Pete Wilson; Dean Robert K. Castetter, California Western Law School; Charles Froelich, President, San Diego County Bar Association; Dr. Donald W. Baerresen, Director, Research Center in International Business; Mayor Frank Curran of San Diego; and Professor S. Houston Lay of California Western Law School.

Professor Lay, assisted by Mrs. Louis Wolfsheimer, a law student, organized the conference, which was attended by approximately three hundred attorneys and businessmen from Southwestern United States and Mexico.

The proceedings were taped and are being transcribed at California Western Law School for eventual distribution to participants and others who may be interested in the subjects of the conference.

S. HOUSTON LAY

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, Office of the Legal Adviser, Department of State.

The references in the headings are to sections of the *Digest of International Law* prepared by Marjorie M. Whiteman (1963 to date) dealing with the same subject matter as the material presented.

### RIGHTS AND DUTIES OF STATES

#### *Recourse to Pacific Settlement* (5 Whiteman's *Digest*, Ch. XIII, §20)

The Department of State issued the following Press Release on June 2, 1971:

On May 28, 1971, the United States brought a dispute with the Federal Republic of Germany concerning the Young Loan before the Arbitral Tribunal for the Agreement on German External Debts.<sup>1</sup> Similar action was taken on behalf of Belgium, France, Switzerland, and the United Kingdom. The tribunal, which sits at Coblenz, Germany, has eight permanent members. Its function is to decide disputes relating to the interpretation or application of the Agreement, signed at London on February 27, 1953.

Under the Agreement the Federal Republic accepted specified settlement terms for German external debts. Among those debts was the 5½ percent International (Young) Loan 1930. The provisions relating to the Young Loan contained in an annex to the agreement extend the maturity date of the loan to the year 1980. They also provide for recalculation of installments due should "the rates of exchange ruling any of the currencies of issue on August 1, 1952, alter thereafter by 5 percent or more."

The Deutschemark, one of the currencies of issue, was revalued in 1961 and again in 1969. In both instances the countries which have now brought the matter before the tribunal contended that as a consequence of the revaluations the bondholders of the other currencies of issue were entitled to receive installment payments recalculated in accordance with the formula contained in the annex. The Federal Republic took the position that the recalculation provision did not apply in cases of revaluation and declined to increase the payments to the holders of the non-German issues of the loan.

Since a number of American citizens hold dollar issue bonds, which represent a significant portion of the loan, the United States attempted to settle the dispute by negotiation with the government of the Federal Republic. Similar efforts were made by other governments with respect to other currency issues. Those efforts having been unsuccessful, the governments principally concerned brought the matter before the tribunal.

<sup>1</sup> 4 U.S.T. 443, T.I.A.S., No. 2252.

Under the Rules of Procedure the President of the Tribunal will ascertain the views of the parties before establishing time-limits for the completion of the various steps in the proceedings.

(Dept. of State Press Release No. 122, June 2, 1971;  
65 Dept. of State Bulletin 55 (1971).)

#### NATIONAL JURISDICTION

(6 Whiteman's *Digest*, C. XIV)

On June 9, 1971, the Soviet freighter *Suleyman Stalskiy* was seized in port at San Francisco pursuant to a writ of attachment issued by the U. S. District Court for the Northern District of California. The writ was issued in connection with a suit filed by a Massachusetts company for damages to its lobster fishing equipment allegedly caused by Soviet fishing vessels off the coast of Massachusetts.<sup>1</sup> By order dated June 15, 1971, the court vacated the attachment. The following documents were submitted to the court on June 15, 1971, before the order was issued:

June 14, 1971

Honorable Richard G. Kleindienst  
Deputy Attorney General  
Department of Justice  
Washington, D. C.

Dear Mr. Kleindienst:

In accordance with your conversation with Under Secretary Irwin, I am transmitting herewith an official translation of a statement which the Ambassador of the Union of Soviet Socialist Republics has requested be submitted to the U. S. District Court for the Northern District of California in connection with the case of *Prelude Corp. v. The Owner of M/V ATLANTIK and other Named Vessels, Known as the U.S.S.R.*

We would appreciate it if you would instruct the U. S. Attorney for the Northern District of California to submit this statement to the Court for its consideration in connection with the above entitled case, indicating that the United States Government is transmitting the statement at the request of the Soviet Ambassador, and that the Department of State accepts as true the representations of the Government of the Union of Soviet Socialist Republics contained in this statement.

Sincerely,

John R. Stevenson  
The Legal Adviser

STATEMENT OF ANATOLIY F. DOBRYNIN, Ambassador of the Union of Soviet Socialist Republics, To Secretary of State WILLIAM P. ROGERS

The vessel "Suleiman Stalsky" belongs to the Far East Steamship Company which is a legal entity charged with independent responsibility for its obligations. This Company deals exclusively in transporting cargo on various routes of the Pacific Ocean, including routes Japan—Canada—

<sup>1</sup> New York Times, June 10, 1971, p. 78 (some editions only).

the United States and Japan—the United States. No fishing vessels belong to the Company and it absolutely does not carry on fishing activities either in the Pacific or in the Atlantic Oceans, or in any other place.

The Far East Steamship Company under Article 13 of the Basic Civil Law of the U.S.S.R. and the Union Republics, is not responsible for state debts, while the state is not responsible for the debts of the Company.

June 13, 1971

*Corrigendum.*—The letter from The Legal Adviser of the Department of State of November 17, 1970, in connection with *First National City Bank v. Banco Nacional de Cuba*, which was reproduced in this section of the April, 1971, issue (65 A.J.I.L. 391 (1971)), should have appeared under the following heading:

#### NATIONAL JURISDICTION

*Recognition of Effects of Acts of Foreign State: "Act of State" Doctrine*  
(6 Whiteman's Digest, Ch. XIV, §1)

#### DIPLOMATIC MISSIONS AND EMBASSY PROPERTY

*Privileges and Immunities: Diplomatic Premises: Inviolability and Protection* (7 Whiteman's Digest, Ch. XVII, §36)

Following is the text of a note delivered by the U. S. Embassy at Moscow to the Soviet Ministry of Foreign Affairs on March 17:

The Embassy of the United States of America wishes to direct the attention of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics to an incident which occurred in Moscow on March 16, 1971 in which Soviet policemen made an unauthorized entry into the premises of the American Embassy when four Soviet citizens attempted to visit the Consular Section of the Embassy to inquire about applying for visas to enter the United States.

The unauthorized, forcible entry of Soviet police into the premises of the United States Embassy is contrary to international law and therefore totally unacceptable. Under generally accepted principles of international law, codified in Article 22, paragraph 1 of the Vienna Convention on Diplomatic Relations (which although not yet in force between the United States and the Soviet Union has been signed by both), the premises of diplomatic missions are inviolable, and the agents of the receiving state may not enter them, except with the consent of the head of the mission. Neither the Ambassador of the United States of America to the Soviet Union nor any other United States official consented to this entry into diplomatic premises, and indeed no request for permission was ever made by any Soviet authority.

The Soviet authorities have moreover engaged in active violations of international law resulting in personal injuries to official personnel of the United States. The Government of the United States protests in the strongest terms the illegal acts of the Soviet authorities and reserves the right to pursue this matter further.

In addition, the actions of Soviet authorities in this instance violate Articles 4 and 7 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics in that the Government of the Soviet Union has failed to take the necessary measures in order that United States Consular officers at the United States Embassy in Moscow may carry out their duties as they are entitled to under the Convention. Such violation of the Convention is inadmissible.

The Government of the United States expects the Government of the Soviet Union in the future to live up to its obligations under international law, including the Consular Convention.

(64 Dept. of State Bulletin 509-510 (1971).)

#### ARMED CONFLICT

*Prisoners of War and Civilian Aliens* (10 Whiteman's *Digest*, Ch. XXIX, §§7, 8)

On June 7, 1971, the United States Representative to the International Committee of the Red Cross Conference on International Humanitarian Law introduced, in Commission IV on Implementation and Application of Existing Law, a proposal concerning procedure for the establishment of Protecting Powers. That proposal was put forth in the form of the following draft:

#### DRAFT PROCEDURE FOR APPOINTMENT OF PROTECTING POWERS

1. In any situation in which nationals of one Party to this Agreement are captured or detained by another Party to this Agreement, and normal diplomatic relations do not exist between them or are severed, the two Parties shall appoint by mutual agreement a protecting power or an organization as a substitute for a protecting power.

2. In any situation covered by the preceding paragraph, if a protecting power or substitute organization has not been appointed within thirty days after either Party first proposes such appointment, the International Committee of the Red Cross shall request the Party which is the detaining power and the other Party each to submit a list of at least — possible protecting powers or substitute organizations acceptable to it. The two Parties shall submit such lists to the ICRC within ten days. The ICRC shall compare the lists and seek the agreement of any proposed protecting power or substitute organization named on both lists. If for any reason a protecting power or substitute organization is not appointed within a further period of twenty days, the ICRC shall be accepted as a substitute for a protecting power.

3. The representatives of protecting powers and substitute organizations shall, without delay, be given access to each captured or detained person in accordance with the Geneva Conventions of 1949 on the Protection of War Victims, if applicable, and in any event in accordance with general international law.

(I.C.R.C. Doc. No. CE/Com. IV/2.)

*Belligerent Occupation* (10 Whiteman's *Digest*, Ch. XXIX, §16)

The following is an excerpt from a statement by a Department of State spokesman at a departmental press briefing on June 9, 1971:

I was asked yesterday whether we had assisted or would assist Israel in projects located in the occupied territories. As a matter of policy, we do not provide assistance to the Israeli Government for projects in the occupied territories.

On the general question of constructing housing and other permanent civilian facilities in the occupied zone, including Jerusalem, our policy is to call for strict observance of the Fourth Geneva Convention of 1949, to which Israel is a party. This Convention prohibits an occupying power from transferring parts of its own population into occupied territory. We interpret this to include undertaking construction of permanent facilities which have the intent of facilitating transfer of Israeli population into the occupied territories.

## THE UNITED NATIONS

*Maintenance of International Peace and Security: Problems of Peace-Keeping* (13 Whiteman's *Digest*, Ch. XXXIX, §9)

The following statement was made on April 1, 1971, by Ambassador George Bush, United States Representative to the United Nations, before the Special Committee on Peacekeeping Operations:

As the new Representative of the United States, I wanted to take this first opportunity to express my strong personal interest in and support for the work of this very important committee. If the U.N. is to be strengthened in the all-important field of international peace and security, the peacekeeping function must be developed. It is all very well to produce declarations of high principle on matters of concern to all of us, but if these declarations are to have any effect they must be complemented by real steps to enhance the capability of the United Nations to act when the need arises.

My concern for progress in U.N. peacekeeping is fully shared by President Nixon and Secretary Rogers. I would like to draw the committee's attention to a passage from the President's February 25, 1971, foreign policy report<sup>1</sup> to the Congress:

Even if U.N. peacekeeping efforts cannot be perfected in the world as it is, they can certainly be improved. Peacekeeping in the past has depended essentially on improvisation. There were, and are, no general understandings on how these operations are to be directed or financed. One result has been that the U.N. has developed a large financial deficit as some countries have refused to pay their share.

We believe that a major effort should be made to reach an agreement on reliable ground rules for peacekeeping operations.

In his March 1971 report on "United States Foreign Policy, 1969-1970,"<sup>2</sup> Secretary Rogers also stressed that "It is especially important that the

<sup>1</sup> The complete text of the report appears in the Dept. of State Bulletin of March 22, 1971.

<sup>2</sup> Department of State publication 8575.



United Nations be in a position to take quick emergency action to check outbreaks of violence." He pointed out that the U. S. administration regards strengthening U.N. peacekeeping machinery as one of the top priorities for the United States in the U.N.

It is because of our vital interest in institutionalizing U.N. peacekeeping that we particularly regret the lack of progress recorded over the past 5 years. My very able predecessor Ambassador Yost reported on the lack of progress on producing agreed guidelines during last year's General Assembly. I regret to inform you that there have been no developments since last fall which would warrant a more optimistic report at this stage. While I am sorry that this is the case, I hasten to point out that as far as the U. S. delegation is concerned this is in no sense a counsel of despair. We remain committed to progress in the work of this committee and pledge continued cooperation in the full committee, the working group, and in our bilateral discussions. I plan to take an active interest in all peacekeeping discussions here at the U.N. and hope to be able to make an active contribution to the work of the committee. Given the will to succeed, I believe that the way can be found. I wish to reassure you that as far as the United States is concerned the will is there.

Mr. Chairman, I want to reiterate, on behalf of the United States, our full and complete dedication to the principles and purposes of the United Nations Charter. We would oppose any action in contravention of that charter—in peacekeeping or in any other area. We see that charter as a *living* document, capable of development through judicious application of its purposes and principles. It is from that viewpoint that we envisage the development of agreed guidelines on peacekeeping.

May I add, Mr. Chairman, that I cannot agree with Ambassador Malik's [Yakov A. Malik, Soviet Representative to the U.N.] statement that earlier peacekeeping operations were carried out in a manner contrary to the charter. I am sure that this view would be rejected by an overwhelming majority of members and by our distinguished Secretary General U Thant, who has rendered extraordinary service in the cause of peace during this past decade in connection with peacekeeping operations in the Congo, Cyprus, Kashmir, and the Middle East.

(U.S./U.N. Press Release 33, reprinted in 64 Dept. of State Bulletin 626-627 (1971).)

#### TREATIES AND OTHER INTERNATIONAL AGREEMENTS

##### *Reservations* (14 Whiteman's *Digest*, Ch. XLII, esp. §§17, 20)

On May 24, 1971, the United States Representative to the United Nations addressed the following note to the United Nations Secretary General:

Excellency:

I have the honor to refer to note No. C.N. 165.1970. Treaties-10 of October 26, 1970 from the Legal Counsel of the United Nations concerning the deposit on October 2, 1970 of the instrument of accession by the

Government of the Syrian Arab Republic to the Vienna Convention on the Law of Treaties, done at Vienna on May 23, 1969, subject to certain stated reservations.

I am instructed to inform you that the Government of the United States of America objects to reservation E of the Syrian instrument of accession which reads in translation as follows:

"E—The accession of the Syrian Arab Republic to this Convention and the ratification of it by its Government shall not apply to the Annex to the Convention, which concerns obligatory conciliation."

In view of the United States Government that reservation is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference.

The United States Government intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention.

The United States Government is also concerned about Syrian reservation C declaring that the Syrian Arab Republic does not accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, as stated in Article 62, 2 (a), and Syrian reservation D concerning its interpretation of the expression "the threat or use of force" in Article 52. However, in view of the United States Government's intention to reject treaty relations with the Syrian Arab Republic under all provisions in Part V to which reservations C and D relate, we do not consider it necessary at this time to object formally to those reservations.

The United States Government will consider that the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfill any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties.

I have the honor to request that this communication be brought to the attention of all States entitled to become parties to the Convention.

Accept, Excellency, the renewed assurances of my highest consideration.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Act of state—"Bernstein exception"—expropriation—Cuba—effect of Department of State opinion—Hickenlooper Amendment*

BANCO NACIONAL DE CUBA v. FIRST NATIONAL CITY BANK OF NEW YORK. 442 F.2d 530.

U. S. Court of Appeals, 2d Cir., April 27, 1971. Cert. granted, No. 70-295 (October 12, 1971).\*

In an action by Banco Nacional de Cuba (Banco Nacional) against The First National City Bank of New York (Citibank) to recover certain proceeds from the sale of pledged assets, the Second Circuit held unanimously that the act of state doctrine precluded Citibank's counterclaim and asserted right to set off against the proceeds an amount up to the value of Citibank's properties allegedly expropriated by the Cuban Government in violation of international law.<sup>1</sup> The Supreme Court granted Citibank's petition for certiorari and remanded the case without opinion on the merits for reconsideration in light of the views of the Department of State expressed in a letter dated November 17, 1970, to the Supreme Court from the Legal Adviser of the Department, John R. Stevenson (the "Stevenson letter").<sup>2</sup> On remand the Second Circuit in a 2-1 opinion by Chief Judge Lumbard held that the court saw "no reason to change . . . [its] initial decision on this appeal,"<sup>3</sup> despite the recommendation in the Stevenson letter that the court not apply the act of state doctrine to preclude Citibank's counterclaim and asserted right to set-off. Citibank has once again petitioned the Supreme Court for certiorari.<sup>4</sup>

In his November, 1970, letter to the Supreme Court, the Legal Adviser stated that both the Department of State and court decisions have recognized that "the act of state doctrine should not be applied with respect to a certain case or class of cases . . .".<sup>5</sup> In support of this conclusion the Stevenson letter cited the Second Circuit's decision in *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*<sup>6</sup> In that case the Second Circuit first held that the act of state doctrine precluded adjudication by an American court of the validity of certain acts by officials of the Nazi German

\* Case report by Peter D. Trooboff, Esq.

<sup>1</sup> Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394 (1970), reversing Banco Nacional de Cuba v. First National City Bank of New York, 270 F.Supp. 1004 (S.D.N.Y., 1967); 65 A.J.I.L. 195 (1971), 62 *ibid.* 182 (1968).

<sup>2</sup> 400 U. S. 1019 (1970); for the full text of the Stevenson letter, see 442 F.2d 530 at 536; 10 Int. Legal Materials 89 (1971). <sup>3</sup> 442 F.2d 530 at 532.

<sup>4</sup> 39 U.S.L.W. 3568 (June 17, 1971). <sup>5</sup> 442 F.2d 530 at 536.

<sup>6</sup> 210 F.2d 375 (2d Cir., 1954), 48 A.J.I.L. 499 (1954), reversing 173 F.2d 71 (2d Cir., 1949), 44 A.J.I.L. 182 (1950).

Government. After this initial ruling, the Second Circuit was given a letter from the then Acting Legal Adviser which stated that it was the policy of the United States to relieve "American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials" <sup>7</sup> in determining claims asserted in the United States for restitution of identifiable property forcibly and wrongfully taken by the Nazi Government. On the basis of this letter, the Second Circuit in *Bernstein* reversed its initial ruling.

The Stevenson letter pointed out that the Supreme Court "specifically avoided ruling on the validity of the *Bernstein* exception" in *Banco Nacional de Cuba v. Sabbatino*.<sup>8</sup> Although he acknowledged that the Department of State has "generally supported the applicability of the act of state doctrine," the Legal Adviser stated that the Department "has never argued or implied that there should be no exceptions to the doctrine."<sup>9</sup> Mr. Stevenson concluded in his letter that, when the following circumstances are present, the Department has determined that "the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff":

- (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred;
- (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and
- (c) the foreign policy interests of the United States do not require application of the doctrine.<sup>10</sup>

Mr. Stevenson indicated that in the instant case the circumstances in (a) and (b) were present and that the United States foreign policy interests "do not require the application of the act of state doctrine . . . ." <sup>11</sup>

In his opinion for the Second Circuit in the instant case, Chief Judge Lumbard reviewed in detail the facts in the *Bernstein* case cited by the Legal Adviser, and in an earlier case involving the same plaintiff, in which Judge Learned Hand had held that the act of state doctrine precluded inquiry into the validity of the confiscation of plaintiff's property by the Nazi German Government.<sup>12</sup> Summarizing the contention by Citibank that these cases required the Second Circuit to change its prior decision to conform with the Stevenson letter, Chief Judge Lumbard explained Citibank's argument as follows: "since the Executive has now written a 'Bernstein letter' exercising its prerogative in the area of foreign policy and suggesting that the act of state doctrine is inappropriate in this case, the policies underlying that doctrine, to which the Supreme Court gave crucial weight in *Sabbatino*, are not present here."<sup>13</sup> The Chief Judge also pointed out that Citibank contended that "without the bar of the act of

<sup>7</sup> 210 F.2d 375 at 376.

<sup>8</sup> 376 U.S. 398 (1964); 58 A.J.I.L. 779 (1964).

<sup>9</sup> 442 F.2d 530 at 537.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Bernstein v. Van Heyghen Frères Société Anonyme*, 163 F.2d 246 (2d Cir., 1947), cert. denied, 332 U.S. 772 (1947); 42 A.J.I.L. 217 (1948).

<sup>13</sup> 442 F.2d 530 at 533.

state doctrine," the Second Circuit "can and must hold in . . . [Citibank's] favor—that it is entitled to set off against Banco Nacional's claim for relief such amount as may be due and owing it from the Cuban government as compensation for its confiscated Cuban property."<sup>14</sup> According to the court, Citibank's argument in this respect relied on the Second Circuit's prior holding in *Banco Nacional de Cuba v. Sabbatino*,<sup>15</sup> followed in *Banco Nacional v. Farr*,<sup>16</sup> that the Cuban takings of property owned by United States persons were invalid under international law.

The Second Circuit opinion disagreed with these contentions by Citibank. Chief Judge Lumbard stated that Citibank had made an "erroneous" assumption that "the so-called *Bernstein* exception to the act of state doctrine applies here since the State Department has written a letter."<sup>17</sup> The Second Circuit concluded that "*Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts."<sup>18</sup> The court's opinion distinguishes the second *Bernstein* case on four grounds:

First, the Nazi government with which the United States had been at war no longer existed when the *Bernstein* letter was written, but Castro's government in Cuba, with which this country has not been at war, still governs Cuba and is recognized by the United States;

Second, the *Bernstein* letter "was written during the aftermath of a great world war" and the plaintiff in *Bernstein* sought relief for Nazi government actions which "had been condemned throughout the world as crimes against humanity";

Third, the *Bernstein* letter declared that the United States had an "affirmative policy" to restitute identifiable property to *all* those victimized by the Nazi confiscation" and not, as with the Stevenson letter, only those "who assert counterclaims or setoffs";

Fourth, in *Bernstein* "the balance of equities was almost entirely on the side of the party opposing application of the act of state doctrine," whereas Citibank, according to the Second Circuit here and as it reasoned in its first opinion, seeks a "windfall" in recovering its counterclaim or setoff from Banco Nacional "at the expense of other creditors."<sup>19</sup>

The opinion also pointed out, as the Solicitor General did in *Sabbatino*, that "a 'Bernstein letter' has been issued only once—in the *Bernstein* case itself." Chief Judge Lumbard added that in the only two cases in which courts relied on the *Bernstein* decision, the holdings were reversed on appeal.<sup>20</sup>

Finally, the Second Circuit interpreted the *Sabbatino* opinion as providing a basis for distinguishing *Bernstein* from the instant case. In

<sup>14</sup> *Ibid.*

<sup>15</sup> 307 F.2d 845 (2d Cir., 1962), 56 A.J.I.L. 1085 (1962), rev'd., 376 U.S. 398 (1964), 58 A.J.I.L. 779 (1964).

<sup>16</sup> 383 F.2d 166 (2d Cir., 1967), cert. denied, 390 U.S. 956 (1968); 62 A.J.I.L. 165 (1968).

<sup>17</sup> 442 F.2d 530 at 534.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* See 431 F.2d 394 at 404, note 18.

<sup>20</sup> *Banco Nacional de Cuba*, note 15 above; *Kane v. National Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Fla. Cir. Ct., 1961), rev'd., 153 So.2d 40 (Fla. App., 1963), 58 A.J.I.L. 189 (1964).

*Sabbatino* the Supreme Court stated with respect to application of the act of state doctrine that "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered."<sup>21</sup> Chief Judge Lumbard recalled that Citibank's properties were confiscated "in Cuba by the extant and recognized Cuban government" and concluded that "the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in such cases."<sup>22</sup>

In his dissent, Judge Hays stated that the Second Circuit's refusal to apply the *Bernstein* exception resulted in "the majority . . . engaging in precisely the kind of judgment which the act of state doctrine has removed from judicial determination."<sup>23</sup> He pointed out that the distinctions relied upon by the majority in distinguishing the second *Bernstein* case were not in the Second Circuit's opinion in that case but in the State Department's *Bernstein* letter. According to Judge Hays, "[u]nless the majority wishes to overrule *Bernstein*, it must accept the *Banco Nacional* [Stevenson] letter as an expression of Executive Policy"<sup>24</sup> which distinguished the instant case from *Sabbatino*, where the Supreme Court held expressly that there had been no expression of Executive policy.

*Act of state doctrine—boundary dispute between foreign states not justiciable in United States court—existence of state—Trucial States of Sharjah and Umm al Qaywayn—joinder of foreign states in private antitrust suit—Hickel-Looper Amendment*

OCCIDENTAL PETROLEUM CORP. v. BUTTES GAS & OIL CO. Civil No. 70-1397-HP.

U. S. District Court, Central District, California, March 17, 1971.\*

Occidental Petroleum Corp. (Occidental) and its wholly-owned subsidiary, Occidental of Umm al Qaywayn, alleging \$100 million in damages resulting from defendants' interference with plaintiffs' oil concession in the Persian Gulf, brought an antitrust action for treble damages and injunctive relief (Clayton Act, 15 U.S.C. §§15, 26; footnote by court, other footnotes renumbered or omitted) against Buttes Gas and Oil Co. (Buttes) and Clayco Petroleum Corp. (Clayco), as well as certain officers of these firms. Plaintiffs charged defendants with conspiracy in restraint of trade, conspiracy to monopolize, and attempted monopoly (Sherman Act, 15 U.S.C. §§1, 2; footnote by court) with respect to "the exploration, development and exploitation of petroleum reserves of the territorial waters of the Trucial States." (Civil No. 70-1397-HP, p. 1, quoted by court.)

In 1969 Occidental received a concession from Umm al Qaywayn consisting of "the exclusive right to explore for, extract and sell oil under

<sup>21</sup> 376 U.S. 398 at 428.

<sup>22</sup> 442 F.2d 530 at 535.

<sup>23</sup> *Ibid.* 538.

<sup>24</sup> *Ibid.*

\* Digested from proofs of report made available by Stephen M. Boyd, Esq., and Lawrence F. Jay, Esq.

lying the territorial and offshore waters" (*ibid.* 8) of that state. In the same year, Buttes and Clayco obtained a similar concession from the adjacent state of Sharjah. The two concessions were located in the vicinity of the Island of Abu Musa which was thirty-eight miles off the coast of Sharjah and was claimed by that state. Sharjah recognized the three-mile limit of the territorial sea. Both states agreed that the territorial waters perimeter of Abu Musa formed the boundary between the two concessions. Plaintiffs' complaint included a map showing the boundary of the concession, which map was allegedly attached to the two concession agreements when they were approved by the British Foreign Office in accordance with treaty arrangements between the United Kingdom and the Trucial states. Occidental complained that when defendants learned that plaintiffs' concession was potentially highly productive, they tried to interfere with plaintiffs' exploitation of the concession by instigating an elaborate scheme of international intrigue which included inducing (1) Sharjah to claim a twelve-mile limit for its territorial sea, including the waters off Abu Musa, (2) the National Iranian Oil Co. to assert Iranian sovereignty over the island together with a twelve-mile limit, (3) the British Foreign Office to request plaintiffs to halt their drilling operations until these claims were settled. Plaintiffs charged, moreover, that pursuant to defendants' blandishments, "British ships and aircraft menaced plaintiffs' personnel and equipment on the drilling site, and . . . [that] members of the Royal Navy forcibly boarded plaintiffs' equipment" (*ibid.* 10). Occidental contended further that, following British intimidation, the Ruler of Umm al Qaywayn ordered plaintiffs to stop drilling pending settlement of the dispute. Allegedly, defendants were seeking unhindered exploitation of plaintiffs' concession after the United Kingdom had withdrawn from the area in 1971.

On the same facts, Occidental filed a claim in a California State court for damages and injunctive relief for inducing breach of contract. They also filed an action for declaratory relief and damages in the United Kingdom against the British Government on the charge of harassment by the British Navy. Clayco moved to dismiss the action in Federal court on grounds of lack of personal jurisdiction, improper venue, and defective service of process (Federal Rules of Civil Procedure, Rules 12(b)(2), 12(b)(3), 12(b)(5)). Buttes moved to dismiss on grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief could be granted, and failure to join indispensable parties (*ibid.*, Rules 12(b)(1), 12(b)(6), 19). The District Court granted defendants' motions.

Judge Pregerson found that jurisdiction and venue were lacking as to Clayco, a Delaware corporation which was not doing business in the Central District of California, and as to the president of Clayco.

Buttes questioned jurisdiction in this case, first upon the ground that no "substantial anti-competitive effect on American commerce" (Civil No. 70-1397-HP, p. 12, quoted by court) had been shown as required by the Sherman Act. The court, however, took the view that plaintiffs' business of extracting oil and importing it into the United States constituted "suffi-

cient effect" (*ibid.* 14) upon United States commerce to support the assertion of jurisdiction here. Its second challenge to the jurisdiction was that this was essentially a boundary dispute between the two Trucial states and that the court had no subject-matter jurisdiction over it. The court agreed:

The determination of foreign states' boundaries is certainly not a permissible function of this court. In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by the pronouncements of the executive. . . . Authoritative judicial resolution of international boundary disputes is a function not of domestic courts, but of international tribunals, acting upon the consent of the contestant states. (*Ibid.* 14-15.)

Buttes next contended that the complaint failed because the plaintiffs had not joined Sharjah, Umm al Qaywayn, the United Kingdom, and Iran as indispensable parties to the action. Occidental responded that the four states were co-conspirators or joint tort-feasors whose joinder was not required in an antitrust action. The court found that while it could be argued that Sharjah could be properly joined (Federal Rules of Civil Procedure, Rule 19(a)(2)(ii), cited by court), the acquisition of jurisdiction over this state was another matter. The issue was whether joinder of Sharjah and the other states was "indispensable" to this action. The court said:

From among the facts enumerated in Rule 19(b) to aid the court in making this determination, "the shaping of relief" would afford means to avert the dilemma posed by Sharjah's contractual rights. For example, a constructive trust decree could be framed that left intact the share of the oil proceeds to which Sharjah was entitled under its concession. Under such an approach the prejudice to Sharjah (loss of oil rights) and to Buttes and Clayco (possible suit by Sharjah) could be "lessened or avoided," Rule 19(b). A comparable result would obtain if the court refrained from awarding any equitable relief, but instead proceeded only with plaintiffs' claim for damages. . . . With these alternatives available, it becomes evident that Sharjah is not an "indispensable" party to this case. (Civil No. 70-1397-HP, p. 18.)

As for the other states, Iran and Umm al Qaywayn were ruled out because the present action was directed to settling title to the disputed area, and it had been established that the court could not decide this issue. The United Kingdom's presence was not indispensable despite the fact that it exercised a ". . . supervisory power over the international relations of the Trucial States, and that in this capacity it has acted to prevent plaintiffs from drilling for oil in the disputed area." (*Ibid.* 19.) The court indicated that while the United Kingdom's presence might be indispensable to the equity proceeding, this would not be true with respect to the plaintiff's request for monetary relief.

Finally Buttes contended that the court lacked jurisdiction because of the nature of the alleged conspiracy. Two points were adduced here.



Arguing from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (cited by court), defendants asserted that anti-trust jurisdiction does not extend to an agreement among two or more persons to "attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (*Ibid.* at 136, quoted by court.) The court found no "direct authority" (Civil No. 70-1397-HP, p. 20) as to whether this doctrine applied to an attempt to influence foreign governments to take such action. Judge Pregerson held:

In sum, the interests asserted in this case are dissimilar to those that Noerr was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate. (*Ibid.* 21-22.)

The court continued: "The act of state doctrine is the relevant and dispositive principle on this motion to dismiss." (*Ibid.*)

The court stated that *American Banana Co. v. United Fruit Co.*, 160 F.184 (S.D.N.Y.), aff'd. 166 F.261 (2d Cir., 1908), aff'd. 213 U.S. 347 (1909) (cited by court) was particularly apposite to the present action. In that case the Court of Appeals, affirming the trial court's dismissal of the complaint, said:

Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court. The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adopted by a sovereign state cannot be inquired into at all—directly or collaterally—by the courts of another state. Relief must be sought in the courts of the former state or through diplomatic channels. (166 F.261 at 266, quoted by court; Civil No. 70-1397-HP, p. 23.)

Judge Pregerson observed:

The significance of the *American Banana* case has been somewhat obscured by virtue of the fact that Justice Holmes's opinion expounds at some length a restrictive view of Sherman Act jurisdiction, based upon the situs of primary conduct. This aspect of the opinion has been distinguished in subsequent international antitrust cases, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, . . . 370 U.S. [690] at 704-05 [1962]. But as those two cases intimate, and as other analyses clearly establish, the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant. This holding would appear directly to control the present case. (Civil No. 70-1397-HP, p. 24.)

Plaintiffs attempted to show that the thrust of their complaint was to "defendants' conduct in 'catalyzing' those acts" (*ibid.*) of the foreign states, not to the acts *per se*. However, this argument failed because plaintiffs had referred to the states as "co-conspirators," hence questioning their acts directly under the antitrust laws, and had described certain acts

of Sharjah as "violative of international law." (*Ibid.* 25.) The act of state doctrine barred both points from consideration by an American court (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430-431 (1964); cited by court; 58 A.J.I.L. 779 (1964)). The court pointed out:

There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, *e.g.* *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 750-51 (9th Cir. 1936), *cert. den.*, 299 U.S. 613 (1937); *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 & n. 1 (9th Cir.), *cert. den.*, 382 U.S. 958 (1965), plaintiffs necessarily ask this court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of "internal documents." But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. See, *Sabbatino*, *supra*, 376 U.S. at 423-24, 431-33. (Civil No. 70-1397-HP, p. 25.)

Plaintiffs contended that the act of state doctrine as asserted in *Sabbatino* had been undermined by the "Sabbatino [Hickenlooper] Amendment" (22 U.S.C. §2370(e)(2), cited by court). Rejecting this argument, Judge Pregerson said:

In any event, this exception is by its terms extremely narrow, and in all other cases the act of state doctrine remains the law of the land. The legislation has been strictly construed, and courts have continued to rely upon act of state in cases deemed not precisely fitting the statutory language. See *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968) (no confiscation or taking, and no claim of right to property) [63 A.J.I.L. 640 (1969)]; *F. Palicio y Compania, S.A. v. Brush*, 256 F.Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir. 1967) (no violation of international law) [61 A.J.I.L. 601 (1967)]. Plaintiffs' assertion that the Amendment in effect pulled the rug out from under the act of state doctrine in all cases is groundless. (Civil No. 70-1397-HP, pp. 27-28.)

Occidental then sought to show that the interference with their concession constituted "in effect an attempted confiscation, without compensation, of plaintiffs' vested property rights in the oil and gas to which they were entitled . . . in violation of international law." (Quoted by court from complaint, *ibid.* 28.) The court said:

This pleading is insufficient to invoke the Sabbatino Amendment for several reasons. In the first place, the charge of an attempted confiscation, invalid under international law, has not been directed against the other acts of state—by Sharjah and also by Iran, Umm al Qaywayn, and Great Britain—adjudication of which would form an integral part of plaintiffs' case. Moreover, the portion of the complaint here in issue does not itself fall within the Sabbatino Amendment's ambit, for the simple reason that the complaint refers to an "at-

tempted confiscation," whereas the statute applies only to a "confiscation or other taking." It is clear from a reading of the complaint as a whole that the conduct of Sharjah did not amount to an effective confiscation; rather, plaintiffs were allegedly deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's claims were not the most efficacious. This is not a situation at which the Sabbatino Amendment was aimed. (*Ibid.* 28-29.)

A further attack against the act of state doctrine was advanced by Occidental with the argument that Sharjah and Umm al Qaywayn were not "states" within the meaning of that doctrine because the United Kingdom had ultimate control over their foreign affairs. Judge Pregerson said:

Under the holding of the *Zeiss* case [*Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892 (S.D.N.Y., 1968), 63 A.J.I.L. 636 (1969); *aff'd.* 433 F.2d 886 (2d Cir., 1970), 65 A.J.I.L. 611 (1971)] and the authority on which it relied, the application of act of state to the Trucial States would appear to follow a fortiori. Previously recognized as independent sovereigns by Britain, the Trucial States acceded supervision over their foreign relations to the latter only by a series of treaties. H. Albaharna, *The Legal Status of the Arabian Gulf States* 70-74 (1968). While the precise international status of these sheikdoms is at present unique and difficult to characterize, see *id.* ch. 8, their degree of international personality is obviously greater than that, say, of Wue-ttemberg. Bearing in mind especially the foreign affairs roots of the act of state doctrine, the court concludes that the doctrine applies to Sharjah and Umm al Qaywayn. (Civil No. 70-1397-HP, p. 29.)

Plaintiffs' final attack on the act of state doctrine was addressed to the conduct of the Ruler of Sharjah which they said "was motivated by his own personal gain and benefit." (Quoted by court from complaint, *ibid.* 30.) The court observed:

*Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), relied on by plaintiffs, holds only that crimes committed by a chief of state outside or in violation of his official authority are not acts of state. *Id.*, at 557-58. Contrariwise, the complaint clearly indicates that the Ruler of Sharjah acted at all times in his official capacity and on behalf of his state. In these circumstances, as the *Jimenez* [*sic*] case itself holds, the act of state doctrine applies. *Id.* at 557. (Civil No. 70-1397-HP, p. 30.)

*War—Trading with the Enemy Act—recovery of property vested by Alien Property Custodian—conspiracy to cloak enemy ownership and control of United States corporation*

BONNAR *v.* UNITED STATES. 438 F.2d 540.

U. S. Court of Claims, February 19, 1971.

Plaintiffs, former stockholders or successors in interest to former stockholders of the General Dye-stuff Corp. of New York (GDC), sought to recover \$22,227,483.15 in stock which had been vested in 1942 by the Alien Property Custodian pursuant to the Trading With the Enemy Act

(50 U.S.C. App. §1 ff. (1964)). The Alien Property Custodian also vested title in the stock of General Aniline & Film Corp. (GAF) in 1942. GDC and GAF were merged by the Attorney General following an exchange of stock in 1954. The GAF common stock was sold in March, 1965, by the Attorney General for \$329,000,000. Plaintiffs sued for their portion of these proceeds with interest from the date of sale. The protracted nature of this litigation was attributable to various difficulties, including the need to revise Congressional legislation designed to enable plaintiffs to sue after settlement and releases in related suits in 1945 and 1951, following the Supreme Court's decision in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (footnote by court; other footnotes by court omitted), and the death in 1966 of the Trial Commissioner assigned to the case.

The Court of Claims accepted with some modification the findings of fact of the Trial Commissioner appointed in 1966. There was no question that the Alien Property Custodian had the power to vest GDC's stock subject to the rule of 50 U.S.C.App. §9(a) to the effect that "adequate provision" must be made for returning property seized by mistake. In suing under §9(a), plaintiffs had the burden of proof as to whether they and the vested property had no "enemy taint" at the time of seizure. Defendant argued that plaintiffs had not sustained the burden of showing that they had not conspired to cloak ownership and control of GDC by I.G. Farbenindustrie, A.G. (Farben), a German cartel, up to the time of vesting. The court held that plaintiffs were entitled to recover because their "... proof meets both tests of *bona fide* ownership and non-enemy status." (438 F.2d 540, 543.)

In a lengthy examination of the history of relations between GDC and Farben, Judge Durfee found that GDC had exclusive rights to import Farben dyestuffs from 1926 through 1940, and that GDC was an American corporation and not an American branch of Farben. The record showed that in the face of the outbreak of the war in 1939 and prospective seizure of their foreign holdings, Farben had divested themselves of direct and indirect interests in certain foreign properties, including GDC, by placing them in the "hands of 'completely independent' but nevertheless 'trusted friends'" (*ibid.* 548), who were relied upon to operate the properties independently of Farben's foreign competitors. This relationship was known as *vertrauensmann*. Defendant interpreted *vertrauensmann* as "agent" or "trustee," i.e., a relationship involving a commitment to return control of the property to Farben after the war. This argument relied upon *Feller v. McGrath*, 106 F.Supp. 147 (W.D.Pa., 1952), *aff'd.* sub nom. *Feller v. Brownell*, 201 F.2d 670 (3d Cir.), cert. denied, 346 U.S. 831 (1953) (cited by court) as illustrative of the type of concealment of beneficial ownership of stock which allegedly existed between Farben and GDC. Judge Durfee was "... unable to isolate even a scintilla of evidence in the instant case from which a similar inference ... [could] be drawn" (438 F.2d 540, 564), and concluded that no such conspiracy had been proved against GDC.

Defendant also attempted to show that plaintiffs were affected by

"enemy taint," which both parties agreed would bar recovery if proved. The doctrine was developed by the Supreme Court in *Uebersee Finanz-Korp. v. McGrath*, 343 U.S. 205 (1952) and defined as ". . . direct and indirect control and domination by an enemy national." (*Ibid.* 212, quoted by court, 438 F.2d 540, 569.) It was clear, however, in the opinion of the court, that E. K. Haltach, majority stockholder of GDC, was not an enemy agent nor had he conspired with the enemy.

The court denied plaintiffs' demand for interest on the amount realized from the sale of their shares in 1965, on the ground that such recovery was not specifically authorized under 50 U.S.C. App. §7(c), as interpreted in *Gmo. Niehaus & Co. v. United States*, 373 F.2d 944, 961-962 (Ct.Cl.1967) (61 A.J.I.L. 1061 (1967)). In determining the amounts to which plaintiffs were entitled, the court offset against the new judgments amounts received in previous settlements.

Judge Skelton, in a dissenting opinion in which he was joined by Judge Nichols, said:

This case is a classic example of a German cloaking operation. It is characterized by long years of careful planning, extraordinary foresight, devotion to detail, and the complete cooperation of those who participated in the plan. (438 F.2d 540, 576.)

Admittedly, plaintiffs could recover on the ground that they were not enemy agents. On the other hand, their recovery was barred, in his opinion, by their failure to prove that they were the beneficial owners of GDC.

*War—existence of state of—war exclusionary provision of life insurance policy—the conflict in Viet-Nam*

HAMMOND v. NATIONAL LIFE & ACCIDENT INSURANCE CO. 243 So.2d 902.

Court of Appeal, Louisiana, 3rd Cir., Jan. 15, 1971. Rehearing denied, Feb. 24, 1971.

Plaintiff sued to recover double indemnity benefits of \$3000 on two life insurance policies of which he was the beneficiary for his son, a lieutenant in the United States Naval Reserve who was killed in a fire on the aircraft carrier *Oriskany* in the Gulf of Tonkin. The *Oriskany* was part of the United States military forces assigned to Viet-Nam; however, the fire and the subsequent death of the insured could not be ascribed to combat action. Defendant paid the face values of the policies but objected to paying double indemnity benefits because each policy contained a war exclusionary provision. The trial court held that these provisions barred the payment of double indemnity. On appeal, plaintiff argued that, as war had not been formally declared against North Viet-Nam, defendant could not invoke the war exclusionary provisions of the policies. The Court of Appeal reversed the lower court's decision.

Judge Savoy observed that the expression, "in time of war," which appeared in the clauses at issue had not been expressly examined in Louisi-

ana jurisprudence. He pointed out that two cases dealing with the same matter emerging from the hostilities in Korea had produced opposite results. In *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 At.2d 202 (1953) (cited by court), the court found for the insured on the ground that there had been no declaration of war by Congress. But in *Stanbery v. Aetna Life Insurance Co.*, 26 N.J.Super. 498, 98 At.2d 134 (1953) (cited by court), a case involving the death of the insured in line of duty, the court defined "war" in a non-technical sense and denied recovery.

In the instant case, Judge Savoy took the view that despite the fact that "the exclusionary clauses in the policies were ambiguous," nonetheless, the insured "was not enrolled in military, naval or associated service 'in time of war' as stated in . . . [these] exclusionary provisions," so that the beneficiary could properly recover double indemnity benefits. (243 So.2d 902 at 904.)

*Maritime boundary—delimitation of seaward boundary of State of Louisiana—determination of State's seaward boundary for purpose of validating oil drilling lease—Convention on the Territorial Sea and Contiguous Zone, 1958*

TEXACO, INC. v. HICKEL. 437 F.2d 636.

U. S. Court of Appeals, District of Columbia Circuit, Aug. 19, 1970.

Plaintiff sought a mandamus-type order to compel the Secretary of the Interior to issue a permit to enable plaintiff to drill for oil off the Louisiana coast. In 1936 Louisiana had granted plaintiff's predecessors in interest a lease covering submerged lands off certain parts of the coast. At this time Louisiana claimed a seaward boundary of three marine leagues. In 1950, the Supreme Court applied the rule of *United States v. California* (332 U.S. 19 (1947), [42 A.J.I.L. 209 (1948)], cited by court) to Louisiana, whereby the United States assumed title to submerged lands lying beyond the ordinary low water mark (*United States v. Louisiana*, 339 U.S. 699 (1950), cited by court). Objections from the coastal States led Congress in 1953 to enact the Submerged Lands Act (43 U.S.C. §1301 ff.; [48 A.J.I.L. Supp. 104 (1954)]; footnote by court; other footnotes renumbered or omitted) and the Outer Continental Shelf Lands Act (43 U.S.C. §1331 ff.; [48 A.J.I.L. Supp. 110 (1954)]; footnote by court). According to the former Act, the Gulf Coast States were given the right to prove their historic claim to seaward limits up to three marine leagues, while the latter Act provided that the Federal Government had jurisdiction over submerged lands on the continental shelf beyond the States' seaward limits, including jurisdiction to issue mineral leases. Section 6 of the Outer Continental Shelf Lands Act (43 U.S.C. §1335, cited by court) affirmed any previous mineral leaseholds, subject to certain requirements in §6(a), including the requirement that

(2) such lease was issued prior to December 21, 1948, and would have been on June 5, 1950, in force and effect in accordance with its

terms and provisions and the law of the State issuing it had the State had the authority to issue such lease. (437 F.2d 636, 639, quoted by court.)

Upon application of a leaseholder, the Secretary of the Interior was authorized to determine whether the State-issued lease met these requirements. Plaintiff's application in 1953 was rejected on the ground that the lease did not cover submerged land on the Outer Continental Shelf. On appeal to the Solicitor of the Department, plaintiff argued that its lease comprehended land twenty-seven miles seaward. In 1958 the Solicitor ruled that plaintiff's lease was valid for submerged land extending three marine leagues seaward from the coast. In *United States v. States of Louisiana, Texas et al.* (363 U.S. 1 (1960) [54 A.J.I.L. 895 (1960)]), cited by the court), the Supreme Court ruled that Louisiana was entitled to a seaward boundary of only three marine miles. However, in *United States v. California* (381 U.S. 139 (1965), [59 A.J.I.L. 930 (1965)]), cited by court), the Supreme Court accepted the definition of inland waters provided in the 1958 Convention on the Territorial Sea and Contiguous Zone (15 U.S. Treaties 1606; 516 U.N. Treaty Series 205), taking the "salient points" line as the basis for delimiting the coastline where the Submerged Lands Act was at issue. Following this decision, Louisiana was granted title to submerged lands within three miles of the salient points line (*United States v. Louisiana*, 382 U.S. 288 (1965), cited by court).

Plaintiff applied for a permit in 1966 to drill for oil within three leagues from the salient points line but more than three leagues from the shoreline. In 1968, the Department of the Interior ruled that the seaward boundary of the lease was not nine miles from the coastline as defined in the Submerged Lands Act but rather nine miles from the Chapman line, "a line which, with respect to the lease here in issue, runs along the shoreline of Louisiana. The parties agree that the proposed well is more than 9 miles from this line." (437 F.2d 636, 640.) Plaintiff then brought this action to set aside the Department's ruling and to compel the issuance of the drilling permit. The District Court found for plaintiff. On appeal, the Court of Appeals held that

we think that while Texaco is entitled to a judgment invalidating the 1968 Solicitor decision, the proper consequence of that judgment is a remand to the Department of the Interior for a de novo decision as to the appropriate baseline. (*Ibid.* 641.)

The District Court's order to the Department to issue a drilling permit was reversed.

Circuit Judge Leventhal stated that

The fact that the parties intended to define the boundary of Louisiana in terms of a three-league line and that Louisiana could in good faith claim such a boundary establishes that for the purpose of meeting the requirements of §6(a) the lease covers land on the Outer Continental Shelf, and the lessee is entitled to continue to maintain it as a Federal lease. Moreover, we find the Solicitor's reading of the Act to be

a reasonable one and we therefore see no basis for concluding that the Secretary lacked authority to interpret Lease No. 340 as one made in reference to a good faith boundary of three leagues and to continue it as so interpreted. (*Ibid.* 643.)

With regard to the Department's invocation of the Chapman line, the court said:

However, we can find no indication that the Department ever considered in 1958 whether the Chapman line did or did not reflect the baseline intended by Texaco and Louisiana in 1936. Nor can we see that the Department considered whether the Chapman line is the only baseline which Louisiana could use in good faith. There were no findings on these points in 1958, and the Secretary is not now entitled to treat these matters as settled by the 1958 proceedings. The 1958 decision was a significant contribution and clarification of the rights of the parties in its decision of the points that were at issue. It is not to be stretched beyond its fair intendment by projecting into it rulings or determinations on points that were not being presented for resolution. (*Ibid.*)

On the other hand, the court rejected plaintiff's claim that the 1958 departmental opinion established the coastline, as defined in §2(c) of the Submerged Lands Act, as the baseline of the lease, pointing out that §2(c) only applied to the State's legal three-mile boundary, whereas a claim to a three-league limit must rest upon an historic baseline (citing *United States v. Louisiana*, 389 U.S. 155 (1968) [62 A.J.I.L. 970 (1968)]). Plaintiff's reading of the Solicitor's continuation decision appeared faulty. Judge Leventhal said:

It appears rather clearly that the Solicitor's reference to the definition of coast line in the Submerged Lands Act was in the context of defining the area as to which a continuation application would be entertained, i.e. that area within which a good faith historical State boundary might lie. On the other hand, when the Solicitor says Louisiana "appears clearly to have assumed a three-league boundary" and "never contemplated that the area covered by these instruments was less than three-leagues from the coastline" he must necessarily mean the "coast line" used by Louisiana in 1936 as the baseline for its three-league claim. There is no indication that the Solicitor found it necessary or sought to determine what that baseline was. (*Ibid.* 644-645.)

The 1958 continuation decision did not determine "... once and for all the precise coverage of ... [plaintiff's] validated lease." (*Ibid.* 645.) Moreover, the impact of the subsequent decisions in *United States v. California* (381 U.S. 139 (1965), cited by court) and *United States v. Louisiana* (389 U.S. 155 (1968), cited by court) had to be considered. Judge Leventhal concluded:

We think the 1958 decision too uncertain, and the impact of later case law developments both too far reaching and too ambiguous, to warrant the conclusion that the Solicitor's decision wrought a final and definitive resolution on a point which was not put before him. (*Ibid.* 646.)



*Jurisdiction—NATO Status of Forces Agreement, 1951—court-martial held abroad—non-service-connected offense*

BELL v. CLARKE. 437 F.2d 200.

U. S. Court of Appeals, 4th Cir., February 5, 1971.

A habeas corpus proceeding was brought by petitioner, formerly an enlisted man in the United States Army stationed in Germany, now held in a Federal reformatory upon his conviction by general court-martial of the crime of rape against a German national. Petitioner, relying upon *O'Callahan v. Parker*, 395 U.S. 258 (1969), argued that the court-martial lacked jurisdiction over a non-service-connected offense and that he should have been tried subject to the usual Constitutional safeguards provided in United States civil courts. It was shown that the German authorities had waived jurisdiction over petitioner in accordance with the provisions of Article VII of the NATO Status of Forces Agreement of 1951 (4 U.S. Treaties 1792; 199 U.N. Treaty Series of 67; 48 A.J.I.L. Supp. 83 (1954)). The District Court dismissed the petition (308 F.Supp. 384, cited by court). On appeal, the Court of Appeals affirmed this decision.

Circuit Judge Bryan observed that *O'Callahan v. Parker* was not relevant to the present case, as it concerned an offense committed in Hawaii, within United States territory where United States civil courts were functioning. Petitioner was subject to the provisions of the Uniform Code of Military Justice (10 U.S.C. §§801, 802(11), 817(a), 920, cited by court). Court-martial jurisdiction was exercised over him in Germany subject to the terms of the Status of Forces Agreement, and this jurisdiction was not controlled by the terms of 18 U.S.C. §3238, which provides:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. (Quoted by court; emphasis by court. 437 F.2d 200 at 203.)

Judge Bryan said:

This statute does not clothe the serviceman with any vested privilege. In our view, Article VII of the Agreement, providing court-martial trial for offenses committed abroad, is not incompatible with the statute. The treaty-making authority evidently designed Article VII to meet the special exigencies of a foreign occupation. This was its right. To read Article VII otherwise would disrupt the whole pattern of the treaty. This part of the Agreement is impliedly an assurance to the "receiving State" that those servicemen of the "sending State" who break the former's laws should be tried immediately. Expedition would be defeated if the offender could not be punished by the American military authorities in Germany. This prohibition might well discourage the referral of the accused to the "sending State", and substitute a trial in the "receiving State", as the latter

may insist upon under the Agreement. Such a result would destroy the comity evinced by the signatories. We believe the treaty authorized, and the statute permitted, the court-martial of Bell. (*Ibid.*)

*Warsaw Convention—limitation of carrier's liability—effect of statute of limitations upon carrier's liability*

MOLITCH v. IRISH INTERNATIONAL AIRLINES. 436 F.2d 42.

U. S. Court of Appeals, 2nd Cir., December 29, 1970.

Plaintiff sued Irish International Airlines for \$125,000 in damages for injuries which she allegedly sustained in a fall down the exit ramp of defendant's aircraft at John F. Kennedy International Airport. Plaintiff was traveling on a charter flight. The accident occurred on May 8, 1966; suit was filed on January 30, 1969. Defendant moved for summary judgment on the ground that plaintiff's suit was barred by Article 29(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) (49 Stat. 3000; 137 League of Nations Treaty Series 11), which established a two-year statute of limitations on the commencement of actions against carriers. The District Court denied defendant's motion, holding that the statute of limitations did not bar plaintiff's action because the passenger ticket did not contain adequate notice of this provision of the convention. The Court of Appeals reversed the lower court's decision and ordered that summary judgment be entered for the defendant.

There were two questions before the Court of Appeals: plaintiff's contention that the Warsaw Convention did not apply to international charter flights and defendant's contention that notice about the limitation placed upon carrier's liability under Article 3(2) of the Convention by the terms of Article 29(1) did not have to be supplied to passengers. As to the first question, Circuit Judge Hays accepted the District Court's finding that the Warsaw Convention applies to international charter flights (citing *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir., 1967), cert. denied, 392 U.S. 905 (1968); 62 A.J.I.L. 778 (1968)). The court did not agree that the carrier's liability had been engaged by its failure to include the statute of limitations in the passenger ticket. Judge Hays said:

The pertinent part of Article 3(2) of the Convention reads as follows:

"\* \* \* if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

This court has interpreted this requirement to mean that not only must a passenger ticket be delivered, but the ticket must inform the passenger of limitations of liability contained in the Convention, *Lisi v. Alitalia-Linee Aeree Italiane, S. p. A.*, 370 F.2d 508 (2d Cir. 1966), affirmed 390 U.S. 455, 88 S.Ct. 1193, 20 L.Ed.2d 27 (1968), [61 A.J.I.L. 812 (1967)] by an equally divided court. The ticket issued to plaintiff in the instant case did not notify plaintiff of the two-year limitation. It is our view, however, that Article 29(1) is not a pro-

vision which "exclude[s] or limit[s] liability" within the meaning of Article 3(2). The *Lisi* case held only that Articles 20 and 22, which provide for limitations of the amount of damages recoverable against an airline under the Convention, are provisions excluding or limiting liability under Article 3(2). *Id.* at 511 and n. 4. An extension of *Lisi* to cover Article 29(1) would be unwarranted. Its reasoning is not applicable to the instant situation. In *Lisi* the court said that its holding would give the passenger "the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit." 370 F.2d at 513. Notification of a two-year limit on bringing an action would have no such effect. A prospective passenger is unlikely to care about the length of the statute of limitations and it is difficult to conceive of any protective measures that he might take prior to boarding the plane were he notified of the limitation. Extension of the requirement of notice to the statute of limitations would be both meaningless and unjustified. (436 F.2d 42 at 44. Footnotes by court omitted.)

*Aliens—refugee status—application for visa under Section 203(a)(7), Immigration and Nationality Act, 1952, as amended—"not firmly resettled" test*

ROSENBERG v. YEE CHIEN WOC. 402 U.S. 49.  
United States Supreme Court, April 21, 1971.

Respondent, a native of mainland China, fled to Hong Kong in 1953. He made trips to the United States in 1959 and 1960, remaining thereafter in this country while maintaining a business in Hong Kong. His wife and son joined him here in 1965 on temporary visitors' permits. In 1966 deportation proceedings were commenced against the three on the ground of overstaying their permits. Respondent then applied for a visa as an alien who had fled a Communist country because of "... persecution or fear of persecution on account of race, religion, or political opinion," and who had been in the United States for two years prior to this application (§203(a)(7), Immigration and Nationality Act of 1952 as amended; 8 U.S.C. §1153(a)(7)).<sup>1</sup> Respondent's application was denied by the District Director of the Immigration and Naturalization Service on the ground that "the applicant's presence in the United States . . . was not

<sup>1</sup> Sec. 203(a)(7) provides in relevant parts: "Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii)[170,000], to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (i) from any Communist or Communist-dominated country or area . . . and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; . . . . *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

and is not now a physical presence which was *a consequence of his flight in search of refuge* from the Chinese mainland.” (402 U.S. 49 at 51, quoted by Court; emphasis by Court.) The Regional Commissioner affirmed this decision, finding that respondent no longer qualified as a refugee because he had resettled in Hong Kong. The United States District Court for the Southern District of California reversed the Service’s decision, holding that respondent had not firmly resettled in Hong Kong, but did not consider the question of whether such resettlement would be a bar to respondent’s application (295 F.Supp. 1370 (1968), footnote by Court; other footnotes by Court omitted). On appeal by the Service, the Court of Appeals for the Ninth Circuit affirmed the lower court’s decision on the following reasoning:

Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless. (402 U.S. 49 at 52, quoted by Court from 419 F.2d 252 at 254 (1969).)

The Court of Appeals for the Second Circuit, however, in a similar case decided the following year took the opposite position.<sup>2</sup> The Supreme Court granted *certiorari* in the instant case in order to resolve the conflict between the two circuits. The Court reversed the judgment below and remanded the case to the Ninth Circuit.

Mr. Justice Black observed that the case turned first on the Immigration and Naturalization Service’s policy of denying relief under §203(a)(7) to persons who were shown to have “firmly resettled” themselves in another country after fleeing a Communist state and before applying for conditional entry into the United States. This language appeared first in the Displaced Persons Act of 1948 (§2(c)(1), 62 Stat. 1009) and reappeared in the Refugee Relief Act of 1953 (§2(a), 67 Stat. 400). It was not used in the extension of the Refugee Relief Act (71 Stat. 639), nor in the Fair Share Act of 1960 (74 Stat. 504). The Court of Appeals for the Ninth Circuit took the view that the apparent abandonment of “not firmly resettled” in the post-1953 legislation terminated this test as a basis for the determination of a refugee’s eligibility for relief under such legislation. The second point at issue was the requirement that applicants not be “nationals of the countries or areas in which their application for conditional entry is made.” (§203(a)(7)(A)(iii); 8 U.S.C. §1153(a)(7)(A)(iii).) The Ninth Circuit had apparently taken the position that this provision had been substituted by Congress for the “not firmly resettled” test. Adopting the reasoning of the Second Circuit as to this issue, Justice Black stated that:

we find no congressional intent to depart from the established concept of “firm resettlement” and we do not give the “not nationals” requirement of §203(a)(7)(A)(iii) as broad a construction as did the court below.

<sup>2</sup> Shen v. Esperdy, 428 F.2d 293 (1970) (cited by Court).

While Congress did not carry the words "firmly resettled" over into the 1957, 1960, and 1965 Acts from the earlier legislation, Congress did introduce a new requirement into the 1957 Act—the requirement of "flight". The 1957 Act, as well as the present law, speaks of persons who have "fled" to avoid persecution. Both the terms "firmly resettled" and "fled" are closely related to the central theme of all 23 years of refugee legislation—the creation of a haven for the world's homeless people. This theme is clearly underlined by the very titles of the Acts over the years from the Displaced Persons Act in 1948 through the Refugee Relief Act and the Fair Share Refugee Act of 1960. Respondent's reliance on the Fair Share Refugee Act of 1960 to show that Congress abandoned the "firmly resettled" concept is particularly misplaced because Congress envisioned that legislation not only as the means through which this country would fulfill its obligations to refugees, but as an incentive to other nations to do likewise. Far from encouraging resettled refugees to leave one secure haven for another, the Act established United States quotas as a percentage—25%—of the refugees absorbed by all other cooperating nations. The Fair Share Refugee Act, like its successor and predecessors, was enacted to help alleviate the suffering of homeless persons and the political instability associated with their plight. It was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives. Nor could Congress have intended to make refugees in flight from persecution compete with all of the world's resettled refugees for the 10,200 entries and permits afforded each year under §203(a)(7). Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation.

In short, we hold that the "resettlement" concept is not irrelevant. It is one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution. The District Director applied the correct legal standard when he determined that §203(a)(7) requires that "physical presence in the United States [be] a consequence of an alien's flight in search of refuge," and further that "the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." (402 U.S. 49, 54-57. Emphasis by Court.)

The Court pointed out that in any event respondent did not qualify under §203(a)(7)(A)(iii) because he was not applying for conditional entry. As the Ninth Circuit had not addressed itself to the District Court's holding that respondent had not been firmly resettled in Hong Kong, the Supreme Court ordered the case remanded for further proceedings.

In a dissenting opinion, Mr. Justice Stewart, who was joined by Justices Douglas, Brennan, and Marshall, stated *inter alia*:

In the face of the unambiguous language of §203(a)(7) and this clear legislative history, the Court today holds that a requirement of firm resettlement may properly be read back into the statute so as not to subvert what it considers to be the "central theme" of refugee legislation—"the creation of a haven for the world's homeless people." I have no doubt that in enacting refugee legislation Congress in-

tended to provide a haven for the homeless. But the Court offers no reason to believe that Congress did not also intend to help those others who have fled their homeland because of oppression, have found a temporary refuge elsewhere, and now desire to emigrate to the United States. Congress may well have concluded that such people should be preferred to immigrants who have not suffered such hardship. The clear language of §203(a)(7) demonstrates to me that this was exactly what Congress intended to accomplish. (402 U.S. 49 at 60.)

*Aliens—entry under special conditions—waiver of two-year foreign residence requirement—plea of exceptional hardship*

SILVERMAN v. ROGERS. 437 F.2d 102.

U. S. Court of Appeals, 1st Cir., December 30, 1970.

Plaintiff, a Turkish national, came to the United States in 1964 as an exchange visitor under the auspices of the Agency for International Development (AID) for the purpose of studying psychiatric nursing (8 U.S.C. §101(a)(15)(J)). It was understood that she would return to Turkey, where a position in a school of nursing awaited her, and that she was under bond to serve for ten years in Turkey upon completion of her studies. After several extensions of her visa, she finished her training. Upon the expiration of the last extension, she married an American national. She then applied to the Immigration and Naturalization Service for a waiver of the statutory requirement that she leave the United States and remain in her place of residence abroad for two years before requesting admission as an immigrant. (8 U.S.C. §1182(e)), on the ground that her departure would be a hardship for her husband, who suffered from ill health. Over the objection of AID, the Immigration and Naturalization Service recommended that a waiver be granted. The Secretary of State recommended denial of a waiver, and plaintiff was so notified by the Service. In the present action, husband and wife sought to enjoin the deportation proceedings against the wife. They argued that, where a waiver is sought in a hardship case, only the Service is authorized to decide the matter. In the alternative, they argued that deportation of the wife would deprive both parties of their rights under the Fifth Amendment. Defendants moved for dismissal of the complaint or, in the alternative, for summary judgment. The District Court held for plaintiffs. On appeal, the Court of Appeals reversed this decision and remanded the case with directions to dismiss the complaint.

The principal issue was the interpretation of the statutory provision for waiver of the foreign residence requirement. The relevant part of 8 U.S.C. §1182(e) provides:

That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident

alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest. . . .

The District Court considered that this provision presented a choice of opinions by the Secretary of State and the Immigration and Naturalization Service; the court chose the one more favorable to plaintiffs. An examination of the legislative history of this provision, however, led Circuit Judge McEntee to state:

We conclude, therefore, that the intent of both the House and Senate versions of the 1961 proviso now in 8 U.S.C. §1182(e)(1964), *supra*, was the same, namely, to include the Secretary of State in the hardship waiver process. Indeed, it would have been illogical to *reduce* the number of agencies wielding a veto, given the expressed purpose of Subcommittee No. 1 [House Committee on the Judiciary] to grant fewer hardship waivers. (437 F.2d 102 at 107. Emphasis by court.)

The court saw no merit in plaintiff's attempt to argue deprivation of their Constitutional rights in view of Congress' power to control the admission, departure, and status of aliens in this country.

*Diplomatic immunity—immunity from local taxation of property occupied by Permanent Representative of Soviet Union to United Nations—1964 Consular Convention with Soviet Union*

UNITED STATES v. CITY OF GLEN COVE. 322 F.Supp. 149.

U. S. District Court, Eastern Dist. New York, January 7, 1971.

The United States brought an action to enjoin the defendants, including the City of Glen Cove, Long Island, New York, various officials thereof, and Nassau County, from assessing some \$15,000 in taxes on property owned by the Soviet Union in that town and from proceeding with tax sales thereon. Plaintiff also sought an order requiring that the tax liens be discharged of record. Plaintiff contended that the property was exempt from taxation under the terms of Article 21 of the 1964 Consular Convention with the Soviet Union (19 U.S. Treaties 5018; T.I.A.S., No. 6503). The property consisted of a forty-five room house on thirty-seven acres of land which had been owned by the U.S.S.R. since 1955 and which served as a residence for the Permanent Representative of the Soviet Union to the United Nations and his deputies. The U.S.S.R. had paid taxes on this property from 1930 to 1966. In the latter year it was removed from tax rolls by Glen Cove, apparently in consideration of the provision for exemption in §418 of the New York Real Property Tax Law (McKinney's Consol. Laws, c.50-A, §148, cited by court). The U.S.S.R. was notified, however, in 1968 that the exemption had been withdrawn and that the property was again subject to local taxation. Defendants questioned the court's jurisdiction, plaintiff's standing to bring the action, and the alleged proofs of the exempt status of the property; and they argued that the lien had attached some time before the treaty became

effective in 1968. Defendants also brought a counterclaim for a judgment declaring that the United States must compensate Glen Cove for its tax losses on the property. The District Court granted the injunction against all defendants except Nassau County and dismissed the counterclaim.

In a memorandum opinion, Judge Judd established first that the court had jurisdiction over the case (28 U.S.C. §1345) and that the United States had standing to bring the action. He said:

It has been long established that the United States need have no pecuniary interest in order to have standing to sue. In *re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1894). In the exercise of its constitutional responsibility for the conduct of foreign affairs, the United States may sue to prevent state action which would violate a treaty obligation of the United States. *United States v. Minnesota*, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539 (1926); *Sanitary District v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925). (322 F.Supp. 149 at 152.)

The court observed that the U.S.S.R. might have sought relief in the New York courts (citing *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698 (1969); 64 A.J.I.L. 178 (1970)).

However, in dealing with the enforcement of a federal treaty and the protection of the honor of the United States in meeting its obligations, a federal court is not required to abstain from jurisdiction in favor of a state court. *United States v. Livingston*, 179 F.Supp. 9 (E.D.S.C. 1959). (322 F.Supp. 149 at 153.)

With regard to proof of the exempt status of the property, it was shown that in addition to notes from the Soviet Union to the Department of State, attesting to the official residential use of the property by the Permanent Soviet Delegate to the United Nations, the Under Secretary of State for Political Affairs had requested the Attorney General to insert a letter in the record declaring that the Department of State was satisfied that the property had tax-exempt status. The court said:

In a case involving a foreign government's treaty rights, the court should accept an official note from that government as at least prima facie evidence, when accompanied by a State Department certificate of the truth of the assertions in the note.

It is not necessary here to consider whether the State Department's acceptance of the fact that Killenworth was used as a residence by the USSR Ambassador to the UN is conclusive, for the defendants did not seek to offer any evidence to the contrary. Cross-examination of the Under Secretary of State would not be a useful way to disprove this fact. The City of Glen Cove, where the property lies, has a clear opportunity to observe the use made of the property, and show whether there was a non-exempt use. If the diplomatic immunity of the premises and the occupants interferes with the defendants' obtaining precise evidence of the actual usage, as may be the case, this merely emphasizes that any attempt to challenge the Department of State's certification would impair the federal government's conduct of foreign relations. (322 F.Supp. 149 at 154.)

As for the priority in point of time of the tax lien over the treaty, Judge Judd found nothing more here than an "inchoate lien" (*ibid.*) in the



period before the treaty went into effect, and such lien could have been challenged under the United Nations Headquarters Agreement (61 Stat. 3416; T.I.A.S., No. 1899; 19 U.N. Treaty Series 43) or §418 of the New York Real Property Tax Law. The court pointed out:

In any event, a lien which is still inchoate will not prevail over a right created by federal law. *New York v. Maclay*, 288 U.S. 290, 53 S.Ct. 323, 77 L.Ed. 754 (1933). Much less should a foreign government be deprived of a treaty benefit by the claim that a municipal government within the federal structure has power to postpone the realization of what the treaty promised. Treaties, after all, are part of the law of every state. *Hauenstein v. Lynham*, 100 U.S. 483, 490, 25 L.Ed. 628 (1879).

This is not a case where a municipality has been taken by surprise by an unexpected removal of property from its tax rolls. The Glen Cove officials deliberately terminated an exemption which had previously been recognized, without citing any change of circumstances or other reason to justify their action.

As for the proviso in Article 21 of the Consular Convention, it is clear that the taxes involved were for the general support of the city government and were not "payments for specific services rendered."

The plaintiff's right to enjoin the Glen Cove tax sales is therefore fully established. (322 F.Supp. 149 at 154-155.)

Finally, the court characterized defendants' counterclaim as "[presenting] an ingenious argument" (*ibid.* 155) which failed on several grounds, including the New York rule that United States property is exempted from taxation without any requirement of compensation for such exemption (New York Real Property Tax Law, §400, cited by court), and the terms of the Tucker Act, which provides that the United States may not be sued in a Federal District Court on a non-tort claim exceeding \$10,000 (28 U.S.C. §1346(a)(2), cited by court).

#### UNITED KINGDOM CASE NOTE

##### *Jurisdiction—enforceability of Federal tax lien on personal property abroad belonging to American nationals—the law of the United Kingdom*

BROKAW v. SEATRAN U.K. LTD. [1971] 2 W.L.R. 791.

Great Britain, Court of Appeal, February 12, 1971.

Plaintiffs brought an action in detinue to recover certain household goods which one plaintiff had sent from the United States to the other plaintiff in the United Kingdom via defendants' ship. Plaintiffs also sought damages for detention of the goods. On an interpleader summons, defendants brought the United States Government into the case as a claimant. It was shown that after the goods had been shipped from Baltimore to Southampton, the United States Government served a notice of levy on the shipowners, demanding surrender of the goods for taxes owed to the Treasury Department by the plaintiff in the United States. The United States Government claimed possession of the goods upon

their arrival at Southampton on the basis of §6331, Internal Revenue Code, 1954, which provides:

(a) If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary [of the Treasury] or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . (b) . . . The term "levy" as used in this title includes . . . the power of distraint and seizure by any means. . . . ([1971] 2 W.L.R. 791 at 794, quoted by court.)

The ten-day notice was dispensed with here. A Master ruled against the United States Government's claim on the ground that it was against the policy of the forum to enforce a foreign revenue law. The United States Government's appeal from this decision was dismissed by the Court of Appeal.

Lord Denning, M.R., pointed out that the United States Government's claim was based upon constructive possession of the goods arising from the Federal tax lien thereon. The court said with regard to this argument:

It is well established in English law that our courts will not give their aid to enforce, directly or indirectly, the revenue law of another country. That was decided in the time of Lord Mansfield; but it was re-stated recently in *Government of India v. Taylor* [1955] A.C. 491, to which I would add *Rossano v. Manufacturers' Life Insurance Co.* [1963] 2 Q.B. 352, 376, 377, *per* McNair J. The United States Government submit that that rule only applies to actions in the courts of law by which a foreign government is seeking to collect taxes, and that it does not apply to this procedure by notice of levy, which does not have recourse to the courts. I cannot accept this submission. If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law. I would apply to this situation some words of the United States Supreme Court in *Companola* [sic] *Espanola de Navegacion Maritima, S.A. v. The Navemar* (1938) 303 U.S. 68, 75 in an analogous case: ". . . since the decree was in invitum, actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful." ([1971] 2 W.L.R. 791, 794-195.)

## BOOK REVIEWS AND NOTES

LEO GROSS

*Book Review Editor*

*Derecho Publico Internacional*. 2nd ed. 2 vols. By Cesar Diaz Cisneros. Buenos Aires: Tipografica Editora Argentina, 1966. Vol. I: pp. ix, 743; Vol. II: pp. vi, 748. Appendices. Indexes.

At the beginning of Volume I, this Argentine expert, in stating that international law is not a cold and abstract system of legal norms divorced from life, sets the pattern for his comprehensive and realistic examination of public international law as it stood in the mid-1960s. The author lays his foundation with a description of the fundamental principles of international law. He then traces the historical evolution of the international community and proceeds to consider the present state of international organization. With the insight born of his long experience in the Latin American milieu, he capably shows the special rôle played by Latin American states in the development of the law relating to international organization, the international personality of man, nationality, foreigners and navigation. Particular attention is paid to the rôle of Argentina in developing the law on these topics.

In regard to the subject of states, the author discusses the relations of Cuba, the Dominican Republic, Haiti, Panama, Honduras and Nicaragua with the United States. In a work so preoccupied with international law considered from the point of view of Latin American states, it is not surprising to find a careful treatment of such matters as state sovereignty and non-intervention as well as the Monroe, Drago and Calvo doctrines.

Under the heading of territorial dominion of the state, there is a careful coverage of territorial, maritime and fluvial dominion and acquisition. A 101-page essay on the territorial dominion of the Argentine Republic discusses in depth the question of sovereignty over the Islas Malvinas together with the fascinating subject of the boundary limit between the Atlantic and Pacific Oceans.

Volume II begins with a chapter on air law and the law of outer space, although the many developments concerning both these subjects since the volume was published makes the chapter quite out of date. Next follows a description of the Law of the Sea Conventions of 1958 and an examination of the legal regime of ships and the related subject of piracy.

Next follows a consideration of the organs of the state for external relations, the organs of international administration and international administrative law. After discussing the law of treaties (now stated in the Vienna Convention of 1969), the author turns to the external policy of states, paying special attention to commercial and economic relations

among states. Under the latter topic he traces the beginnings of the Central American Common Market, which in early 1971 was apparently in some difficulty.

An important part of Volume II is devoted to the consideration of the pacific solution of international conflicts, war and international law, maritime and aerial warfare, neutrality and civil wars.

At the end of Volume II are the texts of the United Nations Charter, the Statute of the International Court of Justice, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947), the United Nations Universal Declaration of Human Rights, the Vienna Convention on Diplomatic Relations and Immunities and the Optional Protocol on the Acquisition of Nationality, 1961, and the Vienna Convention on Consular Relations, 1963.

Practitioners who are interested in international law and practice viewed in a Latin American context cannot fail to profit from using these two volumes which, though now in many respects out of date, contain much material of permanent interest.

GERALD F. FITZGERALD

*International Law Through the Cases.* 3rd ed. By L. C. Green. London: Stevens & Sons Ltd.; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xxii, 855. Index. \$14.00.

In the January, 1970, issue of this JOURNAL<sup>1</sup> Professor Green wrote a review of *International Legal Process: Materials for an Introductory Course* by Professors Chayes, Ehrlich and this reviewer.<sup>2</sup> Green concluded that, while our volume might prove of great assistance to graduate students, so much of what one would expect to find included in an introductory course was omitted as to draw into serious question its value for its stated purpose. Now we have an updated version of what Green regards appropriate to introduce students to international law.

The answer is cases, that is to say, decisions of courts or, about half the time, of *ad hoc* arbitral tribunals. More than Bishop,<sup>3</sup> more than Friedmann, Lissitzyn and Pugh,<sup>4</sup> Green eschews what my colleagues and I would regard as the real world—law in action on the international scene. Green does not show the progression or contrary understandings of any idea, let alone put a decision in any kind of historical or political context. There are no questions, no notes other than occasional drastic abridgments of the facts, only some chapter references to standard English or American treatises.

<sup>1</sup> 64 A.J.I.L. 213 (1970).

<sup>2</sup> Chayes, Ehrlich, Lowenfeld, *International Legal Process* (Boston: Little Brown & Co., 1968-69).

<sup>3</sup> W. W. Bishop, *International Law, Cases and Materials* (Boston: Little Brown & Co. 3rd ed., 1971).

<sup>4</sup> Friedmann, Lissitzyn and Pugh, *Cases and Materials on International Law* (St. Paul, Minn.: West Publishing Co., 1969).

Quite apart from international law, I have had doubts since I was a student about the case method as a pedagogical tool. The fact that it was superior to the previous methods of lecture and doctrine seems to me inadequate recommendation; the fact that it achieved spectacular results in the hands of a Seavey or a Corbin may show its limitation rather than its general applicability. The value of the case method, it seems to me, consists in following a specific line of decisions to illustrate the pulling and hauling and slow growth of the law. For example, I think it worth while taking students through the development of a choice of law approach in interstate (and international) torts by the New York Court of Appeals in the 1960's;<sup>5</sup> products liability, equal protection of the laws, and standing to challenge legislative enactments also come to mind, though more and more an understanding of both issue and process requires statutes, regulatory material, and factual description going beyond the particular case at bar. But in the absence of cases examining closely related issues or decided by tribunals operating on common premises, the undiluted case method seems to me highly questionable.

All the dangers of the case method are magnified with respect to international law, even in the best of hands. As Green uses the method, with one case per issue, with no background and no sense of history, with no suggestion of what the dissenters argued,<sup>6</sup> the result is at best a parody. The only consolation is that the impression apparently intended to be conveyed—for each issue one answer and you can check it in Schwarzenberger<sup>7</sup>—is so incredible that the danger that students may be persuaded is very slight. The only real danger is that students—at least the better ones—will be turned away from international law once and for all.

As for the subjects covered, I can only say Green's view of the field is so different from mine that I wonder whether we are really in the same profession. The economic areas (trade, investment, monetary affairs, transportation and communication) in which the rôle of law is probably most pronounced, are not even mentioned. The law of international institutions (about ninety pages) turns out to be only membership and civil service. And as to peace and security problems, Article 51 of the U.N. Charter is never mentioned, nor Articles 39–42, nor Article 2(4), nor the question of enforcement action, nor regional organizations. The topic "Legal and Illegal Uses of Force" is covered by excerpts from *The*

<sup>5</sup> From *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961) through *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902 (1962); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380 (1966); *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36 (1967); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968); to (at this writing) *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969).

<sup>6</sup> For example, the Sabbatino case is presented without any of Justice White's views, and *Certain Expenses of the United Nations* without any of the views of Judge Koretsky or Judge Basdevant.

<sup>7</sup> Schwarzenberger, *A Manual of International Law* (London: Stevens & Sons Ltd.; New York: Frederick A. Praeger. 5th ed., 1967).

*Naulilaa Incident*,<sup>8</sup> which is not an Eric Ambler novel but an award in 1928 by three Swiss arbitrators concerning the respective rôles of Germany and Portugal in a skirmish in 1914 near the border between Angola and German South-West Africa that was followed by a native uprising. And so on.

Green laments in his preface that "it is no longer possible to consider international law simply from the standpoint of international judicial tribunals and of the judicial practice of the United Kingdom, the United States and the Commonwealth." Apart from a French case on the question of whether a native of Andorra is an alien for purposes of the French Code of Civil Procedure,<sup>9</sup> I could find no evidence of the editor's widened horizons. But the problem with the quoted sentence is not just the insularity of outlook, embarrassing as that is. To make sense of the sentence the emphasis should be placed not on the geographic modifiers, but on the words "judicial" and "tribunal." Since the editor does not see this, I would no more introduce students to international law through this book than I would suggest starting off medical students with a treatise on acupuncture.

ANDREAS F. LOWENFELD

*Répertoire de la Pratique Française en Matière de Droit International Public*. Edited by Alexandre-Charles Kiss. Tome VI. Paris: Éditions du Centre National de la Recherche Scientifique, 1969. pp. xiv, 615. Index. Fr. 85.

A revival of interest in the law of war enhances the timeliness of this volume of the French repertory, dealing with the law relating to resort to force, the conduct of warfare, neutrality, and the termination of war. Although the volumes of the *Répertoire* normally do not carry materials after 1958, an exception has been made in this volume in order to accommodate the new Instructions of the Navy Ministry on the Application of International Law in Time of War of 1964, the new Code of Military Justice of 1965, and the new Rules of General Discipline in the Armed Forces of 1966. The documentation on the law of naval warfare, much of it dating from the nineteenth century, thus forms, as it were, a commentary on the Instructions of the Navy Ministry. The conditions of modern warfare and the long-distance economic blockade provide relatively little scope for the operation of this law. Indeed, it is somewhat surprising to find that there is some little World War II law on such subjects as enemy destination (pp. 354-357).

The most important body of material within this volume relates to the law of belligerent occupation and *postliminium*, arising out of the unhappy experience of France as a belligerently occupied country in two World

<sup>8</sup> Naulilaa Incident Arbitration, Port-Germ. Arbitral Tribunal, 8 Rec. des Décis. des trib. arb. mixtes 409 (1928).

<sup>9</sup> Massip v. Cruzel, Trib. de Perpignan, Dec. 6, 1951, [1952] Sirey, Jur. II. 151, 47 A.J.I.L. 331 (1953).

Wars. Anyone interested in pursuing such a topic as the law applicable in occupied territory would find it indispensable to review the documentation under that rubric in the *Répertoire* (pp. 144-157). These cases and other materials are, as in other areas, important contributions to customary international law. In sectors of the law of war dominated by such major treaties as the Geneva Conventions of 1949, the material tends to be somewhat thinner and would in any event have to be checked for consistency with the later treaties. The Editor has thoughtfully provided references to these later conventions at a number of points.

The fact that materials in this volume, as has been true of the others, cover several centuries means that pre-Charter law relating to such matters as pacific blockades (pp. 18-24) and pledges of territory (pp. 25-34) stand cheek by jowl with such modern developments as the definition of aggression under the United Nations Charter (pp. 64-65). This circumstance underlines the importance of the reader's noting with care not only what has been said but also when it was said.

R. R. BAXTER

*Soviet Public International Law: Doctrines and Diplomatic Practice.* By Kazimierz Grzybowski. Leiden: A. W. Sijthoff; Durham, N. C.: Rule of Law Press, 1970. pp. xx, 544. Index.

This is the fourth volume in less than eight years from Dr. Grzybowski's energetic pen, all of them treating Soviet or Socialist law. As the dust jacket points out, it is the first effort to assess the whole of the Soviet approach to public international law since Taracouzio's semi-classic *The Soviet Union and International Law*, published in 1935.<sup>1</sup>

Despite the sub-title, Grzybowski is concerned primarily with Soviet behavior; doctrine is reviewed summarily and "frequently shown to be irrelevant for the understanding of Soviet practice." The first chapter is devoted to the history and basic doctrines of Soviet international legal science, the author stressing—unduly in this reviewer's opinion—Germanic influence upon Tsarist jurists. Chapter II discusses personality in international law, recognition, state responsibility, the international legal aspects of Soviet statehood (including succession), and the "Socialist commonwealth of nations." "Jurisdiction" is the title of the third chapter, sub-divided into sections on Territory, High Seas, and Limitation of Territorial Jurisdiction. The closed sea doctrine, international straits, continental shelf, and international rivers and canals are all discussed under high seas. Subsequent chapters take up population, organs of international relations (a euphemism for diplomatic and consular law), "Socialist" and "capitalist" international organizations, the "Soviet law of treaties," disputes, propaganda, and a final summing up of the Soviet approach to international law.

The emphasis upon state practice is most commendable, and students of international law will find information here which has not been analyzed

<sup>1</sup> Reviewed in 29 A.J.I.L. 723 (1935).

previously by Western publicists. But on the whole the author's approach to the subject and his handling of original and secondary source materials leaves much to be desired. While it may be true, for example, that doctrine often is irrelevant to state practice, the question remains as to what rôle it serves in the U.S.S.R. One such purpose is to be a conceptual and linguistic medium for debating issues of legal policy confronting Soviet jurists, and on numerous occasions doctrinal views have been inspired expressly by or related directly to governmental attitudes as to what the content should be of a particular legal norm. The relationship between doctrine and practice is a dynamic one which should not be so easily cast aside.

It is justly insisted in the preface that attention must be given to those aspects of international relations, such as technological change and the interests of individual Powers, which determine the shape of the international community. Yet in the present volume this approach is generally restricted to an appraisal of state practice within the context of Soviet domestic and foreign policies. As a result, the reader is left with the impression that Soviet practice in the normal course of events has departed markedly from that of other countries, whereas more often than not Soviet views of "the state of the law" are shared by non-Socialist Powers or are founded upon a narrow construction of customary or conventional norms. Doctrinal views of what the law should be are, of course, another matter.

There are curious lapses in documentation of the volume as well. The continental shelf is discussed without any reference to Soviet writings, views in the International Law Commission, or legislation, and only one of the bilateral treaties delimiting the Soviet shelf is cited. The 1929 Soviet Merchant Shipping Code is mentioned throughout, rather than its very different successor of 1968 (although the 1968 occupation of Czechoslovakia receives critical comment). In the chapter on diplomatic and consular law, data on state practice is drawn from the first eight volumes of *Dokumenty vneshnei politiki SSSR*, which cover the period 1917-25, but the succeeding seven volumes for 1926-32 are wholly and unaccountably overlooked. The treatment of the post-1925 era is based mostly upon summary descriptions of Soviet legislation and press clippings of diplomatic incidents, with very little attention paid to the legal issues involved. None of Ginsburgs' writings on Soviet citizenship, including those published in this JOURNAL, are recognized in the bibliography or footnotes, and a wide range of other important secondary materials also could have been consulted profitably.

WILLIAM E. BUTLER

*Status and Extent of Adjacent Waters: A Historical Orientation.* By J. K. Oudendijk. Leiden: A. W. Sijthoff, 1970. pp. 160. Selected Bibliography. Index. Fl. 24.

The "free seas" and the "marginal seas" are two concepts which are much in evidence today as a result of two-hundred-mile territorial claims,



assertions of special forms of offshore jurisdiction, and plans for international ownership of high seas resources. To support or refute favored positions on the law of the sea, recourse is often made to the thinking of early writers such as Grotius, Bynkershoek, and Galiani, although at times with conflicting interpretations of what these writers were actually trying to say. It is refreshing, therefore, to encounter a book such as *Status and Extent of Adjacent Waters* and to follow the reasonings of nearly two dozen writers of the seventeenth and eighteenth centuries, starting with the free seas of Grotius and ending with the territorial sea of Azuni. In between are such authors as Welwood, Pufendorf, Valin, and De Martens, who, together with Bynkershoek and Galiani, laid the foundations for modern jurisdictional arrangements in the world ocean.

The book is a comprehensive and well-documented survey. In the Introduction the author complains: "Very often facts and opinions have been taken out of their historical surroundings, while juridical expressions are used without previous definition and without regard to their historical meaning." To correct for this she devotes separate chapters to state practice in the seventeenth and eighteenth centuries, bringing in a background of important maritime developments, treaties, and jurisdictional claims, against which the concepts of the time may be judged. She also goes into considerable detail on the various interpretation of *dominium*, *imperium*, *territorium*, and other recurrent terms, with the result that considerable insight is gained of the contexts within which the contemporary authors were thinking.

"The history of marginal seas presents a set of usages, rules, and maxims," she tells us, "not succeeding each other in neat order, but mostly co-existing and often intermingling or even clashing. There are, it is true, certain developments, but there is no general process, to which the too biological term 'evolution' could in reason be applied. Even the rather common idea, that the status of coastal zones originates in pretensions regarding entire seas, is untenable." Throughout the text the reader is frequently confronted with overlapping theories which sometimes appear to be moving in the direction of modern concepts, but at other times are heading for ultimate oblivion. Particularly valuable is the book's discussion of the interactions between the eyesight and cannon-shot principles, and their gradual merging with the marginal belt of fixed breadth. It is wrong, we are told, to credit Galiani with creating the three-mile offshore limit, or to reprove him for a ballistic mistake in assigning too great a range to contemporary guns. Rather, Galiani felt that the three-mile limit was merely the one which was commonly accepted at the time.

An early chapter is devoted to Grotius, who is cited as being "the most famous thinker on the law of the sea." In *Mare liberum* he held that "no part of the sea can be a nation's territory," although he later wrote that small enclosed sea sections are capable of becoming the *dominium* of a state or nation. He distinguished between *dominium* in the sense of property, and *imperium* (jurisdiction and protection in marginal belts which are exercised in the general interest). The author suggests that Grotius

even anticipated the cannon-shot principle, although the evidence here is not clear-cut. The theme of Grotius and his influence on later writers is a continually appearing one throughout the text. In fact, one of the author's main objectives in the book appears to be to emphasize the tremendous and often unrecognized impact the writings of Grotius had on subsequent thinkers.

In the final chapter, an excellent summary is presented of the principal concepts of the two centuries, and of some of their implications in terms of modern-day use. Indeed, this reviewer might have wished that the discussion of the last two pages of the book, linking the past with the present, had been expanded. For the historian, *Status and Extent of Adjacent Waters* might well be followed by reading Henry Crocker's *The Extent of the Marginal Sea*, in which writers of the nineteenth and early twentieth centuries are reviewed. The question might then be asked, who will write a book of this type covering the years since the first World War?

The style of writing is sometimes difficult. For the non-linguist it is unfortunate that the author, for emphasis, frequently reverts to Latin in the middle of a sentence, or introduces a long Latin quotation without translation. But aside from this, the book is an excellent contribution to the literature, filling an important gap in knowledge of the historical development of the law of the sea.

LEWIS M. ALEXANDER

*Aerospace Law*. By Nicolas Mateesco Matte. London: Sweet & Maxwell Limited; Toronto: The Carswell Company Limited, 1969. pp. 501. Bibliography. Index of authors. French edition: *Droit Aérospatial*. Paris: Éditions A. Pedone, 1969. pp. 604. Index of authors. Fr. 55.

The title of this book does not accurately reflect its content, which is overwhelmingly space-oriented. The book deals with aeronautical problems only to the extent that they relate to the question of a demarcation line between airspace and outer space. In the author's view the two environments are indivisible and should therefore be treated in law "as an inseparable whole" (p. 73). Regrettably, Professor Matte makes only a token attempt to apply this approach creatively to the many and diverse uses (and abuses) of the aerospace medium. Given the author's well-known and consistent advocacy of the necessity of working towards an integrated "aerospace law," one hopes that his next effort in the field will more fully reflect this eminently sound and progressive viewpoint.

*Aerospace Law* is divided into five parts. Part I is essentially an analysis of the boundary problem, with the author explaining his opposition to the establishment of artificial lines of demarcation between sovereign airspace and free outer space and arguing in favor of freedom of navigation tempered only by the inherent right of every state to self-defense. Part II contains a comprehensive survey of various international organizations, governmental and non-governmental, concerned with outer space

activities. This part also includes a brief discussion of bilateral co-operation agreements as well as valuable, though sketchy, information on the setting up of the Telesat Canada Corporation and on the now seemingly dormant France-Quebec joint telecommunications satellite project. Part III, entitled "Economic Utilization and Exploitation of Space," is in its entirety devoted to issues of space telecommunications, with particular emphasis upon the political, legal and economic aspects of the U. S. Comsat Corporation and the multinational Intelsat Consortium. Since the new Intelsat arrangements, expected to be adopted in 1971, will significantly differ from the 1964 interim arrangements, much of this part will be of interest only as an historical phase in the rapidly evolving transnational co-operation for the commercial exploitation of space technology. Part IV, comprising about one third of the book's original text, opens with a discussion of the more important arms control programs, ranging from the Baruch Plan of 1946 to the Non-Proliferation Treaty of 1969, then proceeds with an extensive and critical analysis of the Outer Space Treaty and the Rescue of Astronauts Agreement, and concludes with an examination of the legal regulation of liability for damage caused by space vehicles.

Those who tend to be critical of the Outer Space Treaty and the Rescue of Astronauts Agreement will find an eloquent ally in Professor Matte. The "practical usefulness" of the former is found to be "more than limited" and its terms "ambiguous, elliptical [*sic*] and sometimes even contradictory" (p. 320), whereas the latter "remains in the sphere of generalities and principles" in addition to being "deficient" in other respects (*e.g.*, "the cases of military observation or other non-peaceful [uses] are not considered, nor are measures provided for such situations"; "the Agreement provides for expenses to be paid by the 'launching authority' in order to secure the return of space objects or their component parts, but says nothing about these expenses being incurred to save or assist astronauts." (Pp. 334-335.) The concluding Part V of this volume, consisting of two pages, merely mentions, without elaboration, some of the more remote contingencies, such as "extra-terrestrial emigration" and encounters with "extra-terrestrial inhabitants," that might confront policy-makers in the future. The original text is followed by over 100 pages of annexes which include the reprints of twenty documents directly or indirectly relevant to the study of space law.

Even if one does not accept all of Professor Matte's analyses and proposals—and this reviewer would certainly disagree with his negative evaluation of the rôle of the United Nations in the legal regulation of outer space activities—readers will find a rewarding experience in this book, which combines a wealth of factual information with an unorthodox approach to some current problems of space law. Should there be a second edition of *Aerospace Law*, the author would oblige his readers, especially the non-Canadian readers, by devoting more space to the Telesat Canada Corporation and by adding at least a modest subject-matter index to his publication.

IVAN A. VLASIC

*International Conflict for Beginners.* By Roger Fisher. New York, Evanston and London: Harper & Row, 1969. pp. xx, 231. Index. \$5.95.

Professor Fisher has called his book a "how-to-do-it guide for statesmen"; his chosen title is: *International Conflict*. But what he is really trying to suggest is a strategy for influencing foreign governments so that they will do what we want them to do, by presenting to them propositions that will appeal to them. In other words, he is concerned less with conflict than with resolution, and the highly ambiguous or vague "it" (in "how-to-do-it") should be interpreted to mean: how to achieve success through bargaining.

This is both the strength and the weakness of this book. It is concerned with "winning," but in the lawyer's way, which is not necessarily the statesman's. To be sure, the statesman wants results; but sometimes he is as much concerned with imposing his will as he is with the returns he seeks thereby. If the purpose of conflict is gain, the essence of conflict is often the contest itself. The main flaw of Professor Fisher's book lies in his refusal to recognize that there exist in international affairs at certain times intractable conflicts of ends, resulting from antagonistic conceptions of legitimacy, which no attempt to "change the question," or to "fractionate" issues, or to use "legitimate" threats or promises, can resolve. For instance, he appears to believe that if we could only give North Viet-Nam a "yesable" proposition, some negotiated solution could bring the war to an end; but he forgets that, until now, what would be "yesable" to Hanoi would be "no-ful" to us. It is only if we change, not what we ask *them* to do, but what *we* want to do, *i.e.*, our policy, that bargaining may become fruitful (as was shown, in a limited way, by the effects of the policy reversal decided by President Johnson in March, 1968). Consequently, the second flaw of the book lies in the absence of any systematic analysis of the conditions in which an inexpiable conflict of ends may over time become susceptible to the bargaining process to which he devotes his attention. For instance, the Arab-Israeli conflict has evolved to some extent, in 1970, in the direction advocated by Professor Fisher. But the reasons for the change are to be found, not in the effectiveness of the lawyer's techniques, but in the impact and implications of the super-Powers' deepening involvement: *i.e.*, paradoxically, what gives a chance to the de-escalating techniques of the lawyer is the escalation of a local conflict into a potentially world-wide one. When the *status quo* is untenable, and the only alternatives are a risk of annihilation and the uncertainties of bargaining, then—and then only—comes Professor Fisher's day.

Both flaws point in the same direction: without a broad framework of international relations theory, analyzing different types of conflicts and their evolution over time, a "primer" such as this book may be quite misleading. For while bargaining pragmatism (as well as the fashionable mode of analysis known as bureaucratic politics) has its domain, it also has its limits, and nothing is more important than knowing where it is useful and where it would be either wasted or even harmful. Implicitly,

Professor Fisher tends to assume that his "first principles" apply to all international politics. His remark that "domestic courts may . . . be taken as a model not only for how international courts may be expected to exert influence on governments but for other international institutions as well" underlines his failure to understand that, whereas domestically a government usually obeys the laws and the courts even though their commands are not backed by force, compliance with international law or with the dictates of international courts and organizations, when vital state interests are at stake, is a mirage, in the absence of both force *and* any sense of universal community, any allegiance higher than the nation-state.

That beginners will find much to learn from Professor Fisher's "handbook" is certain. His critique of the costs of relying only on threats, of the limits of inflicting pain, of the disadvantages of excessive or vague demands is excellent; his analysis of the rôle of law in the Cuban missile crisis is provocative; his latent optimism about reaching the men who matter on "the other side" is refreshing. But would it be impertinent to suggest that both the beginners and Professor Fisher be also given a primer on international politics?

STANLEY HOFFMANN

*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.* Vols. I & II (Parts 1 & 2). Edited by Paul C. Szasz and Others. Washington, D. C.: International Centre for Settlement of Investment Disputes; Dobbs Ferry, N. Y.: Oceana Publications, distributors. Vol. I: *Analysis of Documents Concerning the Origin and the Formulation of the Convention.* 1970. pp. viii, 403; Vol. II (Parts 1 & 2): *Documents Concerning the Origin and the Formulation of the Convention.* Documents 1-146. 1968. pp. xi, 1088. \$15 each.

These two volumes (three books), part of a four-volume (five-book) study, constitute the English language *travaux préparatoires* of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965. Two additional volumes contain, respectively, corresponding documentation in French and Spanish, when it exists. The entire massive study represents a complete and systematic attempt to gather and present trilingually all relevant preparatory documents behind the convention, including "the successive drafts with the annotations thereto, proposed amendments, staff memoranda and the records of or reports on the debates in the [four regional] Consultative Meetings and the Legal Committee and by the Executive Directors and the Board of Governors of the World Bank." (Vol. I, p. ii.)

Volume I, in English, French and Spanish, contains a short descriptive essay on the formulation of the convention, followed by an article-by-article historical analysis of its text gleaned from various working papers and drafts. Complete lists of all documents originating in the World Bank and

relevant to the convention also are included, as is a list in alphabetical order of the names of persons participating in any of the meetings at which the convention was formulated. Volume II, which consists of two parts, contains photographic reproductions of mimeographed documents in English shedding any substantive light on the formulation of the convention. These documents, arranged in chronological order for the years 1961-1965, contain a vast amount of interesting and useful information, not only about the convention but about the techniques of "international legislation" as well.

The only reservation one might have about these impressive volumes concerns the cost of their production, which obviously must have been substantial. At a time when a great number of important documents go unpublished because national governments and international organizations are strapped for funds, the expenditure of a substantial sum on the *travaux préparatoires* of a convention more noted than utilized by the world community may raise questions about publishing priorities. Still, if the publication of these volumes should encourage resort to the convention over the coming years, this expenditure will have proved more than worth while.

R. B. LILLICH

*Europe's Would-be Polity. Patterns of Change in the European Community.*

By Leon N. Lindberg and Stuart A. Scheingold. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1970. pp. vi, 314. Index. \$7.95, cloth; \$5.50, paper.

It does no discredit to many earlier studies of the intricate political-legal-economic-social developments in the European Community to argue that Lindberg and Scheingold have produced the most incisive and in some respects the most subtle analysis to date. Perceiving the Community to be in its essentials a political system, albeit a "would-be polity," the authors seek to understand the dynamics of its processes and to make tentative projections about its future by constructing analytical models of system change that focus on decision-making as critical in the authoritative allocation of values and resources. Inasmuch as the book is inevitably about the problems and prospects of Western European unity, the models also utilize theories of international integration, many of which, including those expounded previously by these authors, have been developed in the context of the European Community and its unprecedented political characteristics. An underlying purpose of the authors is to meet the need they sense for "a theoretical and conceptual framework capable of providing an overall perspective on the often conflicting theories, descriptions, predictions and evaluations" of previous writers on the Community. The book is neither simplified nor rendered less important by the fact that it is simultaneously an exercise in methodologies of political analysis and an account of concrete experiences.

Three pairs of cases whose outcomes have been sharply divergent are compared and contrasted in an attempt to account for Community growth, stabilization or decline: (1) agriculture, in which the general goals of the

Rome Treaty were successfully translated into a common Community policy, and transport, in which this has not been done; (2) the creation of a general customs union in an almost routine execution of specific obligations of the Rome Treaty in contrast to erosion of specific provisions of the Coal and Steel Treaty governing the coal market; (3) the successful extension of functional obligations beyond the original Coal and Steel Treaty commitments with the establishment of the Economic Community and EURATOM, and the unsuccessful effort to extend the Community geographically through the British attempt to enter during 1961-1963.

Change in the Community system is perceived by relating decisions taken to system scope and institutional capacities, two key variables in the authors' analytical framework. Outcomes which increase functional scope or institutional capacities existing at the onset of a case are considered to contribute to system growth. Growth is equated with political integration. The converse is also held. By qualifying outcomes relative to the obligations of Community members or institutions it becomes possible further to refine the extent of growth, equilibrium and decline.

In the context of their models Lindberg and Scheingold conclude that the transformation of the Coal and Steel Community into the Economic Community and EURATOM, in the one instance, and, in the other, the devising of a common agricultural policy illustrate not only growth and integration by different processes but also growth and integration of qualitative difference. In contrast, establishment of a general customs union is considered as illustrating the Community in equilibrium inasmuch as this brought no increase in scope or institutional capacity. At the other end of the spectrum the authors see a qualitative difference between failure to implement the commitment to devise a common transport policy, on the one hand, and withdrawal from the obligations associated with the common market for coal, on the other, although both cases illustrate Community decline and disintegration. More serious in furthering decline and disintegration was the failure to transform the Community system in response to the first British attempt at entry, an outcome which seriously decreased Community decision-making capacities. Conclusions arrived at by many students of the Community through subjective observation and opinion are thus reinforced and given new perspective by techniques of empirical analysis.

The explanatory utility of the analytical models is not, however, matched by their predictive power, "a prime goal" of the study according to the Preface. In fact, by the last chapter the authors themselves have come to doubt the predictive value under new conditions (for example, change in the method of selection and in the rôle of the European Parliament, or new Community functions in the areas of monetary, defense or foreign policies) of models derived from past phenomena and processes. Consequently, their suspicion that the Community "is nearing the end of its initial growth period" and "is tending towards an overall equilibrium" merits respect less as the outcome of their analytical exercise than as a conclusion grounded in their profound understanding of the Community system.

RUTH C. LAWSON

*Manual of the Council of Europe.* By a Group of Officials of the Secretariat. London: Stevens & Sons, Ltd.; South Hackensack, N. J.: Fred B. Rothman & Co., 1970. pp. ix, 322. Index. \$13.75.

Focus on the innovative and complex evolution of the European Community has tended to diminish attention to the Council of Europe whose structure, functions, and principal activities during its first twenty years are summarized in this volume, published with the approval of the Committee of Ministers. Clearly demonstrated is the substantial progress towards European unity persistently if undramatically made by the eighteen members in fields as diverse as those concerning human rights, legal questions, education and culture, municipal and regional affairs, social questions, public health, and environmental problems. Although cohesion among members has not extended to economic integration or the creation of authoritative political institutions, the authors rightly recall the influence on the Six of initiatives concerning these matters taken in the larger grouping, particularly by the Consultative Assembly, pioneer among international parliamentary bodies. In the critically important area of human rights, moreover, Council of Europe activities endorsed by eleven members are noteworthy in having accorded the individual a new status in international law by enabling him to complain to an international organ (the Commission) even against his own government and by enabling the Commission, if it accepts and cannot otherwise resolve his complaint, to refer it to the European Court of Human Rights during the course of whose proceedings he may be heard.

A principal contribution of this overview is that it enables the reader to appreciate trends not readily discernible among the details of official documents or even necessarily through the *European Yearbook*. Among the most important is the extent to which Council of Europe activities have penetrated not only national institutions and programs but those of lower governmental levels as well. Especially significant has been the growing harmonization of national legislation and the bringing of domestic legislation into line with international commitments. Likewise impressive has been the involvement of both official and unofficial personnel in Council committees and working parties. Noteworthy from another perspective has been the increasing interaction of the Council with other international organizations, both global and regional. Such developments, by conspicuously broadening the knowledge and experience of international and governmental officials and of relevant unofficial élites, have brought a European dimension to policy-making in many sectors, including some heretofore considered to be exclusively domestic. Experience of this breadth and intensity gives strong support to the functionalist exponents of international co-operation.

The discussion of legal questions offers little more than a summary of relevant conventions and resolutions. With few exceptions, throughout the book one misses data concerning the legal status of the sixty-five conventions and agreements concluded among Council members through 1968 and indication of the states bound by those in force. Focus on Council of



Europe organs in discussion of human rights cases, while useful in depicting rôle-playing, enhances the difficulties of the reader attempting to trace the progress of particular cases.

Students and practitioners alike will nevertheless find this a reference work of considerable utility. If the Council of Europe maintains its momentum, it is to be hoped that readers will not have a twenty years' wait for a second edition.

RUTH C. LAWSON

*Der Vietnam-Konflikt—bellum legale?* By Hermann Weber. Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg, Werkhefte/6. Frankfurt a.M. and Berlin: Alfred Metzner Verlag, 1970. pp. v, 336. Bibliography. DM. 18.

The study reviewed here analyzes the rules of international law prohibiting the use of force, the system established by Articles 2 (4), 39 and following, and Article 51 of the United Nations Charter, as well as the applicability of these rules to states which are not Members of the United Nations. These issues, and problems pertaining to necessity or self-preservation and to the recognition of states, governments and belligerents, are examined in the light of the Viet-Nam conflict.

According to Weber, the struggle in Viet-Nam involves two *de facto* states, neither of which may resort to armed force under general international law. The use of force is, however, permissible if it can be characterized as self-defense against an "armed attack." These rules also apply to the United States by virtue of Articles 2 (4) and 51 of the United Nations Charter, which must be interpreted restrictively. "Indirect aggression," such as North Viet-Nam's subversive activities in the South prior to 1965, does not amount to an "armed attack"; thus, American military activities in the North are not justified on grounds of collective self-defense.

It could be argued, however, that under traditional international law, the conflict remains confined to South Viet-Nam's domestic sphere, the Front of National Liberation of South Viet-Nam (FNL) not having been recognized as a belligerent. Hence, the American intervention would have to be qualified as legitimate assistance extended to a legal government upon the latter's request, while the North Vietnamese activities, inasmuch as they amount to "armed intervention," would constitute an unlawful use of force. Weber, however, believes that the traditional rules of international law in this matter are obsolete and that the FNL, as an autonomous movement, is a political reality which cannot be ignored. Thus, the conflict would in fact be of an international character, rendering unlawful the interventions of both the United States and North Viet-Nam.

North Viet-Nam's activities in the South, while undoubtedly unlawful, constituted, at least prior to the bombing of the North by the United States, an "indirect aggression" and not an "armed attack." Thus, the bombing cannot be characterized as an act of legitimate self-defense under

Article 51 of the Charter. Moreover, the United States, in violation of Article 51, failed to appeal to the Security Council before taking this action. As far as South Viet-Nam is concerned, the bombing could have been justified on grounds of necessity or self-preservation. Not being a Member of the United Nations, South Viet-Nam is not bound by the limitations set forth by Articles 51 and 2 (4) of the Charter. As an imperative necessity for bombing cannot be shown, however, the proffered justification would be invalid.

The study reviewed here is well written, thought-provoking and abundantly documented. It provides a valuable introduction to the legal complexities of the conflict in Indochina. It also has some shortcomings, most of which are not, however, imputable to the author; struggles which have not yet become a part of history and in which passions continue to run high are difficult to analyze, chiefly because essential facts are still unknown or disputed. This becomes particularly evident in the present case. Weber's theses are largely based on two assumptions: that the FNL is an autonomous movement and thus enjoys belligerent status, and that no direct North Vietnamese "armed attack" occurred until after the bombing of North Viet-Nam by American and South Vietnamese forces had begun.

Inevitably, some of the legal propositions put forward by the author will be criticized, especially those relating to the narrow interpretation of Articles 2 (4) and 51 of the Charter, with which this reviewer would be inclined to agree at least in part. More doubtful is the validity of the assertion that in principle acts of self-defense based on Article 51 require prior recourse to the Security Council, and that only military interventions are unlawful under international law (page 192). The construction which leads to the conclusion that the FNL enjoys belligerent status is equally open to criticism.

Finally the author could have screened his sources more carefully. An example may illustrate this point. Quoting a German popular magazine, Weber mentions ". . . the episode where President Kennedy placed important nuclear secrets into the hands of the Soviet Union in order to forestall a possible conflict . . ." (page 30, footnote 91). Surely this is an unnecessary as well as an irresponsible assertion.

LUCIUS CAFLISCH

*National Interests and the Multinational Enterprise: Tensions among the North Atlantic Countries.* By Jack N. Behrman. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1970. pp. xi, 194. \$8.50, cloth; \$4.95, paper.

A graph describing the production of books and articles relating the multinational enterprise (or corporation) would curve upward almost as sharply as those describing the production or assets of the institution itself. Professor Behrman's special contribution through this book is that it is the first full-length treatment of the problems that have arisen in the triangular relation between multinational enterprises and host countries and their

home nation, so far primarily the United States.<sup>1</sup> Most of the volume is devoted to description. The host governments welcome the capital and skills that come with multinational enterprises but fear the industrial dominance, technological dependence and disturbance to their economic planning that may accompany them. They are also concerned by the United States' application of foreign direct investment, export and technology and antitrust controls to its corporate citizens abroad. Their reactions to this problem can take the form of excluding or regulating the intruders, of building up countervailing domestic economic units or, finally, of reaching an accommodation with the United States about its corporations.

Lawyers will find much of this material interesting and useful. It reflects the author's experience as Assistant Secretary of Commerce and the numerous interviews that preceded his writing of the book. His collection of case studies of conflicts arising from attempted application of the American controls on trade with Communist countries (pp. 104-113) is the most complete that I have seen. He communicates vividly and, I believe, accurately the views of foreign businessmen, foreign bureaucrats and politicians and of the multinational enterprise's executives. From this base one might expect the author to go on to predictions of the future course of trends in this field and perhaps to recommendations for future action. This, the author states, he is reluctant to do, contenting himself with pointing to various alternatives and listing their advantages and disadvantages. In general, he seems not to be very hopeful that national governments will be able to work together toward a solution of common problems. We will thus be faced with yet more years of muddling through by the nations involved.

Professor Behrman has, from time to time, a good deal to say about various bodies of law, particularly the antitrust laws and the export control regulations. It is often valuable for a lawyer to read analyses by laymen of these rules and to learn how businessmen react to them. It is probably superfluous to issue a warning in this JOURNAL against relying on such a source for accurate statements of specific legal rules. To note but one lapse, Professor Behrman twice (pp. 9, 183) bolsters the rather safe prediction that national governments will be reluctant to surrender their legal authority over corporations with the quite untrue assertion that even in Canada the Provinces are unwilling to surrender the power of incorporation to the Dominion.<sup>2</sup> In general, the view of the antitrust laws that emerges from these pages has a strong negative bias, which perhaps accurately reflects the views of businessmen but is not really fair to the subject matter. It has for one thing a tendency to accuse the laws of being unclear even in cases where they are not particularly vulnerable. For example, the author asserts (p. 119) that the law as to the availability of the defense of

<sup>1</sup> Professor Behrman's book was written in conjunction with the extensive research project directed by Professor Raymond Vernon of the Harvard Business School, with which I have also been loosely connected.

<sup>2</sup> See Ziegel, "Constitutional Aspects of Canadian Companies," in *Studies in Canadian Company Law* 149-194 (Butterworth, 1967).

foreign legal compulsion as against a charge of antitrust law violation has not been clarified. The *Swiss Watchmakers* case and others have given about as much clarity to this point as can reasonably be expected.<sup>3</sup> Thus the lawyer interested in the multinational enterprise should use this book as a guide to the environment and not as a direct source for his own work.

DETLEV F. VAGTS

*The GATT: Law and International Economic Organization.* By Kenneth W. Dam. Chicago and London: University of Chicago Press, 1970. pp. xviii, 480. Index. \$15.00.

*World Trade and the Law of GATT.* By John H. Jackson. Indianapolis, Kansas City, New York: The Bobbs-Merrill Co., 1969. pp. xl, 948. Index. \$27.50.

At the beginning of 1971, oil imports were under a quota—in fact a discriminatory quota—in the United States, and subject to state monopolies or licenses in most of Europe; coffee was subject to an international treaty fixing the amounts to be traded and at least indirectly attempting to maintain prices; trade in cotton textiles was governed by a multilateral agreement and a series of related bilaterals; man-made textiles were not yet restrained, but about to be, one way or another. Steel imports into the United States were restricted by a “voluntary” producers’ agreement negotiated in fact by the United States Government with Japan and the E.E.C.; the major copper-producing countries were attempting to “coordinate” the supply of copper; practically all agricultural products were subjects of production and export subsidies, deficit payments, import quotas, and the variable levies. The European Common Market, while evidently promoting trade among its members with great success, was engaging in a series of side deals for “associated states” that made a mockery of the most-favored-nation principle. During the year, nearly all products destined for the United States not covered by one of the above arrangements were subjected to a “surcharge,” that is, a ten percent *ad valorem* duty on top of the trade agreements rate—up to the level of the 1930 Smoot Hawley rate. At the same time, the anchor of the international monetary system, which had been slipping for some years, came completely loose. Thus, one may well wonder whether anyone still cares about institutions such as the General Agreement on Tariffs and Trade. The answer, one supposes, depends on whether the basic postwar consensus on economic matters still prevails.

The authors of both these books very much hope so. They believe (as does this reviewer) in multilateral trade, in non-discrimination, in lowering of tariffs, and in avoidance of quotas and other tricks. They both tell, though in different ways, the same story of how the consensus, or at least

<sup>3</sup> *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1965 CCH Trade Cases ¶71, 352 (S.D.N.Y., 1965); for a very recent review of the cases see *Inter-American Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.Del., 1970), 64 A.J.I.L. 962 (1970).

the appearance of consensus, was created and preserved in the early post-war years, at first by ambiguous drafting and large exceptions, subsequently by avoidance of confrontations and acceptance of actions by states that probably could not have been stopped anyhow. Thus, for example, the E.E.C.'s Common Agricultural policy and variable levy system, the United States-Canada Automotive Agreement, and the British 15 percent import surcharge were all tolerated by the GATT, though all seem to contravene the "plain meaning" of the agreement. The Cotton Textile Arrangements, though originally having nothing to do with the GATT and basically in conflict with the principle of comparative advantage, were embraced by the GATT, typically with some ambiguity but with reasonable assurance that no one aggrieved by the Arrangements could obtain the required majority of the GATT Contracting Parties to sustain a complaint. It is not surprising, then, that the current debate over United States trade legislation has put so little emphasis on the GATT, despite a large number of potential conflicts.

Both authors think of the GATT as law. The GATT is after all an agreement and a code of obligations as well as an institution and a forum in the Roman sense. Both authors wonder, however, what kind of law it is that shrinks from final decisions, clouds rather than clarifies issues, and masks its coercive pressures.<sup>1</sup> Both also discuss the remarkable feature of the GATT that the principal overt sanction—permitting the other fellow to get even—is available not only if the first party has failed to carry out its obligations (Article XXIII (1) (a)), but also if the first party has taken any other measure, even though not a violation, or even if it has done nothing at all, but the "benefit" that the complainant had previously paid for is being nullified or impaired by the existence of any other situation (Article XXIII(1) (b) and (c)). This "remedy without a right," in Dam's phrase, turns out, however, to have been used very seldom, again thanks to the institution's style of dealing with issues in some other way and avoiding duels of any kind. An interesting by-product, discussed by both authors, is that a country that has no effective remedy, for example, a small country without the means to retaliate, is in a relatively weak position to defend its rights.<sup>2</sup> This may be the one sense in which the GATT is guilty of the charge of discrimination raised increasingly by the developing countries.

Jackson's book is very orderly—indeed it looks like an American hornbook or a continental legal commentary. The book as a whole and every section has a statement of what is about to be discussed, a historical section, a textual discussion, and a summary of important precedents. All the important articles of the General Agreement are taken up, and the footnotes give anyone who wants more on any point a running start. Jackson is not afraid to go beyond research and discuss the message of law for GATT and vice versa. Indeed he even puts forth a draft for a new international

<sup>1</sup> This point is discussed also in another good recent study: Hudec, "The GATT Legal System: A Diplomat's Jurisprudence," 4 J. World Trade Law 615 (1970).

<sup>2</sup> Uruguay tried some years ago to promote a system of financial compensation—damages—for injured countries, but the effort got nowhere.

trade organization—all procedure and no substantive rules of economic conduct at all. But Jackson is no economist, as he says at the outset and at various critical points throughout the volume.

Dam, by contrast, is fully confident and competent in the underlying economic issues. Like many of his Chicago colleagues, he is prepared to take on and do battle with any kind of economic doctrine, including the doctrines reflected (or hidden) in the various provisions of the GATT. With just the briefest introduction (which will not do if the reader has never heard of the GATT) Dam proceeds in a series of brilliant essays to challenge some of the basic assumptions of the framers of GATT and to point out the consequences for development of the international economy flowing from these assumptions. Is it true, for example, that customs unions are good if they are complete, in that they promote trade, but bad if they are partial, in that they divert trade and cause discrimination? It is too late to refashion the European Economic Community, though in retrospect an expansion of the Coal and Steel Community limited to industrial products might have been more desirable, had it not been ruled out by Article XXIV of the General Agreement. Looking to the future, and to a possible new code of international economic conduct, consider the consequences for North America of a different formulation of the customs union article of the GATT. A common energy policy? A United States-Canada Automotive Agreement expanded to embrace say ten or twelve industries? An industrial customs union? It may well be worth rethinking this “fundamental premise.”

The subject of dumping illustrates the difference between the two books under review. Jackson plays it straight—the definitions, the procedures, the prohibitions, a leading case. Dam wants to know why the whole concept of dumping grew up as it did, first in United States law and then in the GATT. Why, he asks, should an importing country be concerned that the prices of a product in the exporter's country are higher than the prices at which the product is offered in international trade? The exporter may have a protected market in his own country, or be in a monopoly or oligopoly position, or, conversely, he may be reducing his export prices in competition with producers in the importing country or in a third country. Under any of these assumptions, making the foreign seller raise his export prices, which will cure dumping as defined both in United States law and in the GATT, serves only a protectionist purpose and no inherent concepts of fairness, let alone interests of consumers. Dam does not come up with a better definition of true unfair competition in international trade, but his combination of antitrust, price, and international trade theories is most refreshing in an area that has previously been discussed primarily in terms of technicalities.<sup>3</sup>

Dam discusses in some detail the difference between tariffs and quotas, questioning all and accepting some of the reasons why the GATT founding fathers thought tariffs basically all right and quotas not. But he points out that as GATT was written, and was tied into the Bretton Woods rules

<sup>3</sup> See, e.g., for a good technical article that does not ask the underlying questions, Hendrick, “The United States Antidumping Act,” 53 A.J.I.L. 914-934 (1964).

concerning monetary conduct, the opposite scale of priorities often prevailed. Tariffs, once bound, could not usually be raised; but when balance of payments difficulties arose, as they often did, Articles XII and XIII of the General Agreement permitted quotas, with not very stringent requirements for dismantlement or review. Moreover, since the I.M.F. rules forbid multiple exchange rates and discourage changes in par value of currencies, the relation of the GATT to the I.M.F. Articles tends to leave quotas as the only external remedies for balance of payments difficulties associated with internal inflationary policies.

The shallowness of the concept of reciprocity that governs GATT negotiations—so-called “trade coverage”—has been observed by many commentators. The only defense for a system that measures the value of a tariff cut by the amount of trade moving prior to the cut, without any reference to the effect of the tariff either before or after the “concession” is that it relies on easily available figures and is irrational in nobody’s favor in the long run. Dam contributes to the analysis, however, by attempting to assess the value of tariff concessions in the context of the over-all tariff structure and (in the E.E.C. terminology) so-called “disparities.” Dam also shows how the I.M.F. prohibition of multiple exchange rates, in a situation of differing rates of growth or inflation in different industries, tends to produce the disparities in tariffs and the item-by-item bargaining that has characterized international tariff negotiations.

Dam discusses with great lucidity the international trade issues associated with internal taxes, and the difference in this context between the cascade and value-added system of turn-over taxes. Again, Dam explores the question of what is a subsidy and asks why, as the GATT provides, subsidies are worse than tariffs. And he poses a series of very hard questions—both institutional and economic—about preferences for developing countries. Jackson, in contrast, mentions the problems but simply refers the reader to specialized economic literatures.

The pervasive theme of both Dam and Jackson is that the GATT ideology of maximizing international trade in the interest of efficient resource allocation is sound, though incomplete and in danger of attrition. Moreover, the interrelations between trade and monetary matters, between trade and development, and between economic and other policies of states, are much better understood today than they were in the 1940’s. GATT, born incomplete and now surrounded by rival institutions, needs revival, or perhaps replacement. Both of the books under review contribute to that task, each in its own way.

Jackson emphasizes the institutional and “legal” questions, on the basis of a detailed study of the record. Dam’s inquiries go deeper. How far, he asks, are states prepared to commit their decision-making to common and previously agreed goals? And how sound (not to say relevant) are the economic premises underlying the formulations agreed on a quarter of a century ago? Both questions seem to this reviewer to call for answers on an urgent basis before the system disintegrates even further than it already has.

ANDREAS F. LOWENFELD

*Sterling-Dollar Diplomacy. The Origins and the Prospects of Our International Economic Order.* New Expanded Edition. By Richard N. Gardner. New York, Toronto, Sidney, London: McGraw-Hill Book Co., 1969. pp. cviii, 423. Bibliography. Index. \$8.95.

The publication of this expanded edition of Professor Gardner's deservedly acclaimed book is a real service to many professions: diplomacy, political science, international relations, international economics, and international law. With comprehensive brevity, the author has added an appraisal of the main developments in international economic policies during the past twenty-five years. A treasure-house of relevant information, scholarly, well balanced, and provocative—this essay of approximately 100 pages in length constitutes the new contribution to the volume.

In a "Foreword" to the new edition, Professor Robert Triffin relates the earlier discussion of the book—the creation of the Bretton Woods institutions, the Anglo-American Financial Agreement, and the Charter for an International Trade Organization—to Gardner's productive use of the concepts "economism," "universalism," and "legalism." Triffin demonstrates the applicability of these concepts to the analysis of pitfalls in international economic diplomacy. He underscores Gardner's conclusion that excess stress on economic tools and objectives often leads to the initial neglect of non-economic factors vital to the ultimate success of international co-operation (p. xv). Concentration on universal rules and institutions, it is maintained, impedes closer political collaboration among like-minded countries. Precise legal agreements result in rigidities, retarding the development of daily expedients to deal with emerging problems in a rapidly changing national and diplomatic environment.

Gardner's new "Twenty-Five Year Perspective" concentrates on the problems facing the international dollar standard; the rôle of sterling as a key currency; the international liquidity debate; the dilemma of adjustment; the effects of United Kingdom entry into the Common Market; the need for increased development assistance; and the institutional imperatives related to these issues. In consequence, his analysis includes a discussion of the I.M.F., I.B.R.D., GATT, UNCTAD, as well as the future of sterling-dollar diplomacy. Clearly, he is constrained to say a little about a great deal rather than a great deal about a little.

The key problems, however, are always raised, the historical background considered, and the most generally accepted solutions, at least by the economics profession, proffered. To illustrate, Gardner points out that the I.M.F. has become an international, not a supranational organization. Its directors serve full time at the headquarters in Washington and act as representatives of the governments that choose them. He notes that the Board of the Fund, like the Board of the Bank, has developed "a large measure of solidarity" and that the "directors can bring this common approach to bear on their respective treasuries and foreign offices, thus assisting accommodations in national policies" (p. xxix). Lord Keynes had hoped that the directors would be the actual members of the respective treasuries and foreign offices, serving at prescribed intervals



with substantial authority to integrate the salient economic policies of the members. He hoped this would set the foundation for the embryonic economic government of the world. Although Gardner emphasizes the development of a "team spirit" among the directors, and believes "the Fund has become a vigorous and often successful spokesman for the interests of the poor countries" (p. xxx), he would be the first to agree that, to date, Keynes' hope has not been fulfilled.

For the prevention of international financial crises, further improvement in the institutional, legal, and operating procedures of the Fund is indispensable. Provisions for increased exchange rate flexibility is a case in point. Countries should have the legal right to float or to fix their exchange rates in terms of the dollar. Gardner recommends an approach widely held in the economics profession; viz., to permit exchange rates to fluctuate up to two percent on either side of parity, rather than the one percent agreed to at Bretton Woods, and to permit the parity itself to move one or two percent a year in response to market forces. It is this kind of informed, balanced judgment that he provides on every issue discussed.

Those who have not had occasion to read Gardner's original volume (1956) may find it of particular interest to compare his somber conclusions on the implementation of American international economic policies during the first postwar decade with the ambiguous lessons of the more recent United States and European experience. The uncertainty of political events in these fields is to be matched only by the growth in the economic literature. Keynes' cable to the British Government during negotiations for the British loan in the mid-1940's could, in the 1970's, apply just as readily to Brussels, or for that matter, to London or Paris:

We are negotiating in Washington repeat Washington. Fig leaves that pass muster with old ladies in Threadneedle Street wither in a harsher climate. (Cited in Gardner (1969), p. 205.)

As regards Britain's entry into the Common Market, Gardner forthrightly describes the restrictions stifling the British economy. Nevertheless, he favors entry. An increasing number of U.K. economists, however, have stressed the high cost of the adaptations that would be entailed and, in their judgment, the economic losses resulting from British entry both to Britain and to the world as a whole.

Gardner could not be more generous in his interpretation of the Fund's operations. But much recent literature has emphasized the need for the I.M.F. to make more rapid progress in developing some of its international central-bank functions. There is a growing danger of the emergence of two rival monetary blocs which could lead to further cleavage in the world economy. While the international dollar standard, with the attendant Eurodollar market, becomes more pervasive, the Common Market Commission works on the creation of its own reserve fund and currency, with rigid exchange rates among the participants. Moreover, the extension of the Common Market to ten European countries entails the proliferation of still more exceptions to the unconditional most-favored-

nation clause, making it practically inoperational as a basis for equality of treatment in international commercial policy.

If the growth of a restrictive continental nationalism in Europe is to be checked, the United States will have to provide a new initiative toward the further reduction of tariff and non-tariff trade barriers. Europe cannot provide this initiative on a world-wide basis. To be effective, negotiations would probably have to proceed *seriatim* on a widespread, industrial-sector basis among the major negotiating countries. The realities of the Common Market have made it essential to establish complete free trade in manufactures to avoid discrimination against non-members. Meanwhile, preferential rather than pejorative trade treatment should be provided for the developing countries. The United States initiative must also apply to non-discrimination in capital movements, and to the orderly expansion of trade with the Soviet bloc and mainland China. A body of comparative and international law, furthermore, must be developed on the responsibilities and rights of the transnational corporation. For politico-economic perspective in dealing with these issues, perspective which is essential for the foundations of an international economy with reduced supranational tensions, I recommend without reservation to practitioners, teachers, and students the expanded edition of Gardner's book.

JOHN M. LETICHE

*China and the Foreign Powers. The Impact of and Reaction to Unequal Treaties.* By William L. Tung. Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xxv, 526. Bibliography. Index. \$15.00.

*India's China War.* By Neville Maxwell. Bombay: Jaico; London: Jonathan Cape; New York: Pantheon, 1970, 1971. pp. 475. Bibliography. Index. Rs. 30.; \$10.00.

Two books dealing with China's reactions to being the victim of so-called "unequal treaties" deepen our understanding not only of events in Asia but also of the nature of a legal system that takes as one of its bases an obligation to observe treaty commitments felt by one party to be oppressive.

Professor Tung of Queens College, The City University of New York, summarizes the imposition of foreign control on Chinese trade and the extortion by foreign countries of concessions in Chinese territory that excited nationalistic feelings in China and contributed to the violent popular reactions of the Taiping Rebellion and the Boxer rising. While the popular clamor in China was not effective to limit the legal incursions of foreigners directly, it did lead to the Chinese Revolution of 1911 and, less directly, to the success of the Communist Revolution culminating in 1949.

The great turning point in the international degradation of China was the first World War, and China's first great diplomatic success was at the Washington Conference of 1921-1922. That Conference, normally remembered in the West for adopting limitations on naval armaments, also

resulted in the former German claims on Shantung being abolished instead of being given to Japan, as had been provided in the Versailles Treaty. Unfortunately, Chinese interest lay in pursuing a course leading to the re-negotiation of treaties by which foreign governments got rights upon which their constituencies relied for investment opportunities, and upon which the foreign governments themselves relied in calculating the balance of interests that is the basis of foreign policy. And treaties giving up rights held unilaterally are, taken in isolation, as much unequal treaties as are treaties giving rights to only one party. Unless the yielding party is convinced of its national advantage in giving up its rights, it is reluctant to enter into the treaty. Therefore, while the course of Chinese diplomacy was, for diplomacy, very fast indeed, the course of political events in China between 1922 and 1949 was even faster.

In two major areas the "unequal treaties" have left traces that still affect Chinese foreign relations directly: the China-Russia and China-India borders. With regard to the territories claimed by China in which Russia has exercised the rights of a sovereign for many years, Dr. Tung regards the origin of Russian rights as defective and therefore the rights themselves subject to re-negotiation. He regards re-negotiation as the only politically acceptable course and even implies that it is a course that is legally compelled, although his argumentation is not entirely clear; basically he seems to say that "states cannot be expected to respect the sanctity" of "unjust commitments" forever; therefore it is the refusal to re-negotiate the treaties containing those commitments that creates conditions "whose continuance might endanger the peace of the world" (pp. 356-357). It is implied that this refusal thus violates international obligations contained in the U.N. Charter. The argument seems intriguing, and it is to be regretted that it is not spelled out more fully. Dr. Tung notes that some Russian treaty-based unjust rights date back to the Treaty of Kiakhta (October 24, 1727), but does not grapple with questions of acquisitive prescription or the general bias of international law towards maintaining the *status quo* that might be raised against the Chinese position. Nor does he draw the analogy that might be expected between this Chinese position and the position taken by the international community with regard to India's claims to Goa, Diu and Daman.

His summary analysis of the China-India border concludes by supporting the view, now becoming increasingly accepted outside of India, that the border is not nearly as clear as India has been claiming, and negotiation with Communist China seems to be the most prudent, as well as the most appropriate, step.

The book ends by summarizing some of the major points of Communist China's current foreign policy, including a wholly unconvincing dismissal of the "two Chinas" idea in the context of U.N. representation by treating it as part of the Taiwanese nationalist movement instead of an attempt by third parties to withdraw from interference in Chinese internal affairs by recognizing both "Chinese" governments as sovereign, each within the territory that it has effectively controlled for over twenty years. The remarkable thing about the summary in this chapter is the

extent to which it is clear that Chinese Communist foreign policy reflects traditional Chinese national interests. Other things being equal, it seems likely that precisely the same policies would be followed by a Kuomintang government in China in all essential points as are now followed by the Communist government. Regardless of the difficulties in logic or historical analysis, that conclusion seems correct: The tree of Chinese Communist foreign policy is rooted in the Chinese national reaction to "unequal treaties" and even if Chinese nationalism, like all nationalism, is in part irrational, the tree is the predictable product of its nutrients.

Neville Maxwell was the *London Times* correspondent in India from 1959 to 1967. His book, *India's China War* is written in a somewhat journalistic style, with the advantages of readability and currency. Nonetheless, it is basically a scholarly work resting on research and the study of documents for which his first-hand observations serve only as local color. His review of the legal questions involved in the Sino-Indian border problem, occupying the first 45 pages of the text, is comprehensive, rests on the best published evidence and some hitherto unpublished evidence from British and Indian files, and generally supports the Chinese case. Indeed, some evidence of British skulduggery, suspected by some researchers before, is now documented: viz., the British issuance of Volume XIV of Aitchison's *Treaties* in 1937 as if it were the 1929 edition in order to include the 1914 Simla Convention setting up the "McMahon Line," which had been left out of the 1929 edition. In 1929 the convention was apparently not considered binding by the British because it had never been signed by China. All known copies of the 1929 edition were recalled to be destroyed; only the one in the Harvard Library is known to have survived.

The bulk of the book is a detailed analysis of Indian foreign policy concerning the border and illustrates the political effect of trusting too strongly in a legal case. Indeed, even had India's legal position been unassailable, which it obviously was not, the policy pursued by Prime Minister Nehru and his military advisers is revealed in painstaking detail to have had war with China as its only possible outcome. Furthermore, Nehru is revealed in documentary detail to have embarked on a policy of confrontation long before he revealed the existence of a border dispute to his people and cut off his own path to political retreat on border questions. He not only rode the charging elephant of popular excitement to disaster for India, but apparently deliberately chose to ride it rather than discuss the border questions with the Chinese. The Chinese, while, of course, not giving away their position either, are shown to have been in the main conciliatory; at least it cannot be said, on the basis of the published documents impressively marshaled by Maxwell, that negotiations between India and China, with each side giving up some claims it had reason to think were valid (as must happen in all negotiations on contentious issues between equals), would have been fruitless.

Maxwell finds the blame for the Chinese incursions of 1962 to lie overwhelmingly with India, as his research shows prior Indian incursions deep into Chinese-claimed territory to have made Chinese military re-

sponse the only course India had left open to China if the Chinese border claims were to be maintained at all. The Indian defeat is blamed squarely on the incompetence of the Indian Army under a political leadership that promoted officers on the basis of political connections despite serious questions regarding the competence of the beneficiaries of the policy. General Kaul's supporters were labeled "Kaul boys" by his critics with malice aforethought. Maxwell's evidence for his analysis of Indian politics in the Army at this time is supported by an Indian Army secret report on the 1962 debacle, the conclusions of which are detailed in print here for the first time. Of course, none of this is to diminish the military achievement of the Chinese; but the full dimensions of that achievement are hidden in Chinese records not available to researchers.

This book must replace the tendentious work of W. F. Van Eekelen<sup>1</sup> as the most thorough and objective analysis of Indian foreign policy and the Sino-Indian border.

ALFRED P. RUBIN

*Betrayal from Within: Joseph Avenol, Secretary-General of the League of Nations, 1933-1940* By James Barros. New Haven and London: Yale University Press, 1969. pp. xiv, 289. Bibliography, Index. \$10.00.

This is a well-written and superbly researched political biography of the second Secretary General of the League of Nations, Joseph Avenol. Professor Barros's thesis is that M. Avenol was an unprincipled reactionary of uneven ability, who directed such talents as he possessed against the League's interests more consequentially than in aid of them. He supports this thesis with a wealth of detail, drawing skillfully on sources hitherto unpublished or unworked. Avenol, to the modest extent his personality is portrayed, appears taciturn and withdrawn. Nevertheless, Professor Barros's lucid style, applied to events which—however uninspiring Avenol may have been—were and remain of high interest, has produced a book fascinating for the historian and significant for the student of international organization.

Avenol was elevated in 1933 from the position of Deputy Secretary General, on the retirement of Sir Eric Drummond, for reasons which had little to do with his capacities and everything to do with politics. Avenol came to power as the League began to lose it.

Avenol attempted to grapple with the crisis that engulfed the League with essentially two policies. The first was to keep Italy in an anti-German front. Avenol saw Nazi Germany as the greater evil (a perception not to be minimized); he accordingly was willing to embrace and excuse the lesser, Mussolini's Italy, even if that were at the expense of Ethiopia and the League's principles. With the failure of that policy, and the increasing abandonment of the League by its principal supporters, England and France, Avenol set out to depoliticize the League by developing its ac-

<sup>1</sup> W. F. Van Eekelen, *Indian Foreign Policy and the Border Dispute with China* (The Hague, 1964), reviewed in 60 A.J.I.L. 431 (1966).

tivities in the sphere of economic and social co-operation. Such development has in a sense borne fruit in the United Nations and its constellation of Specialized Agencies. But in its day, it was not a policy which was successful in restoring either the relative universality or limited effectiveness of the League, nor could it have been.

Avenol was an activist. He had views on the salient League political issues of the day which he pressed behind the scenes, sometimes ably, sometimes not. For the most part, he tended to agree with the Powers that prevailed in London and Paris, not only because they were the Powers but also because their bent was, or almost was, as conservative as his. When aggression came from the right, as against Abyssinia, Avenol maneuvered to dispose the more quickly of the Ethiopian embarrassment; when it came from the left, as against Finland, Avenol displayed energy and ingenuity in contributing importantly to the expulsion of the Soviet Union.

With the fall of France, and the British attack on the French fleet, Avenol turned on the British and towards Pétain. The circumstances of his last months in office did not reflect credit upon him. He resigned late in the summer of 1940 and died, in obscure disgrace, in 1952.

Professor Barros deduces a moral from this tragic story: "... international politics is too serious a matter to be left to the Secretaries-General." (P. 265.) "The underlying assumptions of well-meaning people who support the position that the Secretary-General should be politically active are that he will see and be motivated by the highest interests of the international community and that he will always make the kind of decision that will assist in maintaining the peace. The latter assumption is obviously doubtful," Professor Barros continues (having just cited the "blunder" of the U.N. Secretary General's withdrawal of UNEF), "and Avenol's activities would appear to put into question the former as well." (P. 263.) The Secretary General, Professor Barros suggests, "is fallible"; his actions can have great political import; but those actions affect a world of states "too precarious and too delicately balanced to allow a concentration of power in the hands of an individual whose selection is based on so subjective a procedure, whose fixed contractual tenure in office makes his removal difficult, and whose actions are by necessity cloaked in secrecy." "The belief in a politically active Secretary-General," Professor Barros concludes, "appears to rest on a form of escapism": escape from the reality that states make international decisions. While, in the right hands, the office of Secretary General can "sometimes play an important role in maintaining the peace," in "the wrong hands," it can "play a dangerous role in exacerbating the tensions of the world community. Using Avenol's tenure as an example, it would appear that the latter more than cancels out any advantages to be gained from the former." (P. 264.)

Putting aside the seeming inconsistency of Professor Barros's emphasis upon the preclusive power of states with his emphasis upon the mischief-making potential of the Secretary General, it may be noted that Professor

Barros's discovery of the inevitable fallibility of the Secretary General is hardly new; it was, with the example of M. Avenol well in mind, articulated in the course of the Preparatory Commission's definition of the Secretary General's terms of appointment. It is submitted that it does not follow that advocates of a politically active rôle of the Secretary General are naïve or, more important, that the risk of the Secretary General doing the wrong thing "more than cancels out" the advantages to be gained by his doing the right thing. In the history of the United Nations, the positive contributions of the politically active Secretaries General (and all have been active) far outweigh the negative; and even the history of the League Secretaries General does not provide unarguable support for Professor Barros's thesis. International organization is not so strong as to be able to dispense with the political leadership of its chief permanent officer; the avenues of fact-finding, good offices, conciliation and international initiative and administration are not many. Those whose responsibilities are exclusively international are few. Advocates of political leadership by the Secretary General know perfectly well that it is states that run the world; they know too that the leaders of states also are fallible, sometimes unresponsive and often selected by processes that do not compare favorably with that of the Secretary General. If there is an element of naïve idealism in their approach, it may be in the hope that the Secretary General and the international secretariat will, in the very long run, and as part of a process of the development and reform of international organization, grow into a true international executive.

What Professor Barros's important study does demonstrate is the primordial importance of the political outlook of the Secretary General. A capital consideration in the choice of the Secretary General must be his appreciation of and attachment to the principles of the Charter. However adept his diplomacy, a lack of principle—and of the right principles—can, as the story of Avenol so painfully proves, be disastrous.

STEPHEN M. SCHWEBEL

*The Consolidated Treaty Series.* Edited by Clive Parry. Vols. 1-20. Dobbs Ferry, N. Y.: Oceana Publications, 1969 —. \$40.00 per volume.

The purpose of this ambitiously conceived and highly useful compilation edited by an outstanding British legal scholar is to make available in a single set of volumes all the treaties concluded between 1648 and 1918 that can be found either in previously published collections or in unpublished archives. The value of the undertaking stems from the fact that prior to the initiation of the *League of Nations Treaty Series* in 1919 treaties were published, if at all, in national collections or private compilations which have long since been out of print, which can be found in few libraries, and none of which contained all the available instruments. Yet the texts of old treaties may be of interest not only to legal and historical scholars but also to jurists and government officials, since they may be relevant to contemporary controversies over territorial claims and other matters. Some early treaties, moreover, are still in force.

The original texts of many of the treaties, which in most cases are reproduced in facsimile from the sources utilized, are in Latin, Dutch, German, Portuguese, and even Russian. The value of the compilation is enhanced by the efforts of the editor to find and supply reliable translations of such texts into English or French, although he eschews the more demanding task of making such translations himself. Despite these efforts, however, many of the instruments are not accompanied by English or French versions. The editor has promised, moreover, to provide information about the life of each treaty if possible, but the first twenty volumes here reviewed contain very little of such information.

The editor may have been unduly optimistic about the probable length of the Series. The advance announcement stated that the Series would "extend to about one hundred volumes" the first *ten* of which would cover "the period 1648 to approximately 1693." Actually, the first *twenty* volumes contain the treaties from 1648 to 1694 (plus one treaty made in March 1695). At this rate, at least 200 volumes will be required to cover the entire projected period. It is unlikely, furthermore, that this rate can be maintained for the nineteenth century, especially if the promised effort to include hitherto unpublished treaties, with the help of a favorable recommendation of the Committee of Ministers of the Council of Europe adopted in 1969, is even moderately successful.

As might be expected, the instruments contained in the first twenty volumes are in large part political in character, with many treaties of alliance, peace, cession, interdynastic matrimony, and the like. Also included, however, are some agreements with entities that today would be regarded as private persons or associations, and several treaties with North American Indian tribes. There is a considerable number of treaties between European states or entities (including the Dutch East India Company) and non-European rulers in North Africa and Southeast Asia, but none between non-European states.

The editor deserves high praise for the painstaking scholarship and meticulous accuracy evident in this valuable research tool. No library with pretensions to providing facilities for serious research in international law or world history can afford to be without this Series.

O. J. LISSITZYN

## BRIEFER NOTICES

*Studies in International Law.* By C. F. Amerasinghe. (Colombo: Lake House Investments, Ltd., 1969. pp. xii, 321. Bibliography. Index. \$6.85; 57 s., cloth; 44 s., paper.) *Studies* is not only a significant contribution to legal scholarship but an accommodation as well in that it assembles in a single volume a number of Professor Amerasinghe's previously published essays. The first essay leads the reader through the International Court of Justice's [1962] advisory opinion in the *United Nations Expenses* case and by this method provides a clinical introduction to the subject of international organizations. Another essay surveys the principles applica-



ble to the interpretation of international legal documents, and then proceeds to examine the United Nations' authority to use armed force in light of the *travaux préparatoires* of the Charter.

The third and fourth essays concern the relationship between the individual and international law. The third attempts to analyze the right to life, as that concept is used in documents such as the Convention on Human Rights. Professor Amerasinghe argues quite forcefully that this concept is meaningful only in terms of the *jus naturale*, as refined by the Spanish scholastics and translated by them into international law. The companion essay examines the circumstances which render an offense political and its perpetrator generally unavailable for extradition. The result of Professor Amerasinghe's research of pertinent British and European cases on this very perplexing subject is a classification of at least certain patterns of offending behavior as essentially political.

The remaining essays treat the bases of state liability for injury to aliens as well as the rather specialized legal problems of state trading in Southeast Asia. Over-all the essays are valuable and penetrating studies of the questions presented and are particularly well suited for university use.

F. S. RUDDY

*International Ius Cogens: A Contribution to the Study of the Nature of International Law Norms* [To Anangastikon Diethnes Dikaion: Symboli eis tin erevnan tis physeos tou kanonon tou Diethnous Dikaiou]. By George B. Zotiades. (Thessaloniki and Athens: P. Sakkoulas Brothers, 1968. pp. xvii, 307.) Professor Zotiades, Chief Legal Adviser to the Greek State Department, brings to international legal literature the first extensive and systematic study of the problems pertaining to the existence in international law of norms having the character of *ius cogens*. Previously, writers dealt only occasionally with this important and very complicated subject, and in those few cases no simple proof was presented of the present-day validity, character, applicability or extent of these norms purporting to establish a hierarchy of rules of international law. In this comprehensive examination of the rules capable of constituting international constitutional principles, the author, fully aware of the tendency to safeguard the unlimited contractual capacity of the state, calls his subject a difficult one, mainly because of the failure until now of finding generally accepted criteria for distinguishing *ius cogens* from *ius dispositivum*. According to the author these criteria can be found only by an analysis of both the social and legal prerequisites, in the framework of the international community, for the development of legal norms of a constitutional character.

The author uses the casuistic and abstract analysis of the principles of general international law to test which of them fall within the description of *ius cogens* as defined in internal law. This method leads to the tracing of international *ius cogens* in the area of the constitutional principles of the international legal order, of the fundamental principles necessary for safeguarding international peace and security, of general principles serving the basic common interests of the international community as a whole and of those to be considered as *sine qua non* elements of every system of law.

This book, presenting a detailed analysis of *ius cogens* both as static and dynamic law closely related to the new patterns of the legal organization of the international community, is extremely useful in analyzing the place of *ius cogens* in the hierarchy and operation of the international legal system.

ATHANASIOS D. PAROUTSAS

*International Law and the Resources of the Sea.* By Juraj Andrassy: (New York and London: Columbia University Press, 1970. pp. xviii, 191. Index. \$7.50.) The author's purpose is to "examine legal problems that have already arisen and will continue to arise as technological progress permits man to explore and utilize hitherto inaccessible submarine areas."

The first part of the book, in two brief chapters, offers a description of the physical shelf and an inventory of seabed resources. The second and most successful portion of the book (Chapters 3-5) discusses the evolution of the continental shelf as a legal concept. The author attacks the ambiguities of the "exploitability" criterion. This reviewer would have given equal emphasis to the "adjacency" criterion. Chapter Six focuses on the application of Article VI of the Convention to semi-enclosed seas (e.g., the North Sea), and provides a somewhat gratuitous attack on the so-called "national lakes" solution to deep-ocean floor jurisdiction, which few seriously advocate and which the author himself demolishes in the preceding chapter. The final two chapters turn from analysis to prescription, with hardly enough attention paid to the political feasibility of the solutions proposed. The author advocates in Chapter Seven reliance on a narrow shelf defined in terms of depth with a minimum distance for states with little or no geological shelf. A statement that this course is widely supported suggests that the author's wish may be father to his thought. Chapter Eight heroically compresses the reactions in the United Nations and the U. S. Congress to Malta's initiative regarding the seabed, and then, surprisingly, lays out a set of recommendations for a comprehensive new United Nations agency to deal with *all* activities in submarine areas of the sea. The recommendations, though rather general, are nonetheless more specific than the evidence of the preceding material would appear to warrant. In an effort to be as contemporary as possible, the author has added a postscript in which he argues with conviction against the "continental terrace" version of extended shelf claims, the advocates of which rely on the recent I.C.J. decision in the *North Sea Continental Shelf Cases*.

In summary, the book is scholarly and useful particularly for its discussion of the work of the International Law Commission in Chapters Four and Five, the explanation of customary law in Chapter Four, and the review of problems of disarmament in Chapter Eight. Some will wish that the author had paid more attention to underlying economic factors and to the "contiguous zone" as a possible analogy to the proposed "trusteeship" zone under United Nations discussion in connection with the seabed.

D. S. CHEEVER

*Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648. Eine rechtsgeschichtliche Untersuchung.* By Gundolf Fahl. (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, No. 51. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1969. pp. ix, 143. DM. 28.) The well-documented thesis analyzes the origins of one of the most important principles of international law, i.e., the freedom of the seas. The author has been able to use interesting sources, not yet published (Appendices 4, 5). The book consists of two parts, the first showing the legal developments concerning the claims of Portugal and Spain to the oceans from 1344 to 1643, and the second dedicated to the reactions of France, Britain and The Netherlands to these claims. Unfortunately the book is not easy to read. The many subdivisions and the reporting of details sometimes make it difficult to follow the line of thought. What strikes the modern international lawyer is the lack of dis-

discussion clarifying the relationship between freedom of commerce and navigation and freedom of the seas. While the first always concerns a territory or territorial waters, the second does not. No doubt there are and were many connections in the development. But it seems doubtful if one can argue from one to the other, as Fahl frequently does (pp. 29, 97, 114). Some systematic clarifications would have been helpful in this respect. The historian of international law will find an astonishing amount of detailed information and an abundance of sources cited in the comparatively small book. Latin, Spanish, Portuguese, as well as French, English, German and Dutch literature and sources are used in an admirable way.

JOCHEN ABR. FROWEIN

*Régimen Jurídico del Alta Mar.* By Alejandro Sobarzo. (Mexico, D.F.: Editorial Porrúa, S. A., 1970. pp. xv, 323. Index.) Professor Sobarzo of the National University of Mexico gives us here a most useful summary of the law of the sea. The range of topics is wide, as indeed a treatise on the law of the sea must be with the new problems that are arising. The author supports the decision in the case of *The Lotus* in respect to the territorial character of vessels. The limitations of freedom of fishing are clearly set forth. Piracy receives special treatment, and the procedure of recognition of the nationality of the vessel is discussed in the light of the Geneva Convention of 1958. The continental shelf is analyzed and the opinion expressed that the conception of the continental shelf should be revised. A final chapter deals with the resources of the ocean depths.

The Geneva Conventions of 1958, together with the Declarations, are given in an Appendix, followed by an elaborate bibliography. The author is to be congratulated on a volume which presents its subject so concisely and so clearly, and which is so beautifully printed.

C. G. FENWICK

*International Protection of Human Rights.* By Alessandra Luini del Russo. (Washington, D. C.: Lerner Law Book Co., Inc., 1971. pp. xi, 361. \$12.00.) The literature on the international aspects of human rights has again been enriched by an important work. As Henri Rolin points out in the Foreword, written in December, 1969, Professor Luini del Russo's book came out at a crucial time, when the two International Covenants on Human Rights had been opened for ratification or accession, when the American Convention on Human Rights, Act of San José, had been signed, and when important events were taking place within the Council of Europe. Rolin went on to say that "the Greek crisis will show whether or not the grave violations of human rights and their sanctions do affect the international relations of the transgressor Government and its possibility of survival" and that "undoubtedly, Washington's comprehension or lack of comprehension of the important interests at stake which Strasbourg represents will largely contribute to the final determination of that issue."

It does not appear that the book under review has influenced Washington's attitude towards the present Greek Government in the sense desired by Professor Rolin. This does not, of course, detract from its merits as a textbook and as a very useful collection of relevant materials, particularly on European developments.

Chapters I and II, devoted respectively to "Fundamental Freedoms at the Dawn of International Law" and "The Quest for Human Rights" are

followed by a chapter (III) ("The Emerging of the Individual in the Law of Nations") which in less than forty pages covers the global arrangements in the human rights field made during and since World War II, the human rights provisions of the United Nations Charter, the Universal Declaration of Human Rights, the two International Covenants on Human Rights, a few of the other world-wide arrangements, the Nuremberg principles, genocide, problems of the prosecution and extradition of war criminals, and the Eichmann trial. A section on "Nuremberg and Genocide in Domestic Jurisdictions" contains interesting materials not only on United States, British and Australian practice, but also (p. 65) on a very questionable but significant decision of the Court of Appeals of Bologna. Wide fields of activities of the United Nations system and their results, such as the status of women, the status of refugees, discrimination in education, investigations of racial discrimination, investigation of forced labor, advisory services in human rights, studies, periodic reports on human rights are not touched at all.

The rest of the book is almost exclusively devoted to the European Convention on Human Rights and, to some extent, to attempts at other regional arrangements. Thus, by and large, the book is a monograph on the European Convention, a detailed presentation and analysis of the practice of its organs (the Committee of Ministers, the European Court of Human Rights and the European Commission on Human Rights). An important and informative chapter (IX) describes the effect of the European Convention in the internal legal systems of the states parties.

This reviewer expresses the hope that in future editions of her useful and valuable work the writer will devote to world-wide instruments and other developments attention commensurate with that which in this first edition she has given to the work of the Council of Europe.

EGON SCHWELB

*Human Rights, Federalism and Minorities.* Edited by Allan Gotlieb. (Toronto: Canadian Institute of International Affairs, 1970. pp. x, 268. Index. \$6.00.) Domestic factors contribute to the making of foreign policy; this anthology demonstrates the corollary that scholarship about foreign affairs reflects the domestic concerns of the writer.

In the first section on "Human Rights and Federalism" Prime Minister Trudeau contributes an article which is essentially an argument for a Canadian constitutionally entrenched Bill of Rights. The essays of Professors Gotlieb and Tarnopolsky discuss the impact of United Nations legal developments on the Canadian political system. Gotlieb explores how the peculiar Canadian variant of federalism has adapted to legal developments in the United Nations. Tarnopolsky attempts to demonstrate the influence of United Nations legislation on Canadian legal practices. Professor Louis Sabourin analyzes the problem of federal states adhering to international conventions concerning the rights of man.

The second section on "Human Rights and the Individual" contains two well-researched articles. Maxwell Cohen's contribution is a short, general discussion of "The Individual in International Law." Dean R. St. J. Macdonald presents a longer, more specific article exploring both the legal and political issues involved in "Petitioning an International Authority."

The last section, "Minorities, Language Rights, and Regionalism," offers Canadian scholars the greatest opportunity to apply the lessons of domestic politics to the area of international studies. Professor John Humphrey discusses the impact of decolonization on traditional human rights. He examines, in both an historic and philosophic context, the difficulty

of synthesizing doctrines of self-determination with Western ideas of individual liberties. L. C. Green, "Protection of Minorities in the League of Nations and the United Nations," continues the discussion by examining a variety of historical situations. Both authors make important contributions by illustrating the difficulties international organizations encounter in dealing with the problem of national minorities.

Kenneth D. McRae has called on his experience as a member of the Royal Commission on Bilingualism and Biculturalism to write a superb article on "The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States." This concise, informative paper compares how five states face the challenge of linguistic divisions. Not only is the comparative legal analysis lucid but it is well grounded in political reality. It may be relevant that the most impressive article is by an historian.

The final article by Ivan L. Head of the Prime Minister's Office on "Regional Developments Respecting Human Rights" is a somewhat polemical argument for a Canadian constitutionally entrenched Bill of Rights. He suggests that Canadian practices should follow regional, O.A.S., legal trends.

Most anthologies are uneven in quality and this is no exception. However, all the articles are published here for the first time and several are significant contributions.

PETER Z. R. FINKLE

Memorial University of Newfoundland

*Die Europäische Menschenrechtsordnung. Individualrechte, Staatenverpflichtungen und ordre public nach der Europäischen Menschenrechtskonvention.* By Hannfried Walter. (Cologne and Berlin: Carl Heymanns Verlag KG, 1970. pp. x, 150. DM. 26.) This book deals with what the author calls the "European human rights order," with the rights of individuals, obligations of states and *ordre public* under the European Convention on Human Rights. It is a theoretical work which addresses itself to basic concepts, such as the definition of international law, the subjects of international law, and the capacity to acquire rights under international law. The author's approach is basically conservative, i.e., he attempts to reconcile the state of affairs which developed as a consequence of certain post-World-War-II instruments and, in particular, the European Convention on Human Rights, with traditional concepts of international law. He comes to the conclusion, however, that the convention did make the individual a subject of international law.

The author is critical of the well-known decision of the European Commission of Human Rights in the case of *Austria v. Italy* (1961), which stated that the purpose of the parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their national interests, but to establish a *common public order of the free democracies of Europe* (*un ordre public communautaire*, translated by the author as "*die öffentliche Gemeinschaftsordnung*"). He does not agree that the obligations of the contracting states are essentially of an objective character and prefers the theory of reciprocal rights and obligations (*Gegenseitigkeitstheorie*). What appears to be an interesting theoretical speculation may, in practice, have devastating consequences, having regard to the provisions of Article 60 of the Vienna Convention on the Law of Treaties (termination or suspension of the operation of a treaty as a consequence of its breach). If it were correct that the European Convention is an instrument setting forth only reciprocal rights and obligations of the states parties, it would hardly qualify as a treaty of a humanitarian character and would not be protected by paragraph 5 of Article 60.

Sir Gerald Fitzmaurice, who certainly belongs to the conservative school among contemporary international lawyers, distinguished in his Second Report on the Law of Treaties (1957) between, on the one hand, obligations which have an absolute rather than a reciprocal character, where the obligation is toward all the world rather than particular parties, and, on the other hand, obligations that are not absolute and are essentially bilateral and reciprocal in application. Sir Gerald had no doubt that treaties on human rights came within the first category, with the consequence that a fundamental or, under the Vienna terminology, a "material" breach by one party could neither justify termination of the treaty nor corresponding breaches of the treaty even in respect of nationals of the offending party.<sup>1</sup>

The author admits, however, that the European Convention contains certain elements of *ius cogens*. He is also skeptical of the proposition that Article 24 of the European Convention (dealing with inter-state complaints) provides for an *actio popularis*, i.e., "a right resident in any member of a community," in the present case of every state party, "to take legal action in vindication of a public interest." He relies to a large extent on statements contained in the 1966 Judgment in the *South West Africa Cases*. Apart from the fact that that Judgment was somewhat *sui generis*, a dictum in the Court's decision in the *Barcelona Traction* case (I.C.J. Reports, 1970, p. 32) has considerably qualified what the 1966 Judgment had said on this problem.

While this reviewer cannot share many of the author's conclusions, he does not hesitate to state that the book under review is a work of impressive scholarship, which raises questions which have not been raised before and forces those concerned to re-examine propositions which, in the last two decades, have been taken for granted.

EGON SCHWELB

*Human Rights and International Action. The Case of Freedom of Association.* By Ernst B. Haas. (Stanford, Calif.: Stanford University Press, 1970. pp. xv, 184. Index. \$6.50.) The point of departure of this book by an eminent political scientist is the view that the "formal, legal approach" to the protection of human rights by international action on the global, United Nations, level has not been successful. He suggests therefore as an alternative to comprehensive international instruments, such as the International Covenants on Human Rights, the consideration of a "functional approach to the study of human rights which demands less of governments." Although this may seem to be "a second best strategy," the author proceeds to examine whether or not this "second best strategy" may, in the circumstances, not be the best one. The "functional approach" consists in concentrating on specific rights or groups of rights which have the support of a wide international constituency.

To test his general proposition, the author examines the activities of the machinery which the International Labor Organization, on its own behalf and on behalf of the United Nations, established for the protection of freedom of association for trade union purposes in 1949/1950. This machinery, the Fact Finding and Conciliation Commission on Freedom of Association and the Freedom of Association Committee of the Governing Body of the International Labor Office, was created, not by an international treaty, but pursuant to an agreement between the International Labor Organization and the United Nations and thus has its constitutional basis in the inherent powers of the two Organizations under their respective constitutive instruments.

<sup>1</sup> Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/107, par. 125, 1957 I.L.C. Yearbook (II) 54.

The main part of the book consists of a statistical and substantive analysis of the case law of the Freedom of Association Committee. Professor Haas has used 468 of the 545 cases made public by the beginning of 1968. He lists a number of cases of "great improvement" as a result of the Committee's activities and more numerous instances of "some improvement." The "mobilization policies," *i.e.*, the states of Eastern Europe, were not co-operative. Haas stresses as particularly significant successes achieved in Spain, Greece (both before and after 1967) and Japan.

By and large, the author finds, however, that the neo-functional strategy, as exemplified in the freedom of association procedure of the International Labor Organization, cannot in any sense be considered a significant success.

As to future developments in the human rights field the author sees some hope in the International Convention on the Elimination of All Forms of Racial Discrimination, provided its optional provision permitting complaints by individuals or groups becomes operative.

The United Nations Commission on Human Rights, which in 1947 decided that it had no power to take any action in regard to complaints concerning human rights, seems to him unlikely to play a strong rôle in encouraging value-sharing. In 1970, after this book was written, the Commission reversed itself and recommended to the Economic and Social Council that it be given authority to examine communications which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This authority was granted in principle and subject to a host of precautions and limitations.

Professor Haas' pessimistic book is interesting and valuable, not least because it is a warning against complacency and self-congratulation.

EGON SCHWELB

*Samostanowienie w prawie i w praktyce ONZ* [*Self-determination in the Law and Practice of the UNC*]. By Ludwik Dembiński. (Warsaw: Państwowe Wydawnictwo Naukowe, 1969. pp. 275.) The book under review discusses how the principle of self-determination of peoples has become in the last twenty-five years a notion widely used in the political and legal practice of the United Nations, but how unlikely it is to find an unambiguous, firm and convincing answer as to the content, object, and subjects of the alleged legal right. Dembiński has undertaken the difficult though inspiring task of answering this question. His presentation is quite successful insofar as he has tried logically and literally to reconstruct the legal institution of self-determination as it has been spelled out in the provision of the Charter. He is also successful in presenting a thorough analysis of the relevant practice of the United Nations. He is perfectly justified in stating that "the principle of self-determination of peoples became a norm of positive international law as a result of the placing of relevant provisions in the Charter of the United Nations" (p. 197). This position, which is of merely formal significance, runs counter, however, to the somewhat ambiguous wording of these provisions and to the flexible and inconsistent practice of the United Nations. It is true that this practice has tended to rely on the principle of self-determination, and states have often invoked it. The more visible and quite reliable evidence of this practice concerns the process of decolonization. But the principle of self-determination is, as Dembiński argues, applicable to cases other than those of decolonization; and in this sphere the practice is not uniform. The question in the non-judicial domain is where the

line should be drawn, in the social and political process of civil strife, between that stage in which the integrity of sovereign exclusiveness in domestic jurisdiction still prevails and that stage in which the over-all situation is rapidly transformed into one in which the internationally recognized legal right of self-determination of peoples may effectively be invoked against the sovereign state.

Dembiński's book deserves attention as a timely and valuable contribution to the literature of the subject.

MARIAN E. IWANEJKO

*Das Recht der Volksgruppen und Sprachminderheiten in Österreich, Mit einer ethnosozologischen Grundlegung und einem Anhang (Materialien).* By Theodor Veiter. (Vienna and Stuttgart: Wilhelm Braumüller Universitäts-Verlagsbuchhandlung G.m.b.H., 1970. pp. xxvii, 890. Indexes. \$27.00.) Austria has long been known as a leading center for studies of national minority problems. The present massive volume by Dr. Veiter helps enhance that reputation. The author devotes the first section of the book to a theoretical disquisition on the various component elements of the nationality question, exploring such items as the different proposed conceptual definitions of "people," nation, ethnic group, the themes of genuine and sham national minorities, border minorities and hinterland minorities, "the right to the homeland," loyalty and patriotism, irredentism, the right of national self-determination, the legal status of national minorities and the state constitution, and minority refugee groups. Part Two analyzes in exhaustive detail the position of ethnic and linguistic minorities in the Austrian Republic: the Czechs in and out of Vienna, the Slovaks, the Gypsies, the Jews, the Hungarians, the Croats, the Slovenes in Styria and especially in Carinthia. A sociological *esquisse* dwells on the prospects for the preservation and further development of the culturally "alien" enclaves in light of such factors as the attendant loss of social prestige, party separatism, linguistic distinctiveness and discrimination.

Next, the author examines the corpus of domestic and international legal principles governing the rights and privileges of minorities in the Austrian Republic, from the norms regulating the official use of minority languages in administrative and judicial proceedings to the effect of the more important agreements to which Austria is a party, i.e., the Treaty of St. Germain, the so-called State Treaty of 1955, the Genocide Convention, the European Convention on the Protection of Human Rights, etc. The whole complex of special rules dealing with local practices that run the gamut from prescriptions on the criteria for civil service appointments for members of minority groups to the provision of special schooling facilities also receives due attention. Finally, formal complaints lodged by minorities with sundry international organizations are discussed.

A documentary appendix, a comprehensive bibliography, and indexes close the volume. In terms of wealth of resources, scope of historical perspective, and range of inquiry, this work of research will be hard to match.

GEORGE GINSBURGS

*Powstanie Polski Ludowej. Problemy Prawa Międzynarodowego [Emergence of People's Poland. Problems of International Law].* By Ludwik Gelberg. (Warsaw: Law Institute, Polish Academy of Science, 1970. pp. 163.) This slim volume, ably written and amply documented, deals with international aspects of the position of the Polish state after World War II. Poland of today, the author asserts, is the continuation of the Second



Republic, as the Second Republic was the continuation of the Commonwealth partitioned at the end of the eighteenth century. It has adhered to its legal system as inherited from the interwar regime, has maintained its membership in international organizations, and has settled its differences with other countries in connection with the expropriation of foreign interests. Although it lost more than 50 percent of its territory to the Soviet Union and was recompensed by the acquisition of territory from Germany, it is still the same state that it was in between the wars. It had its government in the West; its army, navy, air force and underground forces continued to resist in Poland. So long as the war continued and its outcome was undecided, German incorporation of Polish provinces into the Reich was illegal.

So far so good. And yet an important aspect vital for the understanding of Poland's position today is missing. Our author failed to reveal the fact that the plan for the liquidation of Poland was a Soviet and German venture agreed to in a special agreement.<sup>1</sup> While Germany incorporated only some of the Polish provinces into the Reich, the Soviet Union (which as a matter of fact acquired more than half of the country) incorporated all of its share into the Soviet Union, and, while Germans kept their plans for Poland secret, Molotov gloated publicly in the Supreme Soviet over the disappearance of that "bastard child" of the Treaty of Versailles. True, our author assures his readers that the Soviet declaration made at the time of the sharing of the spoils (when the Polish state ceased to exist) was illegal and later withdrawn, but only as a result of the German attack and in order to appease the Western Powers.

KAZIMIERZ GRZYBOWSKI

*Die völkerrechtlichen Aspekte des Oder-Neisse-Problems.* By Siegrid Krülle. (Berlin: Duncker & Humblot, 1970. pp. xxiv, 391. Bibliography. DM. 76.) This dissertation analyzes in detail the various legal aspects of the frontier between Poland and Germany and of the part of former East Prussia that has been allotted to the U.S.S.R. The author first establishes some common ground in the field of international law on which the parties to this territorial problem stand. A brief history of the Potsdam decisions is then followed by a thorough discussion of the legal position of defeated Germany and the competence of the victorious Allies to dispose of and administer German territory. The author writes about a possible change of sovereignty in the territories accorded to Poland and the U.S.S.R., and, in this context, reviews the modes of acquisition of territory. The meaning and contents of administration of the former German territories by Poland and the U.S.S.R. are also given some space. The last part deals with the several arguments that were or are still being advanced to substantiate the conflicting claims to these territories. There is, finally, a discussion of the different means and instruments whereby the conflict on the Polish-German borderland might be disposed of. Very little is said about a bilateral regulation of the territorial problem (p. 356), while the *Ostpolitik* of Willy Brandt and the Polish official attitude have amply shown the prospects of reconciliation.

The principal thesis of the book is that the areas taken over by Poland and the U.S.S.R. under the Potsdam decisions are still part of the German state territory (*deutsches Staatsgebiet*). The reviewer does not share this opinion. As the result of the developments that took place in and after 1945, there came a change of sovereignty in the area beyond the Oder and the Western Neisse. In treaties signed with the U.S.S.R. and

<sup>1</sup> Nazi-Soviet Relations 1939-41, pp. 101-107 (U. S. Govt. Printing Office, 1948).

Poland in 1970, which are yet to be ratified, the Federal Republic of Germany recognized the new frontiers in this part of Europe. The other German state (the DDR) did this as early as 1949 and 1950. The Western Powers, of which France and the U. K. have recognized the Oder-Neisse frontier, are far from accepting the fiction of German territory as it existed in 1937. These Powers reserve the final regulation of the matter for a future peace settlement. If it ever materializes, such a settlement can only take account of the frontiers as they exist now.

K. SKUBISZEWSKI

*Intervention and Negotiation: The United States and the Dominican Revolution.* By Jerome Slater. (New York, Evanston and London: Harper & Row, 1970. pp. xix, 254. Bibliography. Index. \$7.95.) This balanced and comprehensive study of United States intervention in the Dominican Republic covers the story from the start of the revolution through the establishment of the Balaguer regime in 1966. Slater's analysis is political rather than legal, but its excellence commends the book to international lawyers as well as political scientists. He finds too broad those criticisms that see the intervention as "symptomatic of a general pathology of American foreign policy under Lyndon Johnson, if not . . . of the entire range of U. S. anti-Communist effort in the postwar period"; but his own criticisms are sweeping enough even within his narrower interpretation of the intervention as "an application of the much more limited and specific No Second Cuba policy . . ." He argues convincingly that, even allowing the validity of that policy, the risk of Communist takeover was insufficient to justify the political and moral costs of intervention; and further, that even another indigenous Communist revolution in the Caribbean would not *per se* have been a threat warranting intervention. Slater also criticizes various post-intervention U. S. policies, especially excessive use of armed force against the Constitutionals and failure to curb (let alone reform) the Dominican military. He also stresses the episode's serious undermining effect on the Organization of American States and the injury to U. S. relations with Latin America generally. Although making a fairly good case against too easy parallels between the Dominican affair and the later Soviet invasion of Czechoslovakia, Slater curiously fails to note the usefulness of our action to Soviet policy-makers in 1968: Moscow framed its claims in Central Europe in the precise language of Washington's 1935 claims; the Johnson Doctrine provided the argument of the Brezhnev Doctrine, a coincidence that can hardly have been accidental. This reviewer nevertheless agrees that the Dominican episode was more of a special case than the beginning of a trend.

RUTH B. RUSSELL

*International Organization* (in Greek). By Alkis-Vasileou N. Papacostas. (Athens: 1970. pp. 158. Bibliography. Index.) The stated object of the book is to deal with the legal problems, the goals and the rôle of international organization. Answers are undertaken to certain basic questions concerning it. What are its main characteristics? To what extent can it contribute to the development of international law and order? Is its rôle limited and, if so, how? What is the difference, if any, between it and national organization?

The treatise does not deal with the United Nations, since the author has covered it in another work. It is limited to an analysis of what the author considers the most representative organs of various categories, which he first

divides into general and specialized agencies. The former are those governing general relations between the member states, while the latter are classified according to their special subjects: military (NATO), economic (European Economic Community), social (World Health Organization), educational (UNESCO), and others.

The volume contains two parts. The first one covers the legal nature of international organization: its characteristics, its relation to states, the international community, international law and policy; also its jurisdiction, responsibility, privileges and immunities. At the end there are the author's conclusions. The second part is divided into two chapters. Sixteen regional international organizations are discussed in the first one, while seven specialized agencies are described in the second.

The treatise is a useful one to students and international practitioners, as it brings together a scholarly analysis of the nature of international organization and basic information on the major international organs.

JOHN MAKTOIS

*La ONU: Dilema a los 25 Años.* (Mexico, D. F.: El Colegio de México, 1970. pp. 304.) The Center of International Studies of the Colegio de Mexico is to be congratulated on taking the occasion of the Twenty-fifth Anniversary of the meeting of the United Nations Assembly to bring together the contributions of some eighteen scholars analyzing the problems of the United Nations and proposing solutions. The contributors are of different nationalities, with the result that we are given a volume useful not only to Mexican students but to a wider range of scholars and the Spanish-speaking public.

All phases of the United Nations are examined. Security, disarmament and the settlement of disputes naturally dominate. Economic and social problems, the development of international law, the protection of human rights, and the relation of undeveloped states to the specialized agencies of the United Nations follow. Professor Falk has an excellent contribution on the Organization of the United Nations, and Professor Tunkin of the University of Moscow presents his point of view on coexistence. Five Mexican scholars contribute a survey of current problems, the two editors, Sepulveda Amor and del Rosario Green, summarizing the particular issues treated. The essay by Professor Lachs of the University of Warsaw on the contribution of the United Nations to the development of international law, 1945-1970, would alone justify the volume.

El Colegio de Mexico has done a great service to Latin America in presenting the problems of the United Nations in such a clear and constructive manner. If one may differ here and there with some of the points made in the individual essays, the volume as a whole is a most useful contribution to the subject. The United Nations is simply too little known in Latin America, as indeed, not too little known in the United States but given too little support.

C. G. FENWICK

*Fundamentos y Propósitos de las Naciones Unidas.* Vol. I. By Luis Valencia Rodríguez. (Quito: Editorial Universitaria, 1970. pp. 387.) A professor in the Institute of International Law of the Central University of Ecuador gives us here a study of the United Nations and its background; and it is done in such simple and direct terms as to commend itself not only to the students but to the general public as well.

An opening chapter surveys the history of international co-operation, beginning with ancient times and coming on down to the antecedents of the League of Nations. The League is described in detail, and the failure

of the great Powers to co-operate in its objectives foreshadows the outbreak of the second World War. Then follows the main body of the volume, a description of the immediate antecedents of the United Nations and a careful analysis of the principles of the Charter. The author is hopeful of what the United Nations can accomplish, both as a center of co-operation and as a public forum for the discussion of problems and a procedure of mediation and conciliation.

An excellent handbook, which should serve a useful purpose in the educational institutions of the country.

C. G. FENWICK

*Die Organisation der Amerikanischen Staaten (OAS).* By Gerhard Kutzner. (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, No. 62. Hamburg: Hansischer Gildenverlag, Joachim Heitmann & Co., 1970. pp. 399. Index. DM. 48.) Gerhard Kutzner's *Die Organisation der Amerikanischen Staaten* is a guidebook to the O.A.S. system, its "constitutions," organs and experience. The author's primary concern is with the legal aspects of the Organization and its actions. The history of the development of the various organs and complex treaty commitments is sketched in a clear but dry fashion. The reader will have difficulty drawing out of the account of chronological developments any feeling for the rôle and importance, or lack thereof, of the Organization of American States and its predecessor organizations in the evolution of inter-American politics. Mr. Kutzner does point to the overriding dominance of the United States at crucial moments, for example, at the time of the Cuba missile crisis, the agonizing choice of a Secretary General in 1967 and the Dominican affair, but one is given little insight into the politics within the system. Nor in his discussion of social, economic and cultural co-operation and of the work of the Inter-American Committee of Jurists do we gain any perspective on the impact of these efforts on conditions within the member states.

The lengthy analysis of the competences of the organs and sub-organs concentrates on the compatibility of the way these have been interpreting their mandates with the various legal documents which set them up and defined their powers. The author is particularly concerned to reconcile the operations of the Council of Ministers with that body's legal parameters. By a rather lengthy analysis of the texts he satisfies himself that the Council has not exceeded its mandate—as has been charged by a number of commentators on the O.A.S. The conclusion is in line with his general position: the O.A.S. and its agencies are operating to a high degree in a way which is consistent with their "constitutions."

This book is a careful, well-organized and competent introduction to the O.A.S. system—useful for one who wants to become acquainted with the system and a place to look up information about structures, competences and major events. It would be more useful had the author spent enough time on his index to make his work a more usable reference book.

ALEXINE ATHERTON

*Organizing African Unity.* By Jon Woronoff. (Metuchen, N. J.: The Scarecrow Press, 1970. pp. x, 693. Index. \$15.00.) This long descriptive work begins with the Pan African movement, and includes a section on regionalism, but its main focus is on the Organization of African Unity. Woronoff presents useful material on the organization, decolonization, internal and interstate conflicts, and development problems. Missing, however, is a theoretical thread to guide the reader in this maze of material.

J. S. NYE

*The Impartial Soldier.* By Michael Harbottle. (London, New York, Toronto: Oxford University Press, 1970. pp. xii, 210. Index. \$5.50.) This book, published under the auspices of the Royal Institute of International Affairs, is largely taken up with the author's experiences with the United Nations peacekeeping operation in Cyprus. Brigadier Harbottle was Chief of Staff of the United Nations Force during the period 1966-1968. In addition to recounting his personal experiences the author gives sufficient historical background and general description of the nature of peacekeeping operations to place this particular experience in context, and furthermore, he does not hesitate to express judgments regarding the value of peacekeeping operations. In fact, for the serious student of this particular form of United Nations activity, the book's great value is that conclusions are based in the solid ground of experience as reported by one in the position to know the facts, able to see the forest in spite of the trees, and fully understanding the complex circumstances making the operation possible and determining the form it must take.

During the period of Brigadier Harbottle's service as Chief of Staff, the United Nations Force was called upon to deal with repeated incidents involving the Greek and Turkish communities and Greek and Turkish fighters from the mainland. Of these the most serious was the fighting at Ayios Theodoros on November 15, 1967, which not only resulted in considerable loss of life and destruction of property but also came near bringing active military intervention by Turkey in its wake. The author's discussion of alternative ways of dealing with this crisis, either to avoid it or to control it, is particularly interesting and illustrates the kind of difficulties that military personnel engaged in peacekeeping operations face when they are required to deal with armed violence without employing the arms they are accustomed to use in such situations.

The author is very generous in his judgments on the performance of individuals and military contingents. He sees no insuperable difficulties in the use of military contingents from different countries to carry out a tricky United Nations peacekeeping operation. More than anything else, in his view, the success of such an operation depends "on the vigilance and mental alertness of the most junior soldier and his young non-commissioned leader, for it is at their level that most of the problems originate." He is clear in his own mind that "the effectiveness of a Peace Force would be considerably diminished if it were to rely on its military weapons to achieve its purpose." He is unqualified in his conviction that there is no alternative to United Nations peacekeeping.

While this may be an unusual kind of book for the Royal Institute to bring out, written as it is in the first person as a personal account, the Institute is to be congratulated for having done so, and this reviewer hopes it will not be the last.

LELAND M. GOODRICH

*Nuclear Proliferation: Prospects for Control.* Edited by Bennett Boskey and Mason Willrich. (New York: The Dunellen Company, Inc., 1970. pp. xvi, 191. \$7.50.) Professor Willrich has followed his publication of *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (1969),<sup>1</sup> with another timely volume on the important subject of nuclear non-proliferation—this time a collection of essays, co-edited with Bennett Boskey, on prospects for control.

Published for the American Society of International Law under the aegis of its Panel on Nuclear Energy and World Order, the volume is divided into three parts: "Nuclear Weapons Proliferation," "Atoms for

<sup>1</sup> Reviewed in 63 A.J.I.L. 853 (1969).

Peace" and "Global Security." That six out of a total of eleven chapters should be devoted to Part Two bespeaks the editors' stress on the peaceful use of atomic energy. But the volume's contribution goes beyond "Atoms for Peace": With the recent conclusion of the treaty banning nuclear weapons from the seabed, and the savor of the S.A.L.T. talks not yet lost, this is an appropriate moment to consider the possibilities of the Treaty on the Non-Proliferation of Nuclear Weapons and its attendant political, economic, military, technical and administrative implications.

Of considerable interest are the explanations of the military potential of civilian nuclear power (and, *vice versa*, "Plowshare Evaluation") and of the technical problems of safeguards and verification of compliance, matters to which reference is often made elsewhere but not spelled out so lucidly for the less scientifically prepared mind.

Comprehensive though the collection is, several central issues await more detailed study: the relevance of customary international law to nuclear tests and weapons (à la *Trail Smelter Arbitration*); nuclear non-proliferation in the larger context of the environmental problem; feasibility of control in the absence of effective participation by two (People's Republic of China and France) of the five Nuclear Powers; and last, but not least, the wisdom and equity of the retention of nuclear weapons by the existing members of the Nuclear Club.

The editors and contributors are to be congratulated for tackling with considerable success a new and difficult field, and achieving substantially the aim of providing original studies which will be of value to scholars, officials and policy-makers, as well as the interested reader who should not be misled by the legal provenance of the book.

LUKE T. LEE

*Non-prolifération des Armes Nucléaires et Systèmes de Contrôle.* By Georges Delcoigne and Georges Rubinstein. (Brussels: Editions de l'Institut de Sociologie, Université Libre de Bruxelles, 1970. pp. 216.) This is essentially a collection of source materials on non-proliferation of nuclear weapons, organized in proper temporal sequence, and with a brief historical summary, in essay form, preceding the documentary section. In the presentation there is an emphasis on international co-operation on both a bilateral and also a broader, regional basis, with special attention to the rôle of European bodies like EURATOM, E.N.E.A., and C.E.R.N. The substance of the book, however, is to be found in the discussion, with accompanying documentation, of measures as to non-dissemination of nuclear weapons in Latin America, Africa, Antarctica, outer space, and on the seabed; and in the analysis of such international conventions as the Moscow Test Ban Treaty of 1963, the Latin American Treaty of 1967, and finally the Non-Proliferation Treaty of 1968 itself.

The presentation is somewhat skeletal and lacking in the light and shade of interpretation and evaluation. The crucial contribution to international control in this area of the developing East-West consensus, manifested in direct Soviet-U.S. talks and exchanges, and in joint, step-by-step progression in practical co-operation in concrete problem-situations under the "politic of mutual example" inaugurated by Premier Khrushchev and Presidents Kennedy and Johnson, is not fully apparent from these pages. However, as a documents and source book in French with accompanying commentary, it is a most convenient collection to have in the contemporary international lawyer's library.

EDWARD MCWHINNEY

*Compétence du Juge Étranger et Reconnaissance des Jugements.* By Dominique Holleaux. (Paris: Librairie Dalloz, 1970. pp. x, 456. Bibliography. Index.) One of the generally assumed conditions for the recognition of a foreign judgment is the rendering court's "jurisdiction." As between the two legal orbits a major difficulty is caused by the use of the same term for both common law jurisdiction and civil law competence.<sup>1</sup> But it is not that question with which Holleaux deals in his excellent book on what is one of the most difficult problems of private international law. For he limits his research and analysis almost entirely to French law in its relation to other civil laws, with mere occasional references to English and American sources.<sup>2</sup> And here he meets with the second major terminological conundrum which permeates the laws of both orbits, namely, the question under which law the foreign rendering court's "jurisdiction" is to be determined. He disposes, first, of such prevailing theories as those of (1) simple unilaterality which relies on the rendering court's own standards insofar as they are not contrary to the recognizing court's *ordre public* (pp. 9-19); (2) double unilaterality which exempts from such reliance those cases in which the law of the recognizing court claims exclusive jurisdiction (pp. 20-120); (3) bilaterality which treats all domestic rules of jurisdiction as applicable in the rendering court (pp. 126-198).<sup>3</sup> In his second part the author purports to offer a "final solution" to replace these theories of "indirect competences" with their extraterritorial claims. He suggests an approach adjusted to the specific circumstances of each case in analogy to the "*ordre public*" generally applied to foreign judgments with regard to the decision on the merits. In his preface, Henri Batiffol expresses some misgivings concerning the lack of certainty which would threaten such a practice. American experience in international conflicts cases makes us wonder, however, whether, in the absence of international treaties, more ambitious traditional approaches have offered a certainty superior to that here suggested.<sup>4</sup>

ALBERT A. EHRENZWEIG

*La Nacionalización de Bienes Extranjeros en América Latina.* 2 vols. By Leopoldo Gonzalez Aguayo. (Mexico, D.F.: Universidad Nacional Autónoma de Mexico, 1969. Vol. I: pp. vi, 412; Vol. II: pp. 297.) These two volumes give a very useful survey of the various practical applications of the nationalization of foreign properties in Latin America. Na-

<sup>1</sup> See Ehrenzweig, *Conflict of Laws* 73, note 12 (1962). For the most recent failures to resolve this difficulty for the United States, see the Uniform Foreign Money-Judgments Recognition Act, 9B U.L.A. 64 (1966); Restatement Second, *Conflict of Laws*, §§ 24, 98, comment c (1971). On similarly frustrated international efforts, see 16 A.J. Comp. Law 601 (1968).

<sup>2</sup> Discussion of French-American problems is limited to that of the quite heterogeneous area of divorce (§§ 78, 79). Regrettably, Holleaux was apparently unable to make use of Heldrich's recent book on the same topic, and may yet be largely overtaken by Schröder's forthcoming work on International Jurisdiction.

<sup>3</sup> This rule is often applied in the United States, particularly with regard to constitutional requirements. See Ehrenzweig, *Conflicts in a Nutshell* § 20-2 (2nd ed., 1970).

<sup>4</sup> The prospect for an international solution cannot be considered too favorable, since even for interstate relations within the United States which are governed by the Full Faith and Credit Clause, the American Law Institute has found it necessary to permit each State to refuse recognition to sister-State judgments claimed to "involve an improper interference with important interests" of the forum State. Restatement Second, note 1 above, at § 103. But cf. Ehrenzweig, note 3 above, at § 20-5.

tionalization is distinguished from requisition, confiscation and expropriation and is given a certain ideological character which appears to put it above international law, almost as if it were part of the right of the state to exist.

But apart from ideology, from the supreme right of the state to reserve to itself the necessary conditions of its effective existence, the discussion of the individual problems is logically arranged and clearly presented. A chapter on the attitude of jurists to the problem contains a discussion of the critical issue of compensation, which may take different forms. A long chapter deals with the background of nationalization in Latin America and the controversies between the United States and the different countries. The second volume opens with a chapter on the petroleum problem in Peru, and is followed by the constitutional texts and the legislation of Argentina, Bolivia, Cuba, Guatemala, and Mexico. An elaborate bibliography closes the first volume.

Dr. Aguayo is to be congratulated upon a work of great industry and careful research, which must be of service to the commercial public in Latin America as well as to students. It is to be hoped, however, that a second edition will be presented in more readable form.

C. G. FENWICK

*East European Rules on the Validity of International Commercial Arbitration Agreements.* By L. Kos-Rabcewicz-Zubkowski. (Manchester, England: Manchester University Press; Bombay: N. M. Tripathi Private Ltd. (distributors); Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xii, 332. Index. \$11.00.) Commercial disputes with countries of different economic structures will mostly arise out of arrangements with state-controlled bodies, especially those of Eastern Europe, which have a state monopoly of foreign trade. Increase of trade in the years to come requires information on the facilities which are available for the settlement of such international commercial disputes. For the first time in the English language a well-documented survey is available, dealing with the capacity of parties to conclude foreign trade arbitration agreements, their form, the arbitrability of the issues involved, the permanent arbitral bodies connected with the Foreign Trade Chambers of Commerce and their jurisdictional competence. The author, Vice President of the Canadian Inter-American Research Institute in Montreal, has considered all these questions both under domestic rules and the pertinent bilateral and multilateral conventions prevailing in Albania, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Rumania, the U.S.S.R. and Yugoslavia.

Numerous decisions of the arbitral bodies in Eastern European countries which were rendered under elaborate rules of procedure (in translation in the annexes) are considered, also under their comparative law aspects. References to the arbitral literature of the foreign countries and to further source material in the English language, especially on problems of conflict of laws, are included throughout in a careful valuation of the problems of international commercial arbitration. A bibliography of the literature and the decisions cited in the text is added. The book makes a valuable contribution to the law and practice in this specific field of East-West settlement of trade disputes.

MARTIN DOMKE

*Foreign Investment: France—A Case Study.* By Robert B. Dickie. (Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. 135.) Mr. Dickie's study starts with a brief "profile" of United States



direct investments in France (pp. 13-21), then moves to a description of French laws and administrative instruments directly regulating foreign investments (pp. 22-48) and a survey of other laws generally relevant to them (corporate form, social insurance, labor law, tax, etc.) (pp. 49-66). There follows a discussion of the conditions and criteria the French Government applies in deciding whether to permit foreign investment projects (pp. 67-95). A translation of the 1966 law on commercial companies and the French text of the statutes and implementing administrative instruments concerning foreign direct investments and transfer of industrial property rights usefully complement the text.

As an introductory overview of French investment laws and policies the book should be valuable to corporation executives and counsel and to students of international transactions. The author is keenly aware of the interplay of legislation, administration and policy, and he tries hard to make investors and government perceive each other's case. His study, however, covers too much ground for its eighty-odd pages. As a result, it is largely descriptive on an abstract, generalized level. Discussion of legal problems tends to be limited to legislative and occasionally administrative texts, without extensive analysis of legal concepts, case law, or administrative practice. The discussion of policies is more concrete and informative, although far from comprehensive. After all, the problems of the "technological gap" cannot adequately be dealt with in five pages. The style is rather pedestrian but generally clear. Persistent use of the term "décrée" for decree (or *décret*), deserves the Franglais prize of the year.

A. A. FATOUROS

*Trade Agreements for Developing Countries.* By Gilbert P. Verbit. (New York and London: Columbia University Press, 1969. pp. xii, 249. Index. \$8.50.) The author, who served for two years as Legal Adviser to the Ministry of External Affairs of the Republic of Tanzania, designed his book as "a working tool for those officials in developing countries who have the responsibility of representing their governments in the negotiation of trade agreements and at meetings of the GATT (General Agreement on Tariffs and Trade) and of the UNCTAD (United Nations Conference on Trade and Development)." Specifically, it is aimed at breaking down the communication barrier between lawyers on the one hand and civil servants representing their ministries of foreign trade and commerce, on the other. Obviously, "no lawyer can participate in the negotiation of trade agreements without a grounding in the economic issues involved. Nor can a civil servant negotiate without knowing what role the law and lawyers should play in such negotiation."

In the introductory chapter entitled "Trade Agreements in Context" the author indicates the various types of trade agreements which the developing countries have entered into and identifies those which are likely to be of continuing significance. The author suggests substantive provisions which should be included in trade agreements to deal with specific problems posed by various economic practices of the participants in world trade. The basic chapter is on the concept of the most-favored-nation treatment. The following chapters on "Quantitative Restrictions on Imports," "Exchange Controls," "Internal Restrictions," "State Trading," and "Export Subsidies and Dumping" all contain useful discussions of the theories and practice with respect to each of these topics. They are all further evaluated in terms of how they relate to the most-favored-nation concept and the principle of comparative advantage, and how a trade agreement should treat them. In the chapter on "Promoting Trade Between the Parties," the au-

thor offers useful samples of clauses which are essential in trade agreements in general, having regard to the specific suggestions made in the discussion in the other chapters. In a separate chapter, a listing is given of certain issues which states may legally exclude from a trade agreement, including standard clauses stipulating the exclusion of the items so identified.

Those negotiators who use Verbit's book, without an easy access to the *United Nations Treaty Series* or *International Legal Materials*, may rightly lament the fact that the book does not include an appendix containing full texts of the regional and global trade agreements and institutions discussed in the book. Such an appendix would have greatly enhanced the value of the book as a handy tool for those engaged in negotiating trade agreements. In the final analysis, *Trade Agreements for Developing Countries* will be valued for its contribution to increasing concern for trade problems of the developing countries as against the traditional preoccupation with investment problems.

A. O. ADEDE

*The Fletcher School of Law and Diplomacy,  
Tufts University*

*Staatslexikon. Recht, Wirtschaft, Gesellschaft.* 6th ed. Supplementary Volumes I-III. Edited by the Görres-Gesellschaft. (Freiburg im Breisgau: Verlag Herder, 1969-1970. Index. Register. DM. 98 each.) The rapidity of contemporary technical development and its impact on national and international politics considerably narrow the span of time within which lexicographical works can possibly retain their usefulness. The editors of the *Görres-Staatslexikon* must therefore be commended for starting the preparation of the supplementary volumes in 1963 at the very moment when the publication of the eight volumes of its sixth edition had been completed.<sup>1</sup> The result of their endeavor is the three supplements under review. They contain, in addition to essays on entirely new subject matters, a great many articles which continue the story, told in the corresponding articles of the previous volumes, down to the end of the sixties. The enlargement of the sixth edition also offered the editors the welcome opportunity to cover questions which could and should have been dealt with in the original volumes.

As in his survey of the earlier volumes, this reviewer will again refer only to articles which are of special interest to the student of international law and politics. By way of exception, attention might be called, however, to the essays surveying and analyzing recent developments in the social sciences, particularly in political science, and to an article on the recent history of the theory and practice of democracy.

The editors of the first eight volumes assembled a large number of highly instructive articles on fundamental concepts and problems of law and politics, including international law and international politics. The supplementary volumes necessarily lack this distinguishing feature, as the fundamentals of law and politics have not been changed by the developments in the sixties. The only additions to the discussion of subjects of basic significance are articles on the emergence of international relations as a special academic field, on national consciousness, and on racial conflicts. The analysis of the latter subject is, unfortunately, far too brief considering its growing importance in current politics, national and international. There are new articles on special issues of international law and politics, such as policy of alliance, policy of détente, aid to less developed countries, civil war, guerrilla war, prohibition of force,

<sup>1</sup> See the reviews of these volumes in 56 A.J.I.L. 1135 ff. (1962), 57 *ibid.* 965 f. (1963), and 59 *ibid.* 188 f. (1965).

spheres of interest, intervention, non-intervention, neutralism, international territories, the Organization of American States, and decolonialization.

The quantity and quality of the articles on individual countries and regions are as impressive in the present volumes as they were in the earlier ones. Particular attention has again been paid to Germany and German political, economic and social problems, and last, but not least, to questions of West European integration. Foremost among the latter is a thorough discussion of all aspects of the Common Market. In contrast, the United Nations is as niggardly treated in the eleventh as it originally was in the eighth volume.

The *Staatslexikon* as brought up to date in these three supplementary volumes continues to hold the high place among German lexicographical works which it immediately attained when first published in 1878.

ERICH HULA

### BOOKS RECEIVED \*

- Alting von Geusau, Frans A. M. (ed.) *NATO and Security in the Seventies*. Leiden: A. W. Sijthoff; Lexington, Mass.: D. C. Heath and Co., 1971. pp. 158. Index. Fl. 25.50.
- Annuaire Suisse de Droit International*, 1969/70 Vol. XXVI. Zurich: Schulthess Polygraphischer Verlag AG, 1971. pp. 361. Index.
- Arnold, Adlai F. *Foundations of an Agricultural Policy in Paraguay*. New York, Washington and London: Praeger Publishers, 1971. pp. xxii, 294. \$17.50.
- Barker, Charles A. (ed.) *Power and Law. American Dilemma in World Affairs*. Papers of the Conference on Peace Research in History. Baltimore and London: The Johns Hopkins Press, 1971. pp. xv, 205. \$8.50.
- Blum, Yehuda Z. *Secure Boundaries and Middle East Peace in the Light of International Law and Practice*. Jerusalem: The Hebrew University of Jerusalem, Faculty of Law, 1971. pp. 134. Index. \$4.00.
- Centre National de la Recherche Scientifique et du Groupe de Travail sur le Droit de l'Espace. *Le Droit de l'Espace. Bulletin d'Analyses et d'Information*. Paris: Editions Techniques et Economiques, 1971. pp. 153. Index.
- Centres de Droit International de l'Institut de Sociologie de l'Université de Bruxelles et de l'Université de Louvain. *L'Immunité de Juridiction et d'Exécution des États. À propos du projet de Convention du Conseil de l'Europe*. Actes du Colloque conjoint des 30 et 31 Janvier 1969. Brussels: Editions de l'Institut de Sociologie, 1971. pp. 317.
- Claude, Inis L. Jr. *Swords into Flowshares. The Problems and Progress of International Organization*. 4th ed. New York: Random House, 1971. pp. xii, 514. Index.
- Colliard, C.-A., R. J. Dupuy, J. Pol-èche and R. Vaissière. *Le Fond des Mers. Aspects Juridiques, Biologiques et Géologiques*. Paris: Librairie Armand Colin, 1971. pp. 208. Fr. 11.
- Dawson, Frank G., and Ivan L. Head. *International Law, National Tribunals, and the Rights of Aliens*. Syracuse, N. Y.: Syracuse University Press, 1971. pp. xvii, 334. Index. \$11.75.
- Elkordy, Abdul-Hafez M. *Crisis of Diplomacy: The Three Wars and After*. San Antonio, Texas: The Naylor Co., 1971. pp. xii, 296. \$7.95.
- Evans, John W. *The Kennedy Round in American Trade Policy. The Twilight of the GATT*. Cambridge, Mass.: Harvard University Press, 1971. pp. xiii, 383. Index. \$13.95.

\* Mention here neither assures nor precludes later review.

- Field, Norman S. (ed.) *League of Nations and United Nations Monthly List of Selected Articles. Cumulative, 1920-1970. Political Questions.* Dobbs Ferry, N. Y.: Oceana Publications, 1971. Vol. I: 1920-1928, pp. vi, 361; Vol. II: 1929-1945, pp. 363-758. \$50.00 per vol.
- Gandolfi, Alain. *Institutions Internationales.* Paris: Masson et Cie., Editeurs, 1971. pp. ii, 206. Fr. 22.
- Goldmann, Dietrich. *Ghana. Staatsverwaltung und Stammesstruktur.* Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1971. pp. xxxiii, 260. Index. DM. 49.50.
- Gordenker, Leon (ed.). *The United Nations in International Politics.* Princeton, N. J.: Princeton University Press, 1971. pp. v, 241. Index. \$7.50.
- Gouldman, M. D. *Israel Nationality Law.* Jerusalem: The Hebrew University of Jerusalem, 1970. pp. 151. Index. \$4.00.
- Hancock, M. Donald, and Dankwart A. Rustow (eds.). *American Foreign Policy in International Perspective.* Englewood Cliffs, N. J.: Prentice-Hall, 1971. pp. viii, 375. Index.
- Hartley, Anthony. *Gaullism. The Rise and Fall of a Political Movement.* New York: Outerbridge & Dienstfrey, 1971. pp. xv, 373. \$10.00.
- Institut d'Études Européennes, Université Libre de Bruxelles. *Colloques Européens. Droit Pénal Européen.* Congrès Organisé les 7, 8 et 9 Novembre 1968 par l'Institut d'Études Européennes. Brussels: Presses Universitaires de Bruxelles, 1970. pp. xi, 659. B. Fr. 980.
- . *La Communauté et les Pays Méditerranéens.* Brussels: Éditions de l'Institut de Sociologie, 1970. pp. 172.
- . *Le Droit de la Communauté Économique Européenne.* Brussels: Presses Universitaires de Bruxelles, 1971. pp. vii, 366. Index.
- Irwin, Manley R. *The Telecommunications Industry. Integration vs. Competition.* New York, Washington and London: Praeger Publishers, 1971. pp. 223. \$15.00.
- Jessup, Philip C. *The Price of International Justice.* New York and London: Columbia University Press, 1971. pp. xi, 32. \$5.95.
- Keith, Kenneth James. *The Extent of the Advisory Jurisdiction of the International Court of Justice.* Leiden: A. W. Sijthoff, 1971. pp. 271. Index. Fl. 40.
- Landheer, B., J. H. M. M. Loenen, and Fred L. Polak (eds.). *World Society. How Is an Effective and Desirable World Order Possible? A Symposium.* The Hague: Martinus Nijhoff, 1971. pp. vi, 211. Gld. 27.
- Lapenna, Ivo. *Soviet Penal Policy.* Chester Springs, Pa.: Dufour Editions, 1971. pp. 148. \$3.50.
- Leonard, William R., Beat Alexander Jerny, and Offia Nwali. *UN Development and Criteria and Methods of Evaluation.* A UNITAR Study. New York: Arno Press, 1971. pp. 135. Index.
- Mallory, J. R. *The Structure of Canadian Government.* New York: St. Martin's Press, 1971. pp. xiii, 418. Index. \$11.50.
- Margairaz, André. *La Fraude Fiscale et ses Succédanés. Comment on Échappe à l'Impôt.* Brussels: Établissements Émile Bruylant, S. A., 1971. pp. 536. Fr. 812.
- Miele, Alberto. *L'Estraneità al Conflitti Armati secondo il Diritto Internazionale.* 2 vols. Padua: CEDAM, 1970. Vol. I: *Origini ed Evoluzione del Diritto di Neutralità.* pp. xii, 241. Index. L. 4,500; Vol. II: *La Disciplina Positiva delle Attività Statuali.* pp. xii, 585. Index. L. 9,500.
- Nye, J. S. *Peace in Paris. Integration and Conflict in Regional Organization.* Boston: Little, Brown and Co., 1971. pp. xiv, 210. \$3.95.
- Okularczyk, Halina. *Członkostwo Organizacji Wyspecjalizowanych ONZ.* Warsaw: Polski Instytut Spraw Międzynarodowych, 1970. pp. 256. Zł. 25.
- Özman, Aydoğan. *Les Organisations Regionales en Asie Sud-Est.* Ankara: Sevinç Matbaası, 1970. pp. viii, 94.
- Rapaport, Jacques, Ernest Muteba, and Joseph J. Therattil. *Small States & Territories. Status and Problems.* A UNITAR Study. New York: Arno Press, 1971. pp. 216. Index.

- Renauld, Jean. *Droit Patrimonial de la Famille. Introduction*. Vol. I: *Régimes Matrimoniaux*. Brussels: Maison Ferdinand Larcier, S. A., 1971. pp. xi, 1022. Index. Fr. 1,911.
- Schachter, Oscar, Mahomed Nawaz, and John Fried. *Toward Wider Acceptance of U.N. Treaties*. A UNITAR Study. New York: Arno Press, 1971. pp. 190. Index.
- Scheingold, Stuart A. *The Law in Political Integration. The Evolution and Integrative Implications of Regional Legal Processes in the European Community*. (Occasional Paper #27) Cambridge, Mass.: Harvard University Center for International Affairs, 1971. pp. xii, 59.
- Shearer, I. A. *Extradition in International Law*. Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xxiii, 283. Index. \$9.00.
- Sico, Luigi. "Toute Prise Doit Être Jugée." *Il Giudizio delle Prede nel Diritto Internazionale*. Naples: Casa Editrice Dott. Eugenio Jovene, 1971. pp. xxxv, 266. Index. L. 4,000.
- Sohn, Louis B. *The United Nations: The Next Twenty-Five Years*. Twentieth Report of the Commission to Study the Organization of Peace. Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xv, 263.
- Tesauro, Giuseppe. *L'Inquinamento Marino nel Diritto Internazionale*. Milan: Dott. A. Giuffrè Editore, 1971. pp. 232. L. 2,800.
- Tharp, Paul A., Jr. (ed.) *Regional International Organizations. Structures and Functions*. New York: St. Martin's Press; Toronto and London: Macmillan Co., 1971. pp. ix, 276. \$4.95.
- Topor, Lucienne. *Les Conflits de Lois en Matière de Puissance Parentale*. Paris: Librairie Dalloz, 1971. pp. x, 402. Fr. 48.
- Towpik, Andrzej. *Bezpieczeństwo Międzynarodowe a rozbrojenie*. Warsaw: Polski Instytut Spraw Międzynarodowych, 1970. pp. 256. Zł. 25.
- Vázquez, Modesto Seara. *Derecho Internacional Público*. 3rd ed. Mexico, D.F.: Editorial Porrúa, S. A., 1971. pp. 399. Index.
- . *La Paz Precaria de Versalles a Danzig*. Mexico, D. F.: Universidad Nacional Autónoma de México, 1970. pp. 561.
- Veicopoulos, Nicolas. *Traité des Territoires Dépendants*. Tome II: *L'Oeuvre Fonctionnelle des Nations Unies Relative au Régime de Tutelle*. Athens: 1971. pp. 531-1032. Indexes.
- Venezia, Jean-Claude. *Stratégie Nucléaire et Relations Internationales*. Paris: Librairie Armand Colin, 1971. pp. 175. Fr. 12.
- Venturini, V. G. *Monopolies and Restrictive Trade Practices in France*. Leiden: A. W. Sijthoff, 1971. pp. 388. Index. Fl. 44.
- Wade, H. W. R. *Administrative Law*. 3rd ed. London: Oxford University Press, 1971. pp. xix, 363. Index. \$5.75.
- Watters, William E. *An International Affair. Non-Intervention in the Spanish Civil War 1936-39*. New York: Exposition Press, 1970. pp. 423. Index. \$12.00.
- Wenger, Alain. *Pétrole et Gaz Naturel en Mer du Nord. Droit et Economie*. Paris: Editions Technip, 1971. pp. viii, 255. Fr. 65.
- Wilmington, Martin W. *The Middle East Supply Centre*. Albany, N. Y.: State University of New York Press; London: University of London Press, 1971. pp. xxiv, 248. Index. \$10.00.
- Wilson, Robert R. *International Law and Contemporary Commonwealth Issues*. Durham, N. C.: Duke University Press, 1971. pp. xii, 245. Index. \$8.50.
- Witzsch, Günter. *Deutsche Strafgerichtsbarkeit über die Mitglieder der U.S.-Streitkräfte und deren Begleitende Zivilpersonen*. Karlsruhe: Verlag C. F. Müller, 1970. pp. xxi, 232. Index.

## OFFICIAL DOCUMENTS

### UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

#### CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

*Adopted at Paris, November 14, 1970 \**

The General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from 12 October to 14 November 1970, at its sixteenth session,

Recalling the importance of the provisions contained in the Declaration of the Principles of International Cultural Co-operation, adopted by the General Conference at its fourteenth session,

Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations,

Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,

Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,

Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,

Considering that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of Unesco's mission to promote by recommending to interested States, international conventions to this end,

Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,

Considering that the Unesco General Conference adopted a Recommendation to this effect in 1964,

\* UNESCO Doc. 16 C/Res., pp. 135-141; reprinted in 10 Int. Legal Materials 289 (1971). Not yet in force.

Having before it further proposals on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, a question which is on the agenda for the session as item 19, Having decided, at its fifteenth session, that this question should be made the subject of an international convention,

Adopts this Convention on the fourteenth day of November 1970.

#### ARTICLE 1

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

#### ARTICLE 2

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation consti-

tutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

### ARTICLE 3

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

### ARTICLE 4

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

### ARTICLE 5

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

- (a) Contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
- (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;



- (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property;
- (d) organizing the supervision of archaeological excavations, ensuring the preservation "in situ" of certain cultural property, and protecting certain areas reserved for future archaeological research;
- (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
- (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
- (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

#### ARTICLE 6

The States Parties to this Convention undertake:

- (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
- (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
- (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

#### ARTICLE 7

The States Parties to this Convention undertake:

- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;
- (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;
- (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported

after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

#### ARTICLE 8

The States Parties to this Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6 (b) and 7 (b) above.

#### ARTICLE 9

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

#### ARTICLE 10

The States Parties to this Convention undertake:

- (a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject;
- (b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

#### ARTICLE 11

The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.

## ARTICLE 12

The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories.

## ARTICLE 13

The States Parties to this Convention also undertake, consistent with the laws of each State:

- (a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
- (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
- (d) to recognize the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

## ARTICLE 14

In order to prevent illicit export and to meet the obligations arising from the implementation of this Convention, each State Party to the Convention should, as far as it is able, provide the national services responsible for the protection of its cultural heritage with an adequate budget and, if necessary, should set up a fund for this purpose.

## ARTICLE 15

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.

## ARTICLE 16

The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.

## ARTICLE 17

1. The States Parties to this Convention may call on the technical assistance of the United Nations Educational, Scientific and Cultural Organization, particularly as regards:

- (a) Information and education;
- (b) consultation and expert advice;
- (c) co-ordination and good offices.

2. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative conduct research and publish studies on matters relevant to the illicit movement of cultural property.

3. To this end, the United Nations Educational, Scientific and Cultural Organization may also call on the co-operation of any competent non-governmental organization.

4. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative, make proposals to States Parties to this Convention for its implementation.

5. At the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, Unesco may extend its good offices to reach a settlement between them.

## ARTICLE 18

This Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.

## ARTICLE 19

1. This Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.

2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

## ARTICLE 20

1. This Convention shall be open to accession by all States not members of the United Nations Educational, Scientific and Cultural Organization which are invited to accede to it by the Executive Board of the Organization.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

## ARTICLE 21

This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective

instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

#### ARTICLE 22

The States Parties to this Convention recognize that the Convention is applicable not only to their metropolitan territories but also to all territories for the international relations of which they are responsible; they undertake to consult, if necessary, the governments or other competent authorities of these territories on or before ratification, acceptance or accession with a view to securing the application of the Convention to those territories, and to notify the Director-General of the United Nations Educational, Scientific and Cultural Organization of the territories to which it is applied, the notification to take effect three months after the date of its receipt.

#### ARTICLE 23

1. Each State Party to this Convention may denounce the Convention on its own behalf or on behalf of any territory for whose international relations it is responsible.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation.

#### ARTICLE 24

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States members of the Organization, the States not members of the Organization which are referred to in Article 20, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance and accession provided for in Articles 19 and 20, and of the notifications and denunciations provided for in Articles 22 and 23 respectively.

#### ARTICLE 25

1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.

2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession, as from the date on which the new revising convention enters into force.

## ARTICLE 26

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Done in Paris this seventeenth day of November 1970, in two authentic copies bearing the signature of the President of the sixteenth session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 19 and 20 as well as to the United Nations.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its sixteenth session, which was held in Paris and declared closed the fourteenth day of November 1970.

IN FAITH WHEREOF we have appended our signatures this seventeenth day of November 1970.

*The President of the General Conference*

ATILIO DELL'ORO MAINI

*The Director-General*

RENE MAHEU

Certified copy  
Paris,

*Director, Office of International  
Standards and Legal Affairs,  
United Nations Educational,  
Scientific and Cultural Organization*

## MEXICO-UNITED STATES

TREATY OF COOPERATION BETWEEN THE UNITED STATES OF AMERICA  
AND THE UNITED MEXICAN STATES PROVIDING FOR THE  
RECOVERY AND RETURN OF STOLEN ARCHAEOLOGICAL,  
HISTORICAL AND CULTURAL PROPERTIES

*Signed at Mexico City, July 17, 1970; in force March 24, 1971\**

The United States of America and the United Mexican States, in a spirit of close cooperation and with the mutual desire to encourage the protection, study and appreciation of properties of archaeological, historical or cultural importance, and to provide for the recovery and return of such properties when stolen, have agreed as follows:

\* T.I.A.S., No. 7088; 63 Dept. of State Bulletin 206 (1970); 9 Int. Legal Materials 1028 (1970).

## ARTICLE I

1. For the purposes of this Treaty, "archaeological, historical and cultural properties" are defined as

- (a) art objects and artifacts of the pre-Colombian cultures of the United States of America and the United Mexican States of outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art;
- (b) art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States of outstanding importance to the national patrimony;
- (c) documents from official archives for the period up to 1920 that are of outstanding historical importance;

that are the property of federal, state, or municipal governments or their instrumentalities, including portions or fragments of such objects, artifacts, and archives.

2. The application of the foregoing definitions to a particular item shall be determined by agreement of the two governments, or failing agreement, by a panel of qualified experts whose appointment and procedures shall be prescribed by the two governments. The determinations of the two governments, or of the panel shall be final.

## ARTICLE II

1. The Parties undertake individually and, as appropriate, jointly (a) to encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars of both countries; (b) to deter illicit excavations of archaeological sites and the theft of archaeological, historical or cultural properties; (c) to facilitate the circulation and exhibit in both countries of archaeological, historical and cultural properties in order to enhance the mutual understanding and appreciation of the artistic and cultural heritage of the two countries; and (d) consistent with the laws and regulations assuring the conservation of national archaeological, historical and cultural properties, to permit legitimate international commerce in art objects.

2. Representatives of the two countries, including qualified scientists and scholars, shall meet from time to time to consider matters relating to the implementation of these undertakings.

## ARTICLE III

1. Each Party agrees, at the request of the other Party, to employ the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that are removed after the date of entry into force of this Treaty from the territory of the requesting Party.

2. Requests for the recovery and return of designated archaeological, historical and cultural properties shall be made through diplomatic offices.

The requesting Party shall furnish, at its expense, documentation and other evidence necessary to establish its claim to the archaeological, historical or cultural property.

3. If the requested Party cannot otherwise effect the recovery and return of a stolen archaeological, historical or cultural property located in its territory, the appropriate authority of the requested Party shall institute judicial proceedings to this end. For this purpose, the Attorney General of the United States of America is authorized to institute a civil action in the appropriate district court of the United States of America, and the Attorney General of the United Mexican States is authorized to institute proceedings in the appropriate district court of the United Mexican States. Nothing in this Treaty shall be deemed to alter the domestic law of the Parties otherwise applicable to such proceedings.

#### ARTICLE IV

As soon as the requested Party obtains the necessary legal authorization to do so, it shall return the requested archaeological, historical, or cultural property to the persons designated by the requesting Party. All expenses incident to the return and delivery of an archaeological, historical or cultural property shall be borne by the requesting Party. No person or Party shall have any right to claim compensation from the returning Party for damage or loss to the archaeological, historical or cultural property in connection with the performance by the returning Party of its obligations under this Treaty.

#### ARTICLE V

Notwithstanding any inconsistent statutory requirements for the disposition of merchandise seized for violation of laws of the requested Party relating to the importation of merchandise, stolen archaeological, historical or cultural property which is the subject matter of this Treaty and has been seized, or seized and forfeited to the requested Party, shall be returned to the requesting Party in accordance with the provisions of this Treaty. The Parties shall not impose upon archaeological, historical or cultural property returned pursuant to this Treaty any charges or penalties arising from the application of their laws relating to the importation of merchandise.

#### ARTICLE VI

1. The Parties shall ratify this Treaty in accordance with the provisions of their respective constitutions, and instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Treaty shall enter into force on the day of exchange of the instruments of ratification, and shall remain in force for two years from that date and thereafter until thirty days after either Party gives written notice to the other Party of its intention to terminate it.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, Ambassador Robert Henry McBride for the United States of America and Antonio



Carrillo Flores, Secretary of Foreign Relations, for the United Mexican States, duly authorized, have signed this Treaty.

DONE in duplicate, in English and Spanish, in the City of Mexico this 17th day of the month of July, nineteen hundred seventy.

## ORGANIZATION OF AMERICAN STATES

### CONVENTION TO PREVENT AND PUNISH THE ACTS OF TERRORISM TAKING THE FORM OF CRIMES AGAINST PERSONS AND RELATED EXTORTION THAT ARE OF INTERNATIONAL SIGNIFICANCE

*Signed at Washington, February 2, 1971 \**

#### WHEREAS:

The defense of freedom and justice and respect for the fundamental rights of the individual that are recognized by the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights are primary duties of states;

The General Assembly of the Organization, in Resolution 4, of June 30, 1970, strongly condemned acts of terrorism, especially the kidnapping of persons and extortion in connection with that crime, which it declared to be serious common crimes;

Criminal acts against persons entitled to special protection under international law are occurring frequently, and those acts are of international significance because of the consequences that may flow from them for relations among states;

It is advisable to adopt general standards that will progressively develop international law as regards cooperation in the prevention and punishment of such acts; and

In the application of those standards the institution of asylum should be maintained and, likewise the principle of non-intervention should not be impaired.

#### THE MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES HAVE AGREED UPON THE FOLLOWING ARTICLES:

##### ARTICLE I

The contracting states undertake to co-operate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

\* O.A.S. Doc. AG/88 rev. 1, Feb. 2, 1971; reprinted in 64 Dept. of State Bulletin 231 (1971), and 10 Int. Legal Materials 255 (1971). Not yet in force.

## ARTICLE 2

For the purposes of this convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive.

## ARTICLE 3

Persons who have been charged or convicted for any of the crimes referred to in Article 2 of this convention shall be subject to extradition under the provisions of the extradition treaties in force between the parties or, in the case of states that do not make extradition dependent on the existence of a treaty, in accordance with their own laws.

In any case, it is the exclusive responsibility of the state under whose jurisdiction or protection such persons are located to determine the nature of the acts and decide whether the standards of this convention are applicable.

## ARTICLE 4

Any person deprived of his freedom through the application of this convention shall enjoy the legal guarantees of due process.

## ARTICLE 5

When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory. The decision of these authorities shall be communicated to the state that requested extradition. In such proceedings, the obligation established in Article 4 shall be respected.

## ARTICLE 6

None of the provisions of this convention shall be interpreted so as to impair the right of asylum.

## ARTICLE 7

The contracting states undertake to include the crimes referred to in Article 2 of this convention among the punishable acts giving rise to extradition in any treaty on the subject to which they agree among themselves in the future. The contracting states that do not subject extradition to the existence of a treaty with the requesting state shall consider the crimes referred to in Article 2 of this convention as crimes giving rise to extradition, according to the conditions established by the laws of the requested state.

## ARTICLE 8

To co-operate in preventing and punishing the crimes contemplated in Article 2 of this convention, the contracting states accept the following obligations:

- a. To take all measures within their power, and in conformity with their own laws, to prevent and impede the preparation in their respective territories of the crimes mentioned in Article 2 that are to be carried out in the territory of another contracting state.
- b. To exchange information and consider effective administrative measures for the purpose of protecting the persons to whom Article 2 of this convention refers.
- c. To guarantee to every person deprived of his freedom through the application of this convention every right to defend himself.
- d. To endeavor to have the criminal acts contemplated in this convention included in their penal laws, if not already so included.
- e. To comply most expeditiously with the requests for extradition concerning the criminal acts contemplated in this convention.

## ARTICLE 9

This convention shall remain open for signature by the member states of the Organization of American States, as well as by any other state that is a member of the United Nations or any of its specialized agencies, or any state that is a party to the Statute of the International Court of Justice, or any other state that may be invited by the General Assembly of the Organization of American States to sign it.

## ARTICLE 10

This convention shall be ratified by the signatory states in accordance with their respective constitutional procedures.

## ARTICLE 11

The original instrument of this convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited in the General Secretariat of the Organization of American States, which shall send certified copies to the signatory governments for purposes of ratification. The instruments of ratification shall be deposited in the General Secretariat of the Organization of American States, which shall notify the signatory governments of such deposit.

## ARTICLE 12

This convention shall enter into force among the states that ratify it when they deposit their respective instruments of ratification.

## ARTICLE 13

This convention shall remain in force indefinitely, but any of the contracting states may denounce it. The denunciation shall be transmitted to the General Secretariat of the Organization of American States, which shall notify the other contracting states thereof. One year following the

denunciation, the convention shall cease to be in force for the denouncing state, but shall continue to be in force for the other contracting states.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, having presented their full powers, which have been found to be in due and proper form, sign this convention on behalf of their respective governments, at the city of Washington this second day of February of the year one thousand nine hundred seventy-one.

#### STATEMENT OF PANAMA

The Delegation of Panama states for the record that nothing in this convention shall be interpreted to the effect that the right of asylum implies the right to request asylum from the United States authorities in the Panama Canal Zone, or that there is recognition of the right of the United States to grant asylum or political refuge in that part of the territory of the Republic of Panama that constitutes the Canal Zone.

[Signed on behalf of: Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, United States, Uruguay and Venezuela.]

### NORTH SEA CONTINENTAL SHELF

#### FEDERAL REPUBLIC OF GERMANY—DENMARK— THE NETHERLANDS

#### PROTOCOL

*Signed at Copenhagen January 28, 1971 \**

#### I

1. The Federal Republic of Germany, the Kingdom of Denmark and the Kingdom of the Netherlands have, on the basis of the judgment of the International Court of Justice of 20 February 1969, conducted tripartite negotiations on the delimitation of the continental shelf under the North Sea. In those negotiations the two treaties signed today were drawn up, viz.:

- (a) the Treaty between the Federal Republic of Germany and the Kingdom of Denmark relating to the Delimitation of the Continental Shelf under the North Sea,
- (b) the Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands relating to the Delimitation of the Continental Shelf under the North Sea.

These treaties concur in so far as the actual conditions permit.

2. In appreciation of the fact that the two treaties together determine the configuration and size of the German part of the continental shelf

\* English translation provided by courtesy of the Embassy of the Federal Republic of Germany; also reprinted in 10 Int. Legal Materials 600 (1971).

under the North Sea and are consequently closely connected, the Governments of the three signatory States propose to exchange the instruments of ratification to the two treaties in Bonn on the same day in order that they may enter into force simultaneously.

## II

The Government of the Kingdom of Denmark and the Government of the Kingdom of the Netherlands confirm that

the Agreement between the Government of the Kingdom of Denmark and the Government of the Kingdom of the Netherlands concerning the Delimitation of the Continental Shelf under the North Sea between the Two Countries, dated 31 March 1966,

shall cease to have effect as soon as either of the treaties specified in Part I above enters into force.

## III

The German part of the continental shelf under the North Sea, which is delimited by the treaties specified in Part I above on the basis of the judgment of the International Court of Justice, is contiguous to the British part of the continental shelf.

1. The Government of the Federal Republic of Germany therefore proposes to establish by treaty with the Government of the United Kingdom of Great Britain and Northern Ireland the Anglo-German boundary line on the continental shelf as the line which runs from the termination point of the German-Danish boundary line on the continental shelf to the termination point of the German-Netherlands boundary line on the continental shelf.

2. The Government of the Kingdom of Denmark proposes to amend, in agreement with the Government of the United Kingdom,

the Agreement between the Government of the Kingdom of Denmark and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the Delimitation of the Continental Shelf between the Two Countries, dated 3 March 1966,

in so far as such amendment has become necessary by virtue of the treaty specified in Part I, 1 (a) above.

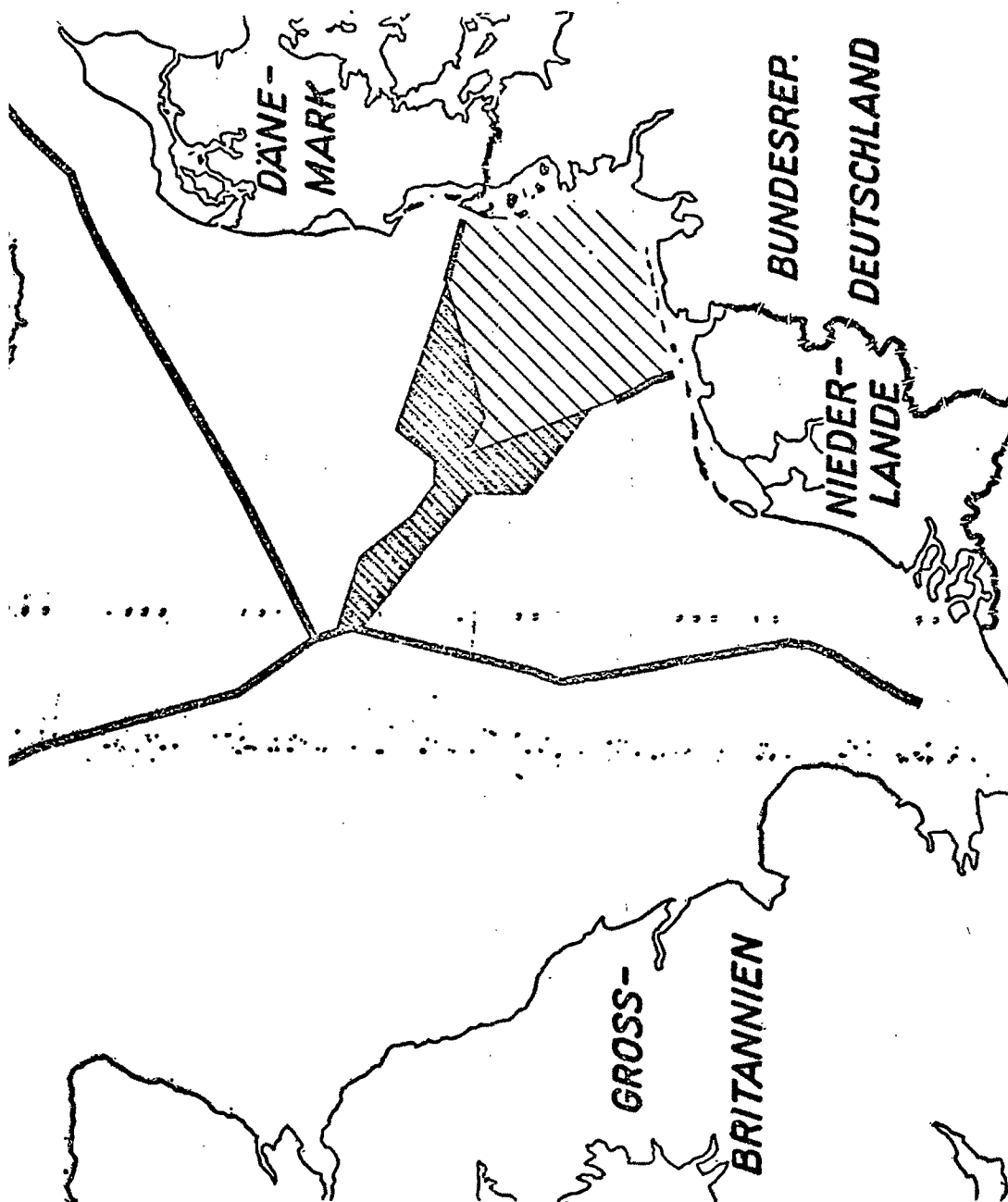
3. The Government of the Kingdom of the Netherlands proposes to amend, in agreement with the Government of the United Kingdom,

the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the Delimitation of the Continental Shelf under the North Sea between the Two Countries, dated 6 October 1965,

in so far as such amendment has become necessary by virtue of the treaty specified in Part I, 1 (b) above.

DONE at Copenhagen on January 28, 1971 in three originals in the German, Danish and Dutch languages, all three texts being equally authentic.

## ANNEX



## FEDERAL REPUBLIC OF GERMANY—DENMARK

TREATY RELATING TO THE DELIMITATION OF THE CONTINENTAL  
SHELF UNDER THE NORTH SEA*Signed at Copenhagen January 28, 1971 \**

The Federal Republic of Germany  
and  
the Kingdom of Denmark,

intending to establish the common boundary of their respective parts of the continental shelf under the North Sea in so far as this has not already been done by means of the Treaty of 9 June 1965 concerning the Delimitation of the Continental Shelf of the North Sea near the Coast,

anxious to regulate the economic exploitation of the continental shelf in so far as this is in their common interest,

on the basis of the judgment of the International Court of Justice of 20 February 1969 in the disputes over the delimitation of the continental shelf under the North Sea between the Federal Republic of Germany on the one hand and the Kingdom of the Netherlands on the other,

taking into account the boundary lines of the continental shelf that are not affected by the judgment of the International Court of Justice,

have agreed as follows:

## ARTICLE 1

(1) The dividing line between the German and the Danish part of the continental shelf under the North Sea shall, in extension of the partial boundary determined by the Treaty of 9 June 1965, be arcs of Great Circles between the following points

S<sub>1</sub> 55°10'03,4" N 07°33'09,6" E  
S<sub>2</sub> 55°30'40,3" N 05°45'00,0" E  
S<sub>3</sub> 55°15'00,0" N 05°24'12,0" E  
S<sub>4</sub> 55°15'00,0" N 05°09'00,0" E  
S<sub>5</sub> 55°24'15,0" N 04°45'00,0" E  
S<sub>6</sub> 55°46'21,8" N 04°15'00,0" E  
S<sub>7</sub> 55°55'09,4" N 03°21'00,0" E

\* English translation provided by courtesy of the Embassy of the Federal Republic of Germany. The translation of Annex 2 of the treaty was provided by courtesy of the Embassy of Denmark. Also reprinted in 10 Int. Legal Materials 603 (1971).

The positions of the points are defined by latitude and longitude on European Datum System (1st Adjustment 1950).

(2) The termination point  $S_7$  of the dividing line shall be the point of intersection of the dividing lines between the German, Danish and British parts of the continental shelf under the North Sea.

(3) The dividing line and the partial boundary established by the Treaty of 9 June 1965 have been drawn on the chart attached to this Treaty as Annex 1.

## ARTICLE 2

(1) Should any mineral resources be discovered on the continental shelf of either Contracting Party and should the other Contracting Party consider that the deposit thus discovered extend to its own continental shelf, it may put forward its view to the other Contracting Party, together with the supporting data. If that other Contracting Party does not share this view, the arbitral tribunal provided for under Article 5 of the present Treaty shall find on this question at the request of either Contracting Party.

(2) Should the Contracting Parties agree or should the arbitral tribunal have found that the deposit is located on the continental shelf of both Contracting Parties, the Governments of the Contracting Parties shall reach agreement as to its exploitation, taking into account the interests of both Contracting Parties on the principle that each Contracting Party is entitled to the mineral resources located on its continental shelf. In the event that mineral resources have already been extracted from the field which crosses the dividing line, the agreement should also contain provisions regarding adequate compensation.

(3) With the approval of the Governments of the Contracting Parties an agreement pursuant to paragraph 2 of this Article may also be concluded wholly or in part between the beneficiaries. A beneficiary shall be any person or persons who has a right to extract mineral resources.

(4) Should an agreement pursuant to paragraph 2 or 3 of this Article not be reached, either Contracting Party may appeal to the arbitral tribunal in accordance with the provisions of Article 5 of this Treaty. The arbitral tribunal may in such cases also decide *ex aequo et bono*. The arbitral tribunal shall be authorized to make an interim order after hearing the Contracting Parties.

## ARTICLE 3

Notwithstanding international regulations concerning the laying of pipelines on the continental shelf, pipelines that are laid on the continental



shelf in connexion with the exploitation of mineral resources shall in order to prevent the pollution of the sea and to avert any other hazards be subject to the legal provisions relating to the installation and operation of pipelines that are applicable in the territory of the Contracting Party upon whose continental shelf such pipelines are laid.

#### ARTICLE 4

(1) The enterprises designated in Annex 2 to this Treaty shall upon application be granted permission in accordance with German law to explore and extract in the area designated in the said Annex oil and gas and any other substances yielded during such extraction.

(2) The application for the permission required in accordance with paragraph 1 of this Article must be made within twelve months of the entry into force of this Treaty.

#### ARTICLE 5

(1) Disputes between the Contracting Parties concerning the interpretation or application of the present Treaty or of any arrangement made pursuant to paragraph 2 of Article 2 of the Treaty should, if possible, be settled by negotiation.

(2) If a dispute has not been settled in this manner within a reasonable period of time it shall upon the request of either Contracting Party be submitted to an arbitral tribunal for decision.

(3) Such arbitral tribunal shall be constituted for each individual case. In so far as the Contracting Parties do not agree on the facilitated procedure of appointing one judge to decide in the dispute, an arbitral tribunal consisting of three members shall be constituted as follows: Each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the two Contracting Parties. Such members shall be appointed within two months, and such chairman within a further two months, from the date on which either Contracting Party has decided to apply to have the dispute settled by an arbitral tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President should make

the necessary appointments. If the Vice-President, too, is a national of either Contracting Party or is likewise prevented from discharging the said function, the member of the Court of Justice next in seniority who is not a national of either Contracting Party and is not prevented from doing so should make the appointments.

(5) The arbitral tribunal shall decide by a majority vote. Each Contracting Party shall bear the cost of its own member and of its representatives in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by both Contracting Parties.

(6) The arbitral tribunal or the single judge shall decide on the basis of the rules of international law applicable between the Contracting Parties. The decision shall be binding.

(7) The arbitral tribunal or the single judge shall determine its or his own procedure in so far as no other arrangement is made under the present Treaty or by the Contracting Parties upon the appointment of the arbitral tribunal or the single judge.

#### ARTICLE 6

Articles 2 and 3, as well as Article 5 in so far as it concerns the settlement of disputes over the interpretation or application of Articles 2 and 3, shall apply *mutatis mutandis* to the areas of the continental shelf near the coast delimited by the Treaty of 9 June 1965.

#### ARTICLE 7

This Treaty shall also apply to Land Berlin provided that the Government of the Federal Republic of Germany does not make a contrary declaration to the Government of the Kingdom of Denmark within three months of the entry into force of the present Treaty.

#### ARTICLE 8

(1) The present Treaty is subject to ratification. The instruments of ratification shall be exchanged in Bonn.

(2) The present Treaty shall enter into force one month after the exchange of instruments of ratification.

DONE at Copenhagen on January 28, 1971 in duplicate in the German and Danish languages, both texts being equally authentic.



## ANNEX 2

(to Article 4)

(1) *Enterprises*: Dansk Boreselskab Aktieselskab, Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 1912 Aktieselskab, individually or jointly, or an affiliated company established under Danish or German law, by one or several of the above-mentioned enterprises at the time when an application is filed.

(2) *License area*: The area circumscribed by arcs of great circles between the following points:

55°15'00,0" N 05°24'12,0" E

55°15'00,0" N 05°09'00,0" E

55°24'15,0" N 04°45'00,0" E

55°20'55,1" N 04°40'00,0" E

55°07'56,2" N 05°15'00,0" E

The positions of these points are defined by latitude and longitude on the European Datum System (1st Adjustment 1950).

## THE NETHERLANDS—FEDERAL REPUBLIC OF GERMANY

TREATY ON THE DELIMITATION OF THE CONTINENTAL SHELF  
UNDER THE NORTH SEA

*Signed at Copenhagen January 28, 1971 \**

The Kingdom of the Netherlands and the Federal Republic of Germany,

In order to fix the boundaries between the parts of the continental shelf under the North Sea to which each party is entitled, in so far as this was not already done under the Treaty of December 1, 1964 concerning the boundary delimitation of the continental shelf close to the coast,

Also wishing to regulate the economic use of the continental shelf in so far as their joint interests demand such regulation,

On the basis of the judgment of the International Court of Justice of February 20, 1969 on the disputes between the Federal Republic of Germany on one hand and the Kingdom of Denmark and the Kingdom of the Netherlands on the other, on the delimitation of the continental shelf under the North Sea,

With due observance of the boundaries of the continental shelf which have not been fixed by the judgment of the International Court of Justice,

Have agreed as follows:

\* English translation provided by the U. S. Department of State; also reprinted in 10 Int. Legal Materials 607 (1971).

## ARTICLE 1

(1) In addition to that part of the boundary fixed under the Treaty of December 1, 1964, the boundary between the Dutch and German parts of the continental shelf under the North Sea is formed by great circles arcs between the points given below, in the same order:

E3 as fixed in the Treaty of December 1, 1964

E4: 54°11'12" N, 06°00'00" E

E5: 54°37'12" N, 05°00'00" E

E6: 55°00'00" N, 05°00'00" E

E7: 55°20'00" N, 04°20'00" E

E8: 55°45'54" N, 03°22'13" E

The location of points E4 to E8 inclusive is expressed in latitude and longitude according to European co-ordinates (1st Settlement 1950).

(2) The boundary's terminal point E8 is the point of intersection of the boundaries between the Dutch, German, and English parts of the continental shelf under the North Sea.

(3) By way of illustration, this boundary, as well as the part of the boundary fixed by the Treaty of December 1, 1964, are drawn on the map of Annex 1 of this Treaty.

## ARTICLE 2

(1) If one of the Contracting Parties proves the presence of minerals in or on the continental shelf and the other Contracting Party is of the opinion that this definite presence extends to its part of the continental shelf, the latter may then inform the former of this, accompanied by data on which the latter bases its judgment. If the first-mentioned party does not share the other party's opinion, the arbitration court will, on request of one of the parties, make a decision in accordance with Article 5.

(2) If the Contracting Parties agree, or if the arbitration court decides upon the existence of minerals extending to both parties' parts in or on the continental shelf, the Governments of the Contracting Parties will then issue regulations for exploitation, which, with due observance of the parties' interests, will be based on the principle that each party is entitled to minerals in or on its part of the continental shelf. In case minerals have already been obtained from those parts claimed by the other party, the regulation will also provide for an appropriate settlement.

(3) A regulation as envisaged in (2) can also be made, wholly or partly by the persons entitled thereto, with the permission of the Contracting Parties' Governments. The person who has an exploitation right for the respective minerals is the one who is so entitled.

(4) If a regulation, in conformity with (2) or (3), cannot be effected within a reasonable period of time, each Contracting Party may appeal to

the arbitration court in accordance with Article 5. In such cases the arbitration court may also pronounce judgment *EX AEQUO ET BONO*. After hearing the Contracting Parties, the court is authorized to make preliminary provisions.

### ARTICLE 3

Without prejudice to the rules of international law concerning the construction of pipelines on the continental shelf, pipelines which are constructed on the continental shelf in connection with the exploitation of minerals with a view to stopping sea pollution and other dangers are subject to stipulations, concerning the construction and use of pipelines, of the Contracting Party on whose part of the continental shelf such pipelines are constructed.

### ARTICLE 4

(1) Upon application, exploration and exploitation licenses for petroleum and natural gas in accordance with German law, as well as for other materials obtained through this exploitation, shall be granted to enterprises mentioned in Annex 2 of this Treaty for the areas indicated in the same Annex which are part of the German continental shelf according to Article 1 of this Treaty.

(2) Within one year after this Treaty becomes effective, the license envisaged in the preceding paragraph must be obtained from the proper German authority.

### ARTICLE 5

(1) Disputes between the Contracting Parties on the interpretation or application of this Treaty or of the regulation made as a result of paragraph 2 of Article 2 will be settled by negotiation as far as possible.

(2) If a dispute cannot be settled in this way within a reasonable period of time, one of the Contracting Parties may apply to an arbitration court in order to come to a decision.

(3) The arbitration court is appointed *AD HOC*. If the Contracting Parties, by means of a simplified procedure in joint consultation, do not appoint one single arbiter to settle the dispute, an arbitration court of three persons will be composed in this manner:

Each Contracting Party appoints one member and those two members reach agreement on a citizen of a third State, who will be elected chairman.

The members must be elected within two months and the chairman within another two months after one of the parties has requested settlement of the dispute by an arbitration court.

(4) If the periods mentioned in the third paragraph cannot be met, either of the Contracting Parties may request the President of the International Court of Justice to make the required appointment. If the President has the same nationality as one of the Contracting Parties or if he is unable to carry out his duties, the appointment will be carried out by the Vice President. If the Vice President is also of the same nationality as one of the Contracting Parties, or also engaged in other duties, the appointment will be made by one of the Court of Justice's members, next in rank, who has not the same nationality nor is engaged.

(5) The arbitration court shall decide by majority. Each of the Contracting Parties shall bear the cost of its member and of its representation at the arbitral procedure; the chairman's charges as well as other expenses are shared by the two parties.

(6) The arbitration court or the single arbiter shall decide on the basis of international law which is applicable between the Contracting Parties. The decision shall be binding.

(7) The arbitration court or the single arbiter shall determine the procedure, in so far as this is not determined by this Treaty or by the Contracting Parties with the establishment of the arbitration court or the appointment of the single arbiter.

#### ARTICLE 6

Articles 2 and 3, as well as Article 5 as far as this concerns the settlement of disputes over the interpretation or application of Articles 2 and 3, shall be applied in the same way with respect to that area of the continental shelf near the coast on which a boundary has been established by the Treaty of December 1, 1964.

#### ARTICLE 7

This Treaty also applies to Land Berlin, unless the Government of the Federal Republic of Germany informs the Government of the Kingdom of the Netherlands to the contrary within three months after the Treaty becomes effective.

#### ARTICLE 8

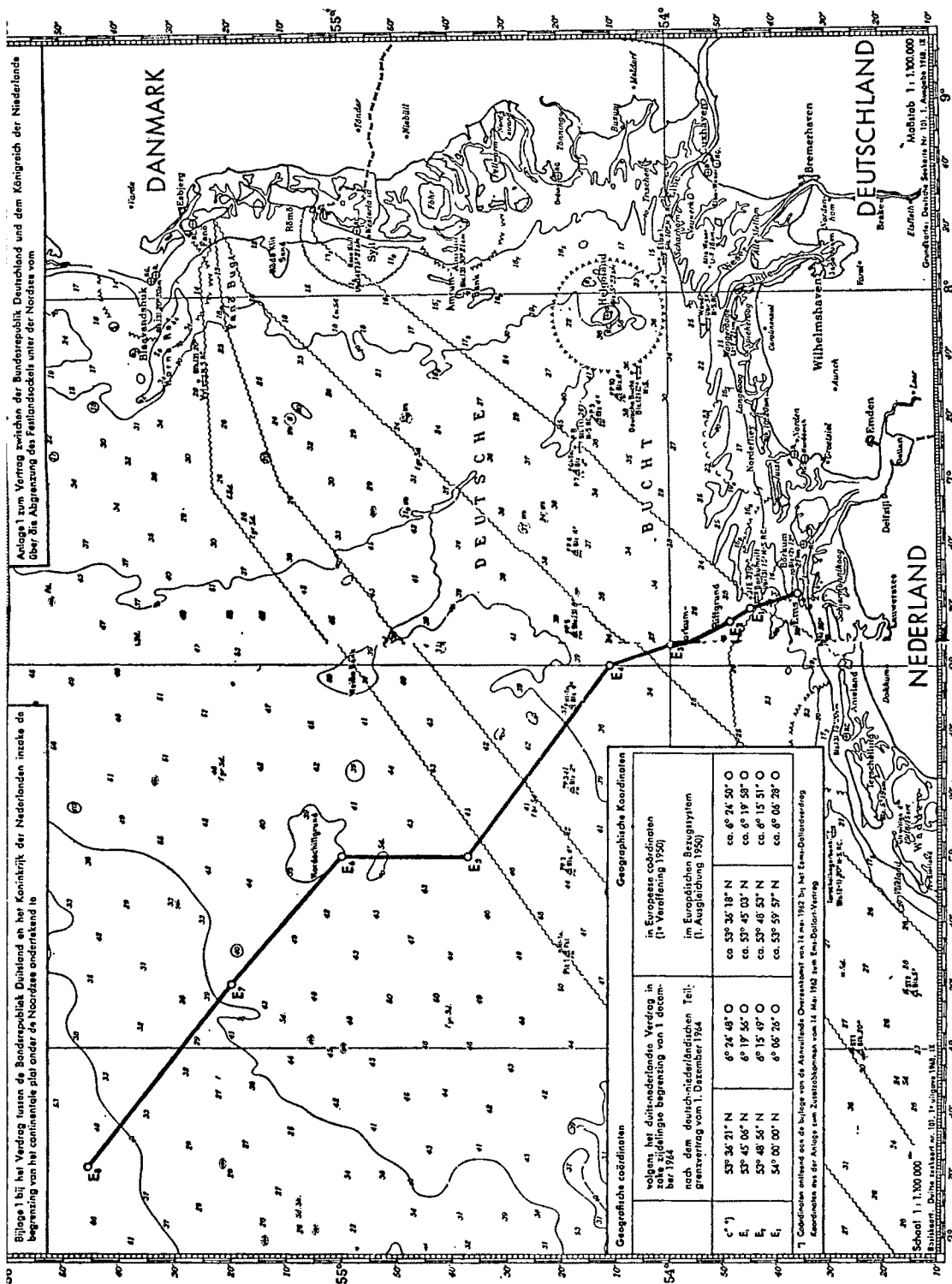
(1) This Treaty shall be ratified. The instruments of ratification shall be exchanged in Bonn.

(2) This Treaty becomes effective one month after the exchange of the instruments of ratification takes place.

In witness whereof the Plenipotentiaries thereto have signed the present Treaty.

DONE at Copenhagen, January 28, 1971, in duplicate, in the Dutch and German languages, both texts being equally authoritative.

## ANNEX I





## ANNEX 2

## (to Article 4)

Enterprises holding concessions	Areas <sup>1</sup> for which licenses can be requested
1. Amoco Hanseatic Petroleum Company	B/7, B/10
2. Exploratie- en Produktie- maatschappij Dyas N.V.	
3. Gelsenberg AG	
1. Gewerkschaft Norddeutschland	B/15, C/16
2. German Gulf Oil Production Company	
Gewerkschaft Brigitta	B/14, B/18, G/10
1. Entreprise de Recherches et d'Activités Pétrolières	G/4, G/7
2. Société Nationale des Pétroles d'Aquitaine	
3. Compagnie Française des Pétroles	
4. Eurafrep N.V.	
5. Corexland N.V.	
6. Cofraland N.V.	
Placid International Oil Ltd.	G/11, G/14
1. Deutsche Tenneco Oil Company	A/6, A/9, A/12
2. Monsanto Oil Company of Germany	
3. Ethyl Germany Inc.	
4. N.V. Laura & Vereeniging	

## UNITED STATES—SPAIN

## TREATY ON EXTRADITION

*Signed at Madrid May 29, 1970; ratifications exchanged June 16, 1971;  
in force June 16, 1971 \**

The President of the United States of America and The Chief of State of Spain, desiring to make more effective the co-operation of the two

<sup>1</sup> Specification of the licensed areas according to the map attached to the Royal Decree of January 27, 1967 for the execution of Article 12 of the Mining Law, Continental Shelf (*Dutch Government Gazette* 1967, 24).

\* T.I.A.S., No. 7136. This treaty terminates and replaces the Extradition Treaty and Protocol between the United States and Spain signed June 15, 1904, and August 13, 1907, respectively, and which entered into force April 6, 1908, 35 Stat. 1947. The new treaty is here published to indicate the modernization of extradition treaties of the United States to cover particularly the offense of hijacking, which, by the provisions of the present treaty, is presumed to be a common crime under certain conditions.

countries in the repression of crime through the rendering of maximum assistance in matters of extradition,

Have decided to conclude a Treaty and to this end have named as their representatives:

The President of the United States of America, The Honorable William P. Rogers, Secretary of State,

The Chief of State of Spain, His Excellency Señor Gregorio Lopez Bravo de Castro, Minister of Foreign Affairs, who have agreed as follows:

#### ARTICLE I

In accordance with the conditions established in this Treaty, each Contracting Party agrees to extradite to the other, for prosecution or to undergo sentence, persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article III.

#### ARTICLE II

A. Persons shall be delivered up according to the provisions of this Treaty for any of the following offenses provided that these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year:

1. Murder; infanticide; parricide; manslaughter.
2. Abortion.
3. Rape; statutory rape; indecent assault, including sodomy and unlawful sexual acts with or upon minors under the age specified by the penal laws of both Contracting Parties.
4. Aggravated injury or mutilation.
5. Procuration.
6. Willful nonsupport or willful abandonment of a child or spouse when for that reason the life of that child or spouse is or is likely to be endangered.
7. Bigamy.
8. Kidnapping or abduction; child stealing; false imprisonment.
9. Robbery or larceny or burglary; housebreaking.
10. Embezzlement; malversation; breach of fiduciary relationship.
11. Obtaining money, valuable securities or property, by false pretenses, by threat of force or by other fraudulent means including the use of the mails or other means of communication.
12. Any offense relating to extortion or threats.
13. Bribery, including soliciting, offering and accepting.
14. Receiving or transporting any money, valuable securities or other property knowing the same to have been obtained pursuant to a criminal act.
15. Any offense relating to counterfeiting or forgery; making a false statement to a government agency or official.
16. Any offense relating to perjury or false accusation.
17. Arson; malicious injury to property.

18. Any malicious act that endangers the safety of any person in a railroad train, or aircraft or vessel or bus or other means of transportation.
19. Piracy, defined as mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel, any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.
20. Any offense against the bankruptcy laws.
21. Any offense against the laws relating to narcotic drugs, psychotropic drugs, cocaine and its derivatives, and other dangerous drugs, including cannabis, and chemicals or substances injurious to health.
22. Any offense relating to firearms, explosives, or incendiary devices.
23. Unlawful interference in any administrative or juridical proceedings by bribing, threatening, or injuring by any means, any officer, juror, witness, or duly authorized person.

B. Extradition shall also be granted for participation in any of the offenses mentioned in this article, not only as principal or accomplices, but as accessories, as well as for attempt to commit or conspiracy to commit any of the aforementioned offenses, when such participation, attempt or conspiracy is subject, under the laws of both Parties, to a term of imprisonment exceeding one year.

C. If extradition is requested for any offense listed in paragraphs A or B of this article and that offense is punishable under the laws of both Contracting Parties by a term of imprisonment exceeding one year, such offense shall be extraditable under the provisions of this Treaty whether or not the laws of both Contracting Parties would place that offense within the same category of offenses made extraditable by paragraphs A and B of this article and whether or not the laws of the requested Party denominate the offense by the same terminology.

D. Extradition shall also be granted for the above mentioned offenses, even when, in order to recognize the competent federal jurisdiction, circumstances such as the transportation from one State to another, have been taken into account and may be elements of the offense.

### ARTICLE III

A. For the purposes of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight or if any such vessel is on the high seas when the offense is committed. For purposes of this Treaty an aircraft shall be considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

B. Without prejudice to paragraph A, 1 of Article V, when the offense for which extradition has been requested has been committed outside

the territory of the requesting Party, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances, and if the person whose surrender is sought is not also the subject of a request from another state whose jurisdiction over the person may take preference for territorial reasons and in respect of which there exists an equal possibility of acceding to a request for extradition.

#### ARTICLE IV

Neither of the Contracting Parties shall be bound to deliver up its own nationals, but the executive authority of the United States and the competent authority of Spain shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

#### ARTICLE V

A. Extradition shall not be granted in any of the following circumstances:

1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.
2. When the person whose surrender is sought has been tried and acquitted or has undergone his punishment in a third state for the offense for which his extradition is requested.
3. When the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of either of the Contracting Parties.
4. When the offense in respect of which the extradition is requested is regarded by the requested Party as an offense of a political character, or that Party has substantial grounds for believing that the request for extradition has been made for the purpose of trying or punishing a person for an offense of the above mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the government on which the requisition is made shall decide.
5. When the offense is purely military.

B. For the purposes of the application of subparagraph A, 4 of this article, the attempt, whether consummated or not, against the life of the Head of State or of a member of his family shall not be considered a political offense or an act connected with such an offense.

C. For the same purposes of application of subparagraph A, 4 of this article an offense committed by force or intimidation on board a commercial aircraft carrying passengers in scheduled air services or on a charter basis, with the purpose of seizing or exercising control of such aircraft, will be presumed to have a predominant character of a common crime when the consequences of the offense were or could have been grave. The fact that the offense has endangered the life or jeopardized

the safety of the passengers or crew will be given special consideration in the determination of the gravity of such consequences.

#### ARTICLE VI

If a request for extradition is made under this Treaty for a person who at the time of such request is under the age of eighteen years and is considered by the requested Party to be one of its residents, the requested Party, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting Party that the request for extradition be withdrawn, specifying the reasons therefor.

#### ARTICLE VII

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be denied unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

#### ARTICLE VIII

The requested Party may, after a decision on the request has been rendered by a court of competent jurisdiction, defer the surrender of the person whose extradition is requested when that person is being proceeded against or is serving a sentence in the territory of the requested Party for an offense other than that for which extradition has been requested until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.

#### ARTICLE IX

The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with this Treaty and with the law of the requested Party. The person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

#### ARTICLE X

A. The request for extradition shall be made through the diplomatic channel.

B. The request shall be accompanied by:

1. A description of the person sought;
2. A statement of the facts of the case;
3. The text of the applicable laws of the requesting Party including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitations of the legal proceedings or the enforcement of the penalty for the offense.

C. 1. When the request relates to a person already convicted, it must be accompanied by:

When emanating from the United States, a copy of the judgment of conviction and of the sentence, if it has been passed; or

When emanating from Spain, a copy of the sentence.

2. In any case, a statement showing that the sentence has not been served or how much of the sentence has not been served shall accompany the request.

D. When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting Party.

The requested Party may require the requesting Party to produce prima facie evidence to the effect that the person claimed has committed the offense for which extradition is requested. The requested Party may refuse the extradition request if an examination of the case in question shows that the warrant is manifestly ill-founded.

E. If a question arises regarding the identity of the person whose extradition is sought, evidence proving the person requested is the person to whom the warrant of arrest or sentence refers shall be submitted.

F. The documents which, according to this article, shall accompany the extradition request, shall be admitted in evidence when:

In the case of a request emanating from Spain they bear the signature of a judge or other juridical or public official and are certified by the principal diplomatic or consular officer of the United States in Spain; or

In the case of a request emanating from the United States they are signed by a judge, magistrate or officer of the United States and they are sealed by the official seal of the Department of State and are certified by the Embassy of Spain in the United States.

G. The documents mentioned in this article shall be accompanied by an official translation into the language of the requested Party which will be at the expense of the requesting Party.

#### ARTICLE XI

A. In case of urgency a Contracting Party may apply to the other Contracting Party for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. This application may be made either through the diplomatic channel or directly between the respective Ministries of Justice.

B. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction or sentence against that person, and such further information, if any, as may be required by the requested Party.

C. On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.

D. A person arrested upon such an application shall be set at liberty upon the expiration of 30 days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article X shall

not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

#### ARTICLE XII

If the requested Party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that Party shall require.

If the person sought is under arrest and the additional evidence or information submitted as aforesaid is not sufficient or if such evidence or information is not received within the period specified by the requested Party, he shall be discharged from custody. However, such discharge shall not bar the requesting Party from submitting another request in respect of the same or any other offense.

#### ARTICLE XIII

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third state unless:

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;
2. He has not left the territory of the requesting Party within 45 days after being free to do so; or
3. The requested Party has consented to his detention, trial, punishment or to his extradition to a third state for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

#### ARTICLE XIV

A Party which receives two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting states it will extradite the person sought, taking into consideration the existing circumstances and particularly the possibility of a later extradition between the requesting states, the seriousness of each offense, the place where the offense was committed, the nationality of the person sought, the dates upon which the requests were received and the provisions of any extradition agreements between the requested Party and the other requesting state or states.

#### ARTICLE XV

The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

In the case of a complete or partial rejection of the extradition request, the requested Party shall indicate the reasons for the rejection.

If the extradition has been granted, the authorities of the requesting and requested Parties shall agree on the time and place of the surrender of the person sought. Surrender shall take place within such time as may be prescribed by the laws of the requested Party.

If the person sought is not removed from the territory of the requested Party within the time prescribed, he may be set at liberty and the requested Party may subsequently refuse to extradite that person for the same offense.

#### ARTICLE XVI

To the extent permitted under the law of the requested Party and subject to the rights of third Parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered upon the granting of the extradition request.

Subject to the qualifications of the first paragraph, the above mentioned articles shall be returned to the requesting Party even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

#### ARTICLE XVII

Expenses related to the transportation of the person sought shall be paid by the requesting Party. The appropriate legal officers of the country in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting Party before the respective judges and magistrates.

No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the requested Party against the requesting Party.

#### ARTICLE XVIII

The ratifications of this Treaty shall be exchanged in Washington as soon as possible.

This Treaty shall enter into force upon the exchange of ratifications and will continue in force until either Contracting Party shall give notice of termination to the other, which termination shall be effective six months after the date of receipt of such notice.

This Treaty shall terminate and replace the Extradition Treaty between the United States and Spain signed at Madrid June 15, 1904 and the Protocol thereto signed at San Sebastian August 13, 1907; however, the crimes listed in that Treaty and Protocol and committed prior to the entry into force of this Treaty shall nevertheless be subject to extradition pursuant to the provisions of that Treaty and Protocol.

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

DONE in duplicate, in the English and Spanish languages, both equally authentic, at Madrid this twenty-ninth day of May, one thousand nine hundred seventy.



## UNITED STATES

ACT TO IMPLEMENT THE CONVENTION ON THE RECOGNITION AND  
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS*July 31, 1970* \*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 9, United States Code, is amended by adding:

"Chapter 2.—CONVENTION ON THE RECOGNITION AND  
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

"Sec.

"201. Enforcement of Convention

"202. Agreement or award falling under the Convention.

"203. Jurisdiction; amount in controversy.

"204. Venue.

"205. Removal of cases from State courts.

"206. Order to compel arbitration; appointment of arbitrators.

"207. Award of arbitrators; confirmation; jurisdiction; proceeding.

"208. Chapter 1; residual application.

## "§201. ENFORCEMENT OF CONVENTION

"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

"§202 AGREEMENT OR AWARD FALLING UNDER  
THE CONVENTION

"An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

\* Public Law 91-368, 91st Cong., 2nd Sess. See article by Martin Domke entitled "The United States Implementation of the United Nations Arbitral Convention," 19 A. J. Comp. Law 574 (1971). The text of the convention (T.I.A.S., No. 6997) is printed at 53 A.J.I.L. 420 (1959). The United States accession with declarations was deposited on Sept 30, 1970 and the convention went into force for the United States Dec. 29, 1970.

### "§203. JURISDICTION; AMOUNT IN CONTROVERSY

"An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

### "§204. VENUE

"An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

### "§205. REMOVAL OF CASES FROM STATE COURTS

"Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of cases otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

### "206. ORDER TO COMPEL ARBITRATION; APPOINTMENT OF ARBITRATORS

"A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

### "§207. AWARD OF ARBITRATORS; CONFIRMATION; JURISDICTION; PROCEEDING

"Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

### “§208. CHAPTER 1; RESIDUAL APPLICATION

“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”

SEC. 2. Title 9, United States Code, is further amended by inserting at the beginning:

“Chapter	Sec.
1. General provisions .....	1
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards .....	201”

SEC. 3. Sections 1 through 14 of title 9, United States Code, are designated “Chapter 1” and the following heading is added immediately preceding the analysis of sections 1 through 14:

### “CHAPTER 1.—GENERAL PROVISIONS”

SEC. 4. This Act shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States.

## INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume 10, Nos. 4, (July) and 5 (September), 1971, of *International Legal Materials: Current Documents*.<sup>1</sup>

### VOLUME X, NUMBER 4 (July, 1971)

JUDICIAL AND SIMILAR PROCEEDINGS	PAGE
International Court of Justice: <i>U.N. Security Council Request for an Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)</i>	
Advisory Opinion .....	677
Declaration of President Zafulla Khan .....	716
Separate Opinions (Excerpts)	
Vice President Ammoun .....	723
Judge Padilla Nervo .....	734
Judge Petrán .....	737
Judge Onyeama .....	741

<sup>1</sup>The annual subscription for six numbers of *International Legal Materials* is \$35.00; there is a concessionary rate of \$15.00 for members of the American Society of International Law. Inquiries and orders should be directed to International Legal Materials, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

	PAGE
Judge Dillard .....	748
Judge de Castro .....	776
Dissenting Opinions (Excerpts)	
Judge Sir Gerald Fitzmaurice .....	780
Judge Gros .....	795

## TREATIES AND AGREEMENTS

Australia-Indonesia: Agreement Establishing <i>Seabed Boundaries</i> ...	830
Union of Soviet Socialist Republics-United Arab Republic: Agree- ment on <i>Friendship and Cooperation</i> .....	836
Union of Soviet Socialist Republics: Draft Treaty Concerning the <i>Moon</i> .....	839

## LEGISLATION AND REGULATIONS

Algeria: Ordinances and Decrees on the <i>Nationalization of Foreign Oil Companies</i> .....	847
--	-----

## OTHER DOCUMENTS

International Atomic Energy Agency: Guidelines for <i>Safeguards Agreements under the Non-Proliferation Treaty</i> .....	855
Special Latin American Coordinating Committee (CECLA)-Euro- pean Communities: Declaration <i>Establishing Machinery for Dia- logue on System of Cooperation</i> .....	873
United States: Documents Concerning <i>Contacts with the People's Republic of China</i> .....	877

## VOLUME X, NUMBER 5 (September, 1971)

## TREATIES AND AGREEMENTS

France-Union of Soviet Socialist Republics-United Kingdom-United States: Agreement and Notes on <i>Berlin</i> .....	895
India-Union of Soviet Socialist Republics: Treaty of <i>Peace, Friend- ship and Co-Operation</i> .....	904
<i>International Telecommunications Satellite Organization</i>	
Intergovernmental Agreement .....	909
Operating Agreement .....	946
Resolution on <i>United Nations Request for Utilization of INTEL- SAT System</i> .....	964
United Nations:	
Draft Convention on <i>Liability for Damage Caused by Objects     Launched into Outer Space</i> .....	965
<i>Proposals Submitted to the 1971 Session of the Committee on     Peaceful Uses of the Sea-Bed</i>	
Summary of the Work of the Committee .....	973
Draft Statute for an International Sea-Bed Authority (Tan- zania) .....	982

	PAGE
Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes (Union of Soviet Socialist Republics) .....	994
Working Paper on the Regime for the Sea-Bed and Ocean Floor and Its Subsoil Beyond the Limits of National Jurisdiction (Latin American Countries) .....	1003
Preliminary Working-Paper Concerning Matters to Be Regulated in an International Sea-Bed Convention (Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands, and Singapore) .....	1011
Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries (United States) .....	1013
United States: Draft Convention on the <i>Regulation of Ocean Dumping</i> .....	1021

## JUDICIAL AND SIMILAR PROCEEDINGS

Switzerland: Federal Supreme Court Decision in X v. Federal Tax Administration ( <i>Examination of Bank Secrecy Principle in Relation to Double Taxation Agreement with United States</i> ) .....	1029
United States:	
Court of Appeals Decision in Heaney v. Spain and Gomero ( <i>Sovereign Immunity; Consular Immunity</i> ) .....	1038
Court of Appeals Decision in Isbrandtsen Tankers v. President of India ( <i>Sovereign Immunity; Waiver of Immunity in Contracts</i> ) .....	1046
Proceedings in Supreme Court in Founding Church of Scientology v. Lord Cromer and Mr. Crowe ( <i>Sovereign Immunity</i> ) .....	1051
Motion for Leave to File Complaint and Complaint .....	1053
Memorandum for the United States Suggesting Immunity ....	1058
Letter from Clerk of the Court to Lord Cromer .....	1058
Supreme Court of Virginia Decision in Jackson v. North America Assurance Society of Virginia ( <i>United States Involvement in Vietnam; Definition of War</i> ) .....	1059

## LEGISLATION AND REGULATIONS

Andean Commission: Resolution on Certain Modifications to Decision Concerning <i>Treatment of Foreign Capital</i> .....	1065
Chile: Constitutional Amendment Concerning <i>Natural Resources and Their Nationalization</i> .....	1067
Venezuela: <i>Hydrocarbons Reversion Law</i> .....	1073

## OTHER DOCUMENTS

Organization of Petroleum Exporting Countries: Resolution Concerning <i>Member Countries' Rights to Participate in Existing Oil Concessions</i> .....	1082
---	------

	PAGE
United Nations Conference on Trade and Development: <i>Generalized System of Preferences</i>	
Decision 75 (S-IV) of the Trade Development Board .....	1083
GATT Authorization of Generalized Preferences .....	1092
United Nations: The Question of <i>Representation of the People's Republic of China</i>	
The Albanian Draft Resolution and Explanatory Memorandum .	1094
The United States Request for Agenda Item and Explanatory Memorandum .....	1100
The United States Draft Resolutions .....	1101

## INDEX TO VOLUME 65

[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article; *P.C.I.J.*, Permanent Court of International Justice]

Académie de Droit International. Recueil des Cours, 1966. *BR*. 632.

Acheson, Dean. Quoted on U. S. action in Korea and war-making power. 32.

Act of state:

*Banco Nacional de Cuba v. First National City Bank of New York*, 431 F. 2d 394, *JD*, 195, letter of Legal Adviser of Department of State to U. S. Supreme Court, 391; 442 F. 2d 530, *JD*, 812.

Injunction against patent action in foreign court. *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.*, 412 F. 2d 577. *JD*. 610.

*Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, U. S. Dist. Ct., C. D. Calif., 1971. *JD*. 815.

*Oliner v. Canadian Pacific Railway Company*, 311 N.Y.S. 2d 429. *JD*. 205.

*South African Airways v. New York State Division of Human Rights*, 315 N.Y.S. 2d 651. *JD*. 403.

*Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F. 2d 686. *JD*. 611.

*Adede, A. O.* *BN*: Verbit, 882.

Aerial hijacking. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 440; ICAO Assembly Declaration, June 30, 1970, 452, Council Res., Oct. 1, 1970, 453; U. N. General Assembly Res. 2645 (XXV), 445; U. N. Security Council Res. 286 (1970), 445; U. N. Secretary General, statement, 447.

Aerospace law. N. M. Matte. *ER*. 843.

Afghanistan, Austria, Belgium *et al.* Preliminary working paper on regime for the sea and seabed beyond national jurisdiction. 766, 767.

Africa. Berlin Conference, 1884-1885, 151; Woronoff, J., Organizing African Unity, *BN*, 877.

Aggression. North Vietnamese and Viet Cong violation of Cambodian territory, J. N. Moore, *LA*, 47, 55; SEATO Treaty, Art. IV quoted, 60; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Assembly Res. 2625 (XXV), 245, 246, R. Rosenstock, *LA* 718; U. S. military action in Cambodia, R. A. Falk, *LA*, 1, 11, W. D. Rogers, *LA*, 30.

Agnew, Vice President Spiro. Quoted on U. S. military action in Cambodia. 16.

Aguayo, Leopoldo G. La Nacionalización de Bienes Extranjeros en América Latina. *BN*. 880.

Air carriers, international. Liability for death or injury to passengers. Protocol of 1971 to amend the Warsaw Convention of 1929 as amended at The Hague, 1955. 671.

Air law. International Conference, The Hague, 1970. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970. 440.

Air transportation, international:

Air carrier's liability. Limitation of. *Molitch v. Irish International Airlines*, 436 F. 2d 42. *JD*. 827.

Aircraft hijacking in. Convention for Suppression of Seizure of Aircraft, 1970, 440; ICAO Assembly Declaration, June 30, 1970, 452, Council Res., Oct. 1, 1970, 453; U. N. General Assembly Res. 2645 (XXV), 445; U. N. Security Council Res. 286 (1970), 445; U. N. Secretary General, statement, 447.

- Racial discrimination in. *South African Airways v. New York State Division of Human Rights*, 315 N. Y. S. 2d 651. *JD.* 403.
- Warsaw Convention of 1929 as amended at The Hague, 1955. Protocol to amend, 1971. 670.
- Aircraft. Unlawful seizure of. Convention for Suppression of, 1970, 440; ICAO Assembly Declaration, June 30, 1970, 452, Council Res., Oct. 1, 1970, 453; U. N. General Assembly Res. 2645 (XXV), 445; U. N. Security Council Res. 286 (1970), 445; U. N. Secretary General, statement, 447.
- Akehurst, Michael. A Modern Introduction to International Law. *BR.* 643.
- Al-Baharna, Husain M. The Legal Status of the Arabian Gulf States. *BR.* 227.
- Alder, Claudius. Koordination und Integration als Rechtsprinzipien. *BR.* 413.
- Aldrich, George H., Deputy Legal Adviser, Department of State. Comments on legality of U. S. action in Cambodia, *LA*, 76; letter to Professor Jerome A. Cohen regarding Chinese representation in U. N. and Charter provisions. 396.
- Aleksidze, L. A. Quoted on *jus cogens* in international law. 799.
- Alexander, Lewis M. *BR:* Oudendijk, 841.
- Alexandrowicz, Charles H. The juridical expression of the sacred trust of civilization. *CN.* 149.
- Aliens:
- Admission of. *Rosenberg v. Yee Chien Woo*, 402 U. S. 49, *JD.* 828; *Silverman v. Rogers*, 437 F. 2d 102, *JD.* 831; commuters from Canada or Mexico, immigrant status, *Gooch v. Clark*, 433 F. 2d 74, *JD.* 618.
- Enemy. Property, vesting of. *Bonnar v. United States*, 438 F. 2d 540. *JD.* 820.
- Expulsion and deportation. American Convention on Human Rights, 1969, 686; *Molefi v. Principal Legal Adviser*, [1970] 3 W.L.R. 338, *JD.* 407.
- Injuries abroad, jurisdiction of. *Fiorenza v. United States Steel International, Ltd.*, 311 F. Supp. 117. *JD.* 201.
- Non-resident. Inheritance by. *Bjarsch v. DiFalco*, 314 F. Supp. 127, *JD.* 398; *In re Estate of Horman*, 90 Calif. Repr. 439, *JD.* 615; *In re Estate of Scardigli*, 467 Pac. 2d 841, *JD.* 200.
- Property. Nationalization of. *Aguayo, L. G., La Nacionalización de Bienes Extranjeros en América Latina*, *BN*, 880; *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F. 2d 394, *JD.* 195.
- Suits in U. S. courts. *Fiorenza v. United States Steel International, Ltd.*, 311 F. Supp. 117. *JD.* 201.
- Alldridge, Williamson v., 320 F. Supp. 840. *JD.* 624.
- Amerasinghe, C. F. Studies in International Law. *BN.* 865.
- American Convention on Human Rights, 1969. 679; Declaration of El Salvador, 702; Reservation of Uruguay, 701; Statements: Argentina, 702; Chile, 701; Ecuador, 701; Mexico, 702; Art. 64 on advisory opinions of Court of Human Rights, 697, quoted, 321; restrictions on interpretation, 688.
- American Law Institute. Restatement (Second) on Foreign Relations Law of the United States. Quoted on definition of state, 352; on diplomatic protection of shareholder claims, 523.
- American Society of International Law. Annual meeting, 65th, *CN*, 176, 381, 587; Constitution, amendment of, 591; regional meetings: Chicago, 1970, M. C. Bassiouni, *CN*, 172; Denver, 1970, 1971, V. P. Nanda, *CN*, 800, 801; Iowa City, 1970, E. J. Lemons, *CN*, 174; New School for Social Research, 1971, N. S. Rodley, *CN*, 802; San Diego, 1971, S. H. Lay, *CN*, 803; Syracuse, 1971, L. F. E. Goldie, *CN*, 585; resolution on publication of U. S. Foreign Relations, 591.
- Amoun, Judge Fouad, I.C.J. Opinion cited on lump-sum claims settlements as international law source. 528.
- Amsterdam, University of. Van Harvel Criminological Seminar. Justiz und NS-Verbrechen. Sammlung Deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945-1966. *BR.* 423.



- Anderson, Stanley V. *BR*: Etzioni, 427.
- Andrassy, Juraj. *International Law and the Resources of the Sea*. *BN*, 867; cited on the continental shelf, 762, 766.
- Angelo, Homer G. *BN*: Merryman, 663.
- Anna Maria, The. Seizure by belligerents in neutral port. Cited. 52.
- Antarctic. Claims in. *The Ross Dependency*, F. M. Auburn, *CN*, 578; *Antarctic Treaty*, Art. IV, quoted, 579.
- Antiquities. *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership*, 1970, 887; *U. S.-Mexican Treaty for the Recovery and Return of Stolen Properties*, 1971, 895.
- Apartheid. As crime against humanity. *U. N. Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity*. 481, 491, 498.
- Arab-Israeli conflict. Application of *Geneva Conventions of 1949* to, statement by Department of State, 809; laws of war and: *Military Prosecutor v. Omar Mahmud Kassem et al.*, *Mil. Ct. Ramallah*, 1969, *JD*, 409; *Military Prosecutor v. Adnan Ibn Adal Ibn Badawi al Bahsh*, *Mil. Ct. Nablus*, 1969, *JD*, 410; neutralization of Israel, J. F. Murphy, *CN*, 167.
- Arabian Gulf States. *The Legal Status of*. H. M. Al-Baharna. *BR*. 227.
- Arango Ruiz, Gaetano. Quoted on Declaration on Principles concerning Friendly Relations among States and general principles of international law. 724.
- Araya, Jonas Guerra. *Derecho y Practica Consulares*. *BR*. 228.
- Arbitral awards, foreign. Recognition and Enforcement of, *Convention on*. *U. S. Act to implement*. 922.
- Arbitral Tribunal for Agreement on German External Debts, 1953. *U. S.-German dispute regarding Young Loan before*. 805.
- Arbitration, international:
- And adjudication as substitute for war, L. Gross, *LA*, 253, 269; and conciliation since World War II, 268.
  - Commercial. Agreements for, *East European Rules on Validity*, L. Kos-Rabcewicz-Zubkowski, *BN*, 881; *Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, *JD*, 198; G. B. Michael v. S. S. Thanasis, 311 F. Supp. 170, *JD*, 202; *U. S. Act to Implement Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 1970, 922.
  - Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970. 443.
  - Germany-Denmark Treaty on the North Sea Continental Shelf*, 1971. 905, 906.
  - Netherlands-Germany Treaty on the North Sea Continental Shelf*, 1971. 910, 911.
  - Rann of Kutch award*. J. G. Vetter. *LA*. 346.
  - U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*. Gen. Assembly Res. 2625 (XXV). 247.
- Archaeological materials. *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership*, 1970, 887; *U. S.-Mexican Treaty on Recovery and Return of Stolen Properties*, 1971, 895.
- Arctic Sea. Canadian anti-pollution legislation. L. Henkin. *Ed*. 131.
- Argentina. *Regimen Constitucional de los Tratados*, J. R. A. Vanossi, *BN*, 433; statement on American Convention on Human Rights, 702.
- Argentina-United States. *Treaty of Friendship, Commerce and Navigation*, 1853. Exemption of nationals from compulsory military service. *Vazquez v. Attorney General of the United States*, 433 F. 2d 516. *JD*. 625.
- Armed attack. Self-defense against, legality of *U. S. intercession in Cambodia*, J. N. Moore, *LA*, 46, 55, 58; *SEATO Treaty*, Art. IV quoted, 60; *U. S. military operations in Cambodia*, G. H. Aldrich, *LA*, 76, R. A. Falk, *LA*, 1, J. L. Hargrove, *LA*, 81, J. N. Moore, *LA*, 58, 64, *Constitutionality of*, W. D. Rogers, *LA*, 26.
- See also *Aggression and Force*, use of.
- Armed conflict, the law of. Schwarzenberger, Georg. *International Law as Applied by International Courts and Tribunals*. *BR*. 635.
- See also *War*.

- Armed forces. U. S. President's power to use abroad. R. H. Bork, *LA*, 79; R. A. Falk, *LA*, 6; J. N. Moore, *LA*, 38, 61, 66; W. D. Rogers, *LA*, 26; proposal of Representative Findley, 72.
- Armed forces abroad. Criminal jurisdiction over. *Bell v. Clarke*, 437 F. 2d 200, *JD*, 826; *Williamson v. Alldridge*, 320 F. Supp. 840, *JD*, 624.
- Armistice lines, violation of. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Gen. Assembly Res. 2625 (XXV). 246; R. Rosenstock, *LA*, 719.
- Arms control and limitation. *See* Disarmament.
- Arrest pending extradition request. Spain-United States Extradition Treaty, 1970. 919.
- Artistic objects. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership, 1970, 887; U. S.-Mexican Treaty on Recovery and Return of Stolen Properties, 1971, 895.
- Artwohl v. United States, 434 F. 2d 1319. *JD*. 608.
- Asia. United Nations Peacekeeping, 1946-1967. R. Higgins. *BR*. 221.
- Assembly, right of. American Convention on Human Rights, 1969. 685.
- Assessors, I.C.J. Art. 7 (1) of Rules of Court quoted, 277; Art. 30 of Statute quoted, 277.
- Association, freedom of. American Convention on Human Rights, 1969, 685; Human Rights and International Action, E. B. Haas, *BN*, 871.
- Asylum, right of. American Convention on Human Rights, 1969, 686; Memorandum of Legal Adviser's Office, Department of State, regarding attempted defection of Lithuanian seaman in U. S. territorial waters, 389; O.A.S. Convention to Prevent and Punish Acts of Terrorism in form of Crimes against Persons and Related Extortion that Are of International Significance, 1971, 899, Panama statement regarding Panama Canal Zone, 901.
- Atherton, Alexine. *BN*: Kutzner, 877.
- Auburn, F. M. Legal rights in the Ross Dependency. *CN*. 578.
- Aufricht, Hans. *BR*: Hoffmann, 225.
- Austin, Warren. Quoted on U. S. recognition of Israel. 557.
- Austria. National minorities in, Veiter, T., *Das Recht der Volksgruppen und Sprachminderheiten in Österreich*, *BN*, 873; neutralization of, cited, 169.
- Avenol, Joseph, Secretary General of the League of Nations, 1933-1940. J. Barros. *BR*. 862.
- Aviation, international. Pillai, K. G. J. *The Air Net: The Case against the World Aviation Cartel*. *BR*. 227.
- Axline, W. Andrew. *BN*: Brinkhorst and Schermers, 233; Green, 233.
- Bacteriological methods of warfare. Geneva Protocol, 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers to the President, 189; U. S. proposed reservation, 190, proposed understandings, 191.
- Badawi al Bahsh, Adnan Ibn Adal Ibn, *Military Prosecutor v.*, Mil. Ct. Nablus, 1969. *JD*. 410.
- Bagge, Algot. Quoted on treaties as source of international law. 526.
- Bahrain dispute, Iran-Great Britain. Resolution of. E. Gordon. *CN*. 560.
- Bailey, Sydney D. Voting in the Security Council. *BR*. 425.
- Banco Nacional de Cuba v. First National City Bank of New York, 431 F. 2d 394, *JD*, 195, letter of Legal Adviser, Department of State, to U. S. Supreme Court re application of act of state doctrine, 391; 442 F. 2d 530, *JD*, 812.
- Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398. Quoted on international law of state responsibility. 312.
- Bankruptcy. Application of U. S. Act to citizens abroad. *Stegeman v. United States*, 425 F. 2d 984. *JD*. 211.
- Barcelona Traction, Light and Power Co., Ltd., case, *Belgium v. Spain*, [1964] I.C.J. Rep. 6. Quoted, 329, 331, 524; [1970] I.C.J. Rep. 3, quoted, 334, 336, 337, 338, 339, 341, 342, 523, 524, 525, 526, 529, 531, 533; H. W. Briggs, *LA*, 327; R. B.

- Lillich, *Ed*, 522; relevance to nationality of corporate investment under investment guaranty schemes, S. D. Metzger, *Ed*, 532.
- Barros, James. Betrayal from Within: Joseph Avenol, Secretary-General of the League of Nations, 1933-1940. *BF*. 862.
- Bassiouni, M. Cherif. Regional conference of the ASIL, Chicago, 1970. *CN*. 172.
- Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau, 311 F. Supp. 68. *JD*. 198.
- Baxter, R. R. International Co-operation to Curb Fluvial and Maritime Pollution, cited, 84; *BR*: Kiss, 839; Schwarzenberger, 635.
- Baxter, R. R., and T. Buergenthal. Legal Aspects of the Geneva Protocol of 1925. Quoted on U. S. invocation of Connally Reservation in I.C.J. case. 374.
- Bebler, Aleš. Dissenting opinion in Rann of Kutch arbitration. Quoted. 350.
- Bebr, G. *BR*: Alder, 413.
- Becker, Loftus. Quoted on application of Connally reservation to U. S. acceptance of I.C.J. compulsory jurisdiction. 375.
- Beckett, Sir Eric. Cited on travaux préparatoires and treaty interpretation, 366; quoted on interpretation of treaties by international adjudication, 365.
- Beesley, J. A. Statement before U. N. Committee on Peaceful Uses of the Sea-Bed. Cited. 769.
- Behrman, Jack N. National Interests and the Multinational Enterprise, *BR*, 851; *BR*: Rolfe and Damm, 657.
- Belgium. *Jus standi* in Barcelona Traction case, I.C.J., H. W. Briggs, *LA*, 327; submissions in Barcelona Traction Co. case, 327, 334, 337, 339, quoted 328, 329; R. B. Lillich, *Ed*, 523.
- Belgium-Spain. Barcelona Traction, Light and Power Co. Ltd. case, [1970] I.C.J. Rep. 3. See Barcelona Traction, Light and Power Co. Ltd. case above.
- Bell v. Clarke, 437 F. 2d 200. *JD*. 823.
- Bellei v. Rusk; Rogers v. Bellei, 396 U. S. 811; 397 U. S. 1060; 398 U. S. 935. Cited. 213.
- Belligerent occupation. Statement by Department of State regarding Israeli activities in occupied Arab territory. 809.
- Belligerents. Rights and duties with regard to neutral states. J. N. Moore. *LA*. 47, 57.
- Bemis, S. F., Diplomatic History of the United States. Quoted on Act of Berlin, 1885. 158.
- Berk v. Laird, 429 F. 2d 302. *JD*. 401.
- Berlin. Four-Power rights respecting. U. S. note to German Federal Republic regarding its non-aggression treaty with U.S.S.R., 1970. 178.
- Berlin Conference, 1884-1885 on Africa. 151; Commission report, quoted on natives of Africa, 155; General Act, 1885, 155, 157, provisions regarding occupation of African territory by European Powers, 155, U. S. Delegate quoted on, 156.
- Berlin, Land. Application of treaty to. Denmark-Germany Treaty on Delimitation of the North Sea Continental Shelf, 1971, 907; Germany-Netherlands Treaty on Delimitation of the North Sea Continental Shelf, 1971, 912.
- Bethell, Leslie. The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question, 1807-1869. *BN*. 663.
- Bethlehem Steel Corporation v. Board of Commissioners of the Department of Water and Power of the City of Los Angeles, 30 Calif. Reprtr. 800. *JD*. 609.
- Biafra. Was it at any time a state in international law? D. A. Ijalaye. *CN*. 551.
- Biological warfare. Geneva Protocol of 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 190; proposed U. S. understandings, 191.
- Bjarsch v. DiFalco, 314 F. Supp. 127. *JD*. 398.
- Black, Cyril E., and R. A. Falk. The Future of the International Legal Order. *BR*. 218.
- Bleicher, Samuel A. Quoted on General Assembly resolutions as source of law. 777.

- Blount, Williams v., 314 F. Supp. 1356. *JD.* 405.
- Bobrov, R. L. Cited on international personality of international organizations, 504; quoted on the status of the United Nations in international law, 505.
- Bonnar v. United States, 438 F. 2d 540. *JD.* 820.
- Book notes, 232, 430, 660, 865; book reviews, 214, 411, 632, 836; books received, 239, 437, 665, 884.
- Bork, Robert H. Comments on Constitutionality of U. S. action in Cambodia. *LA.* 79.
- Boskey, Bennett, and M. Willrich. Nuclear Proliferation. Prospects for Control. *BN.* 878.
- Boundaries:
- Demarcation of. Rann of Kutch award. J. G. Wetter. *LA.* 355.
  - Germany-Poland. Krülle, S., Die Völkerrechtlichen Aspekte des Oder-Neisse-Problems, *BN*, 874; K. Skubiszewski, Zachodnia Granica Polski, *BR*, 418.
  - India's China War. N. Maxwell. *BR.* 859.
  - International Seabed Area. U. S. draft U. N. Convention. Summary. 181, 183.
  - North Sea continental shelf. Germany-Denmark-Netherlands Protocol, 1971, 901; Germany-Denmark Treaty, 1971, 904; Netherlands-Germany Treaty, 1971, 909.
  - Postwar. Federal Republic of Germany-U.S.S.R. Treaty Renouncing Force, 1970. U. S. note to the German Government, Aug. 11, 1970. 178.
  - The Rann of Kutch arbitration, India-Pakistan. J. G. Wetter. *LA.* 346.
  - Seaward. Delimitation of. Texaco, Inc. v. Hickel, 437 F. 2d 636. *JD.* 823.
  - Violation of. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly Res. 2625 (XXV). 246; R. Rosenstock, *LA*, 718; statement by William P. Rogers on U. S. position, quoted, 718, 719.
- Boundary disputes. Jurisdiction of. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., U. S. Dist. Ct., C.D. Calif., 1971. *JD.* 815.
- Bowett, D. W. Self-Defence in International Law. Quoted on collective self-defense. 13, 55.
- Bradley, Martin A., and E. McWhinney. New Frontiers in Space Law. *BN.* 234.
- Brazil. Slave trade, abolition of, Britain, Brazil and the Slave Trade Question, 1807-1860, L. Bethell, *BN*, 663; territorial waters, Decree of April 1, 1971, 764.
- Bretton Woods Conference, 1944. Consideration of unauthorized changes in monetary par value and exchange rates. 117; Committee report quoted on, 119; Preliminary Draft of Suggested Articles of Agreement for Establishment of an International Monetary Fund, 117; Preparatory Conference, Atlantic City, 116; United Kingdom-United States Joint Proposal, Committee report quoted, 119.
- Bretton Woods system. Unauthorized changes of par value and fluctuating exchange rates in. J. Gold. *LA.* 113.
- Brierly, James L. The Law of Nations. Quoted on recognition of new states, 557, 558; on use of force in self-preservation, 723.
- Briggs, Herbert W. Barcelona Traction: the *jus standi* of Belgium, *LA*, 327; J. L. Kunz, *Ed*, 129; the travaux préparatoires of the Vienna Convention on the Law of Treaties, *LA*, 705; *BR*: British Year Book of International Law, 1967, 429; De Visscher, 412.
- Brinkhorst, L. J., and H. G. Schermers. Judicial Remedies in the European Communities. *BN.* 233.
- British Year Book of International Law, 1967. *BR.* 429.
- Brokaw v. Seatrain U. K. Ltd., [1971] 2 W.L. R. 791. *JD.* 834.
- Brownlie, Ian. Principles of Public International Law. Quoted on treaties as source of international law. 527.
- Brussels Conference, 1890. General Act. 156, 157; quoted, 158.
- Buergenthal, Thomas. *BR*: Pillai, 227.
- Bush, Ambassador George, U. S. Representative to the United Nations. Statement before U. N. Special Committee on Peacekeeping Operations. 809.
- Bustamante Code of Private International Law. Need for revision. K. H. Nadelmann. *CN.* 782.

- Butler, William E. "Socialist international law" or "Socialist principles of international relations"? *CN*, 796; *BN*: McWhinney and Bradley, 234; *BR*: Grzybowski, 840; Tunkin, 416.
- Butte, Woodfin L. Teaching international law. *CN*, 597.
- Buttes Gas & Oil Co., Occidental Petroleum Corp. v., U. S. Dist. Ct., C. D. Calif., 1971. *JD*, 815.
- Cafisch, Lucius. *BR*: Weber, 850.
- California, State of. Buy American Act and U. S. foreign policy. Bethlehem Steel Corporation v. Board of Commissioners of the Department of Water and Power of the City of Los Angeles, 80 Calif. Repr. 800. *JD*, 609.
- Cambodia:
- Application of SEATO treaty to. J. N. Moore, *LA*, 60; W. D. Rogers, *LA*, 26.
  - Geneva Agreement on Cessation of Hostilities in, 1954. Cited, 39, 45, 46, 47; Art. 13(c) quoted, 41.
  - Neutrality. At Geneva Conference, 1954, 39, R. Randle quoted on, 39, declaration concerning, quoted, 39; neutrality law, 1957, 40; rights and duties with respect to the war in Viet-Nam, J. N. Moore, *LA*, 44; violation by North Viet-Nam, J. N. Moore, *LA*, 47.
  - Situation in, and U. N. Security Council. J. N. Moore. *LA*, 73.
  - U. S. military actions in. Address by Legal Adviser of the Department of State before Hammarskjöld Forum, cited, 3, 6, 11, 17, 28, 76, quoted, 1, 7, 9, 11, 27, 41; Constitutionality of, G. H. Aldrich, *LA*, 76, R. H. Bork, *LA*, 79, R. A. Falk, *LA*, 6, J. N. Moore, *LA*, 61, W. D. Rogers, *LA*, 26; international law and, G. H. Aldrich, *LA*, 76, R. A. Falk, *LA*, 1, W. Friedmann, *LA*, 77, J. L. Hargrove, *LA*, 81, J. N. Moore, *LA*, 38; statements by Government, 50, 51, 56; statements by President Nixon, cited, 74, quoted, 2, 4, 5, 6, 15, 56.
- Canada. Arctic anti-pollution legislation, L. Henkin, *Ed*, 131; Arctic Waters Pollution Act, cited, 93; Declaration of acceptance of I.C.J. compulsory jurisdiction, quoted, 316; Fishing Zones Order, 1970, U. S. statement, 388; position with regard to the continental shelf and territorial sea, 769; Trading with the Enemy Regulations, *Oliner v. Canadian Pacific Railway Company*, 311 N.Y.S. 2d 429, *JD*, 205.
- Campbell, Alan. Common Market Law. *BR*, 644.
- Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F. 2d 577. *JD*, 610.
- Canadian Pacific Railway Company, *Oliner v.*, 311 N.Y.S. 2d 429. *JD*, 205.
- Canadian Yearbook of International Law, 1969. *BR*, 229.
- Capital offenses. Spain-United States Extradition Treaty, 1970. 918.
- Capital punishment. American Convention on Human Rights, 1969. 680.
- Carey, John. *BR*: Van Dyke, 224.
- Caroline, The, case. Cited on self-defense, 53, 58; W. E. Hall, International Law, quoted, 58.
- Cartels. Pillai, K. G. J. The Air Net: The Case against the World Aviation Cartel. *BR*, 227.
- Castañeda, Jorge. Legal Effects of United Nations Resolutions. *BR*, 647.
- Castrén, Erik. The Present Law of War and Neutrality. Quoted on belligerent rights regarding neutral territory. 52.
- Central American Court of Justice. Settlement of disputes by. L. Gross. *LA*, 260.
- Chagla, M. A. C. Quoted on *ad hoc* judges of I.C.J. 295.
- Charter parties. Arbitration clause in. *G. B. Michael v. S. S. Thanasis*, 311 F. Supp. 170. *JD*, 202.
- Cheever, D. S. *BN*: Andrassy, 837.
- Chemical and biological warfare. Geneva Protocol, 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 190; U. S. proposed reservation, 190; U. S. proposed understandings, 191.
- Chen, King C. Vietnam and China, 1938-1954. *BN*, 234.
- Chicago. ASIL regional meeting, 1970. M. C. Bassiouni. *CN*, 172.

- Children. Acquisition of nationality through parents' naturalization, *Vazquez v. Attorney General of the United States*, 433 F. 2d 516, *JD*, 625; rights of, American Convention on Human Rights, 1969, 686.
- Chile. Consular law and practice, J. G. A-aya, *BR*, 228; statement on American Convention on Human Rights, 701.
- Chile-Ecuador-Peru. Santiago Declaration, 1952, on territorial sea. 763.
- China:
- And the Foreign Powers. W. L. Tung. *BR*. 859.
  - Contemporary law. J. A. Cohen. *BR*. 655.
  - Representation in United Nations. Letter of Deputy Legal Adviser George H. Aldrich to Professor Jerome A. Cohen. 396.
  - Unequal treaties with foreign Powers. Maxwell, N., India's China War, *BR*, 859; W. L. Tung, *BR*, 859.
  - Vietnam and, 1938-1954. K. C. Chen. *BN*. 234.
- Chiu, Hungdah. *BN*: Chen, 234.
- Cisneros, Cesar Diaz. Derecho Publico Internacional. *BR*. 836.
- Citizenship. Acquisition and loss of, Memorandum of Legal Adviser's Office of State Department re Rigerman family, 394; derivative, *Vazquez v. Attorney General of the United States*, 433 F. 2d 516, *JD*, 625.
- Civil and political rights. American Convention on Human Rights, 1969. 680.
- Civil law. Merryman, J. H. Introduction to the Legal Systems of Western Europe and Latin America. *BN*. 663.
- Civil strife, acts of. U. N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. Gen. Assembly Res. 2625 (XXV). 245, 246, 248; R. Rosenstock, *LA*, 720.
- Civilians in time of war. U. S. proposed procedure for appointment of Protecting Powers. 808.
- Civilization, sacred trust of. Juridical expression. C. H. Alexandrowicz. *CN*. 149.
- Claims against foreign governments:
- Banco Nacional de Cuba v. First National City Bank of New York*, 431 F. 2d 394. *JD*. 195.
  - Colgate-Palmolive Company*, In the Matter of, U. S. For. Cl. Settlement Commission, Feb. 3, 1971. *JD*. 627.
  - Judicial review of U. S. Claims Settlement Commission decision. *Fraenkel v. United States*, 320 F. Supp. 605. *JD*. 619.
  - Nationality of. Shareholders in foreign corporation. *Barcelona Traction, Light and Power Co. Ltd.* case, I.C.J. R. B. Lillich, *Ed*, 522; *jus standi* of Belgium, H. W. Briggs, *LA*, 327; under investment guaranty schemes, S. D. Metzger, *Ed*, 532.
- Clark, Gooch v.*, 433 F. 2d 74. *JD*. 618.
- Clarke, Bell v.*, 437 F. 2d 200. *JD*. 826.
- Coasts. Wastes discharged from, and marine pollution. O. Schachter and D. Serwer. *LA*. 99.
- Coenra Brothers v. German State*, Greco-German Mix. Arb. Trib. Cited. 51.
- Coercion. Invalidity of treaties due to. Vienna Convention provisions. S. E. Nahlik. *LA*. 741, 742, 743, 754.
- Cohen, Edwin S., Assistant Secretary of the Treasury. Statement on U. S. taxation of income from foreign investments. 165, 166.
- Cohen, Jerome Alan. Contemporary Chinese Law. *BR*. 655.
- Colgate-Palmolive Company*, In the Matter of, U. S. For. Cl. Settlement Commission, Feb. 3, 1971. *JD*. 627.
- Colonial peoples. Right of self-determination. R. Emerson, *LA*, 461; U. N. General Assembly Resolutions, cited, 460, 462, 470, 730, quoted, 463, 466; U. N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 245, 249, R. Rosenstock, *LA*, 719, 730.
- Colonialism. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Gen. Assembly Res. 2625 (XXV). 245, 249; R. Rosenstock, *LA*, 719, 730.

- Comity, international. Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F. 2d 577. *JD.* 610.
- Commonwealth v. White, 265 N. E. 2d 473. *JD.* 614.
- Conciliation. Syrian Arab Republic reservations to Vienna Convention on Law of Treaties, Note of U. S. Representative to U. N. Secretary General, 810; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Assembly Res. 2625 (XXV), 247.
- Conflict of laws:
- Choice of law. G. B. Michael v. S. S. Thanasis, 311 F. Supp. 170. *JD.* 202.
- Enforcement of foreign revenue laws. Brokaw v. Seatrain U. K. Ltd., [1971] 2 W. L.R. 791. *JD.* 834.
- Foreign divorce decree. Ramm v. Ramm, 310 N.Y.S. 2d 111. *JD.* 207.
- Insurance contracts. Gonzalez y Camejo v. Sun Life Assurance Co. of Canada, 313 F. Supp. 1011. *JD.* 400.
- Jurisdiction. Foreign business transaction, Transomnia v. M/S Toryu, 311 F. Supp. 751, *JD.* 212; torts, Fiorenza v. United States Steel International, Ltd., 311 F. Supp. 117, *JD.* 201.
- Title to stock shares. Oliner v. Canadian Pacific Railway Company, 311 N.Y.S. 2d 429. *JD.* 205.
- See also* Private international law.
- Connally Reservation to U. S. acceptance of I.C.J. compulsory jurisdiction. Quoted, 375; invocation by United States, L. Henkin, *Ed.* 374, R. R. Baxter and T. Buergenthal quoted, 374, Senator Tom Connally quoted, 375.
- Consular law and practice. J. G. Araya. *BR.* 228.
- Consuls. Authentication of documents, In re Estate of Scardigli, 467 Pac. 2d 841, *JD.* 200; rights and privileges, Kita v. Matuszak, 175 N. W. 2d 551, *JD.* 620.
- Contiguous zone. Truman proclamation on coastal fisheries conservation, 1945. L. Henkin. *Ed.* 133.
- Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Association, Ltd., 397 U. S. 911. Cited. 213.
- Continental shelf. Geneva Convention, 1958, Art. 1 cited, 759, 768, quoted, 758; Art. 5 quoted, 92; mineral resources, Danish-German Treaty on Delimitation of North Sea Continental Shelf, 1971, 905; Dutch-German Treaty on Delimitation of North Sea Continental Shelf, 1971, 910; U. N. General Assembly Res. 2749 (XXV), quoted, 757.
- Contracts. Arbitration clauses. Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau, 311 F. Supp. 68. *JD.* 198.
- Cooper, Senator Sherman. Quoted on Southeast Asia resolution and SEATO Treaty, 64, 65.
- Cooper-Church Amendment. 70; U. S. military actions in Cambodia and, 26, J. N. Moore, *LA.* 70.
- Coplin, William D. *BR.* Falk, 637.
- Corporations. Enemy character. Bonnar v. United States, 438 F. 2d 540. *JD.* 820.
- Corporations, foreign. Diplomatic protection of shareholders in. Barcelona Traction, Light and Power Co. Ltd. case, I.C.J. R. B. Lillich, *Ed.* 522; the *jus standi* of Belgium, H. W. Briggs, *LA.* 527; investment guaranty schemes and, S. D. Metzger, *Ed.* 532.
- Corwin, E. M., The President: Office and Powers 1787-1957. Quoted on Congress and powers of President as Commander-in-Chief. 67.
- Cosgrove, Carol A., and K. J. Twitchett. The New International Actors: The United Nations and the European Economic Community. *BN.* 661.
- Council of Europe. Manual of. *3R.* 849.
- Cox, Goldstein a/k/a Pietraru v. 394 U. S. 996; 396 U. S. 471. Cited. 213.
- Crimes:
- Application of statutes of limitation to. 476, 483.
- By German National Socialists. Amsterdam University, Sammlung Deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945-1966. *BR.* 423.

- Committed abroad. Jurisdiction of. *Bell v. Clarke*, 437 F. 2d 200, *JD*, 826; *Commonwealth v. White*, 265 N. E. 2d 473, *JD*, 614.
- Common. O.A.S. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance, 1971, 898; Spain-United States Extradition Treaty, 1970, provisions on offenses on board aircraft, 916, 917.
- Extraditable. Spain-United States Treaty, 1970. 915.
- On board aircraft. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 440; I.C.A.O. Assembly Declaration, June 30, 1970, 452, Council Res., Oct. 1, 1970, 453; U. N. General Assembly Res. 2645 (XXV), 445; U. N. Secretary General's statement, 450.
- Criminal jurisdiction. Aerial hijacking, Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 441; armed forces abroad, *Williamson v. Alldridge*, 320 F. Supp. 840, *JD*, 624; offenses committed abroad, *Bell v. Clarke*, 437 F. 2d 200, *JD*, 826, *Commonwealth v. White*, 265 N. E. 2d 473, *JD*, 614.
- Cruel and inhuman punishment. American Convention on Human Rights, 1969. 681.
- Cuba:
- Expropriation of American property. Counterclaim against, *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F. 2d 394, *JD*, 195; Letter of Legal Adviser, Department of State, to U. S. Supreme Court, 391; 442 F. 2d 530, *JD*, 812; measure of compensation for, In the Matter of Colgate-Palmolive Company, U. S. For. Cl. Settlement Commission, Feb. 3, 1971. *JD*, 627.
  - Withdrawal from International Monetary Fund Agreement. Effect on insurance contract. *Gonzalez y Camejo v. Sun Life Assurance Co. of Canada*, 313 F. Supp. 1011. *JD*. 400.
- Cultural property. UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership, 1970, 887; U. S.-Mexican Treaty on Recovery and Return of Stolen Properties, 1971, 895.
- Cultural rights, progressive development. American Convention on Human Rights, 1969. 687.
- Customary international law:
- Barcelona Traction Co. case*, I.C.J. R. B. Lillich. *Ed.* 522.
  - Belligerent rights and duties under. J. N. Moore. *LA.* 47, 51.
  - Reference of questions from domestic courts to I.C.J. L. Gross. *LA.* 309.
  - Sources of. A. A. D'Amato cited, 774; R. A. Falk cited, 774, 776; N. G. Onuf, *CN*, 774.
- Czasz, Paul C., *et al.* Convention on the Settlement of Investment Disputes between States and Nationals of Other States. *BR.* 846.
- Dam, Kenneth W. The GATT: Law and International Economic Organization. *BR.* 853.
- D'Amato, Anthony A. Manifest intent and the generation by treaty of customary rules of international law. N. G. Onuf. *CN.* 774.
- Damm, Walter, and S. E. Rolfe. The Multinational Corporation in the World Economy. *BR.* 657.
- Darwin, H. G. *BR:* Bailey, 425.
- Dawson, Frank, and B. H. Weston. Quoted on international claims settlement agreements as source of international law. 526.
- Delcoigne, Georges, and G. Rubinstein. Non-Prolifération des Armes Nucléaires et Systèmes de Contrôle. *BN.* 879.
- Del Russo, Alessandra Luini. International Protection of Human Rights. *BN.* 868.
- Dembiński, Ludwik. Samostanowienie w prawie i w praktyce ONZ. *BN.* 872.
- Denmark-Netherlands. Agreement of March 31, 1966, concerning delimitation of North Sea Continental Shelf. Termination of. Protocol, 1971. 902.
- Denmark-United Kingdom. Boundary line of North Sea continental shelf. Amendment of 1966 agreement. Germany-Denmark-Netherlands Protocol, 1971. 902.
- Denver, Colorado. ASIL regional meetings, 1970, 1971. V. P. Nanda. *CN.* 800, 801.



- Dépendent territories. Transfer or recognition of sovereignty. Problems of. J. A. Frowein. *CN*. 568.
- Deutsche Continental Gas-Gesellschaft v. Polish State, German-Polish Mixed Arb. Trib. Quoted on definition of state. 552.
- Developing countries. Trade Agreements for, G. P. Verbit, *BN*, 882; U. S. tax treaties with, P. L. Kelley, *CN*, 159.
- De Visscher, Charles. Problèmes de Confins en Droit International Public, *BR*, 412; Theory and Reality in Public International Law, quoted on admission of states to the U. N. and recognition, 556.
- Dickie, Robert B. Foreign Investment: France—A Case Study. *BN*. 881.
- DiFalco, Bjarsch v., 314 F. Supp. 127. *JD*. 398.
- Diplomatic personnel. Sale abroad of duty-free imports. Artwohl v. United States, 434 F. 2d 1319. *JD*. 608.
- Diplomatic premises. Inviolability of. Note of U. S. Embassy at Moscow to Soviet Ministry of Foreign Affairs. 807.
- Diplomatic privileges and immunities. Exemption from import duties, Artwohl v. United States, 434 F. 2d 1319, *JD*, 508; Inter-American Commission and Court of Human Rights, American Convention on Human Rights, 1969, 698; taxation of property owned and occupied by Soviet Government representative, United States v. City of Glen Cove, 322 F. Supp. 149, *JD*, 832.
- Diplomatic protection of citizens abroad. Shareholders in foreign corporation. Barcelona Traction, Light and Power Co. Ltd. case, I.C.J. R. B. Lillich, *Ed*, 522; S. D. Metzger, *Ed*, 532; *jus standi* of Belgium, H. W. Briggs, *LA*, 327.
- Disarmament. Geneva Protocol of 1925 for Prohibition of Use in War of Poisonous Gases and Bacteriological Methods, Message of President Nixon transmitting to the Senate, 189, Report of Secretary of State Rogers, 191; universal treaty on, U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Assembly Res. 2625 (XXV), 247, R. Rosenstock, *LA*, 721.
- Divorce. Foreign decree of. Ramm v. Ramm, 310 N.Y.S. 2d 111. *JD*. 207.
- D.M. & Antique Import Corp. v. Royal Saxe Corp., 311 F. Supp. 1261. *JD*. 199.
- Dölle, Hans, and Konrad Zweigert. Rechtsprechungssammlung zum Europarecht, 1961/62. *BN*. 435.
- Dominican Republic. U. S. intervention in. Slater, J. The United States and the Dominican Revolution. *BN*. 875.
- Domke, Martin. *BN*: Kos-Rabcewicz-Zubkowski, 881.
- Double jeopardy. Spain-United States Extradition Treaty, 1970. 917.
- Dulles, Secretary of State John Foster. Quoted on Congressional resolution and President's power to deploy armed forces. 28.
- Dumbarton Oaks Proposals. Quoted on settlement of international disputes. 261.
- Eastern Europe. Rules on the Validity of International Commercial Arbitration Agreements. L. Kos-Rabcewicz-Zubkowski. *BN*. 881.
- Economic organization, international. The GATT; Law and. K. W. Dam. *BR*. 853.
- Economic rights, progressive development. American Convention on Human Rights, 1969. 687.
- Ecuador. Statement on American Convention on Human Rights. 701.
- Ecuador-United States. Fisheries dispute. Statement by U. S. Representative to the O.A.S., 601; U. S. note to Permanent Council of O.A.S., 599.
- Egger, R., and J. Harris, The President and Congress. Quoted on Congress and powers of President as Commander-in-Chief. 67.
- Ehrenzweig, Albert A. *BN*: Hollaux, 880.
- Ehrlich, Thomas. *BR*: Randle, 651.
- El Salvador. Declaration on American Convention on Human Rights. 702.
- Emerson, Rupert. Self-determination. *LA*. 459.
- Emigration, right of. American Convention on Human Rights, 1969. 686.

- Enemy. Transactions with. *Military Prosecutor v. Adnan Ibn Adal Ibn Badawi al Bahsh*, Mil. Ct. Nablus, 1969. *JD*. 410.
- Enemy property. Seizure of. *Bonnar v. United States*, 438 F. 2d 540, *JD*, 820; *Oliner v. Canadian Pacific Railway Company*, 311 N.Y.S. 2d 429, *JD*, 205.
- Engel, Salo. On the status of U. S. treaty law, *CN*, 593; *BN*: *Annales d'Etudes Internationales*, 1970, 436; Van Panhuys, 433; *BR*: *Hague Academy, Recueil des Cours*, 1966, 632.
- Engers, J. F. U. N. travel and identity document for Namibians. *CN*. 571.
- Entezam, Nasrollah. Opinion in Rann of Kutch arbitration. Quoted. 350.
- Error. Invalidity of treaties due to. Vienna Convention provisions. S. E. Nahlik. *LA*. 741, 742, 754.
- Estates. Distribution to non-resident aliens. *Bjarsch v. DiFalco*, 314 F. Supp. 127, *JD*, 398; *In re Estate of Horman*, 90 Calif. Reptr. 439, *JD*, 615; *In re Estate of Scardigli*, 467 Pac. 2d 841, *JD*, 200.
- Etzioni, Minerva M. The Majority of One: Towards a Theory of Regional Compatibility. *BR*. 427.
- Europe. Political integration, Work of Court of Justice of the European Communities, A. W. Green, *BN*, 233; postwar boundaries, Fed. Rep. of Germany-U.S.S.R. Treaty of Aug. 12, 1970, U. S. note to the German Government, Aug. 11, 1970, 178.
- European Coal and Steel Community Treaty, 1951. Art. 31 on function of Court of Justice in interpretation of treaty. 310.
- European Common Market. Law of. A. Campbell. *BR*. 644.
- European Communities. Coordination and Integration as Legal Principles, C. Alder, *BR*, 413; Court of Justice, jurisdiction of, L. Gross, *LA*, 269, Work in European Political Integration, A. W. Green, *BN*, 233; Judicial Remedies in, L. J. Brinkhorst and H. G. Schermers, *BN*, 233; Law of, Dölle, Hans, and K. Zweigert, *Rechtssprechungsammlung zum Europarecht*, 1961-1962, *BN*, 435.
- European Community. Lindberg, L. N., and S. A. Scheingold. Europe's Would-be Polity. Patterns of Change in. *BR*. 847.
- European Economic Community. Law, A. Campbell, *BR*, 644; Protocol on Statute of Court of Justice, Art. 20 quoted, 310; Treaty, 1957, Art. 177 on competence of Court of Justice, quoted, 309; the United Nations and, C. A. Cosgrove and K. J. Twitchett, *BN*, 661.
- European Nuclear Energy Agency. Radioactive waste disposal. Cited. 109.
- Evans, Alona E. Judicial decisions involving questions of international law. *JD*. 195, 398, 608, 812.
- Evidence, discovery of. Rann of Kutch arbitral award. J. G. Wetter. *LA*. 347, 356.
- Ex aequo et bono. Application by arbitral tribunal. Denmark-Germany Treaty on North Sea Continental Shelf, 1971, 905; Netherlands-Germany Treaty on North Sea Continental Shelf, 1971, 911.
- Ex post facto laws. American Convention on Human Rights, 1969, 683; U. N. Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, 488, 496, 500, Norwegian proposal, 496, U. S. objection, 496.
- Exchange rates, fluctuating. Unauthorized changes of par value and, in the Bretton Woods system. J. Gold. *LA*. 113, 123.
- Expatriation. Memorandum of Legal Adviser's Office of State Department regarding citizenship of Esther and Henry Rigerman. 394.
- Export certificates. UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970. 887.
- Exportation of stolen cultural property. UNESCO Convention on Means of Prohibiting and Preventing, 1970, 887; U. S.-Mexican Treaty for the Recovery and Return of Stolen Cultural Properties, 1971, 896.
- Expropriation of private property. Extraterritorial effect, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F. 2d 686, *JD*, 611; measure of compensation, *In the Matter of Colgate-Palmolive Company*, U. S. For. Cl. Settlement Commission, Feb. 3, 1971, *JD*, 627.
- See also Cuba, expropriation of American property.

Extortion. O.A.S. Convention to Prevent and Punish Acts of Terrorism against Persons that are of International Significance, 1971. 898.

Extradition:

Aerial hijacking. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 442; Spain-U. S. treaty, 1970, 916, 917.

Spain-United States Treaty, 1970. 914.

Terrorism. O.A.S. Convention to Prevent and Punish Acts in form of Crimes against Persons and Related Extortion that Are of International Significance, 1971. 899.

War Crimes and Crimes against Humanity. Convention on Non-Applicability of Statutory Limitations to. 494.

Extraterritorial jurisdiction. U. S. antitrust laws, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, U. S. Dist. Ct., C. D. Calif., 1971, *JD*, 815; U. S. Bankruptcy Act, *Stegeman v. United States*, 425 F. 2d 984, *JD*, 211.

Fahl, Gundolf. *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648*. *BN*. 867.

Falk, Richard A. The Cambodian operation and international law, *LA*, 1; G. H. Aldrich, *LA*, 76; J. L. Hargrove, *LA*, 81; J. N. Moore, *LA*, 58; on the quasi-legislative competence of the General Assembly, cited, 774, 776, N. G. Onuf, *CN*, 774; The Status of Law in International Society, *BR*, 637.

Falk, Richard A., and Cyril E. Black. *The Future of the International Legal Order*. *BR*. 218.

Family, rights of. American Convention on Human Rights, 1969. 685.

Farer, Tom J. *BR*: Falk and Black 218.

Fatouros, A. A. *BN*: Dickie, 881; Fulda and Schwartz, 232.

Federalism. Minorities, Human Rights and. A. Gotlieb. *BN*. 869.

Feliciano v. United States, 400 U. S. 823. Cited. 213.

Fenwick, Charles G. *BN*: Aguayo. 880; Colegio de Mexico, 876; Rodriguez, 876; Sobarzo, 868; Vanossi, 433.

Ferencz, Benjamin B. *BR*: Taylor, 640.

Finch, Eleanor H. ASIL, 65th annual meeting, *CN*, 176, 587; Journal of Maritime Law and Commerce, *CN*, 175; Philippine Society of International Law, annual meeting, *CN*, 387; Scott prizes in international law, *CN*, 175; student journals of international law, *CN*, 584; Q. Wright, *Ed*, 130; *BN*: Hudson, 664.

Findley, Representative Paul. Proposal regarding President's employment of armed forces abroad. 72.

Finkle, Peter Z. R. *BN*: Gotlieb, 869.

Fiorenza v. United States Steel International, Ltd., 311 F. Supp. 117. *JD*. 201.

First National City Bank of New York, *Banco Nacional de Cuba v.* 431 F. 2d 394, *JD*, 195; letter of Legal Adviser, Department of State re application of act of state doctrine, 391; 442 F. 2d 530, *JD*, 812.

Fisher, Roger. Quoted on right of self-determination, 472, 473; International Conflict for Beginners, *BR*, 845.

Fisheries, high seas. Canadian Fishing Zones Order, Dec. 18, 1970, U. S. statement, 388; Ecuador-U. S. dispute, Statement by U. S. Representative to the O.A.S., 601, U. S. note to O.A.S. Permanent Council, 599.

FitzGerald, Gerald F. *BR*: Araya, 228; Cisneros, 836.

Fitzmaurice, Judge Sir Gerald G. Cited on *ad hoc* judges of I.C.J., 296; Opinion in Barcelona Traction Co. case, I.C.J., cited, 337, 338, 343, quoted on application of municipal law to international shareholder claims, 531; *Vae Victis* or woe to the negotiators! *LA*, 358.

Force, threat or use of:

Convention for Suppression of Unlawful Seizure of Aircraft, 1970. 440.

Duties of Cambodia with respect to Viet-Nam war. J. N. Moore. *LA*. 44.

Federal Republic of Germany-U.S.S.R. Non-Aggression Treaty, Aug. 12, 1970. U. S. note to German Government of Aug. 11, 1970, concerning rights of Four Powers in Germany and Berlin. 178.

- Institute of International Law resolution, 1959. Quoted. 257.
- International adjudication as substitute for. L. Gross. *LA*, 253.
- ICAO Assembly Declaration, June 30, 1970, 452; Council Res., Oct. 1, 1970, 453.
- U. N. Charter, Art. 2 (4). Cited, 256, 257; L. Henkin, *Ed*, 544.
- U. N. Conference on Law of Treaties. Declaration quoted. 257.
- U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 1970. 245, 246; quoted, 258; R. Rosenstock, *LA*, 717.
- U. N. General Assembly Res. 2645 on aerial hijacking. 445.
- U. N. Security Council Res. 286 (1970). 445.
- United States Cambodian operation. R. A. Falk. *LA*, 1.
- Vienna Convention on Law of Treaties. Art. 52 quoted. 257.
- Foreign courts. Jurisdiction of. Holleaux, D. *Compétence du Juge Étranger et Reconnaissance des Jugements*. *BN*, 380.
- Foreign investment. Behrman, J. N., National Interests and the Multinational Enterprise, *BR*, 851; France, A Case Study, R. B. Dickie, *BN*, 881; nationality of corporate investment under investment guaranty schemes, the relevance of the Barcelona Traction case, S. D. Metzger, *Ed*, 532; Rolfe, Sidney E., and W. Damm, The Multinational Corporation in the World Economy, *BR*, 657.
- Foreign judgments, recognition of. Holleaux, D., *Compétence du Juge Étranger et Reconnaissance des Jugements*, *BN*, 880; *Ramm v. Ramm*, 310 N.Y.S. 2d 111, *JD*, 207.
- Foreign sovereign. Counterclaims against. *Banco Nacional de Cuba v. First National City Bank of New York*. 431 F. 2d 394, *JD*, 195; letter of Legal Adviser, Department of State to U. S. Supreme Court, 391; 442 F. 2d 530, *JD*, 812.
- Forster, Judge Isaac. Dissenting opinion in South West Africa cases, I.C.J. Quoted. 150.
- Forum non conveniens. *Fiorenza v. United States Steel International, Ltd.*, 311 F. Supp. 117, *JD*, 201; *Transommia v. M/S Toryu*, 311 F. Supp. 751, *JD*, 212.
- Fraenkel v. United States, 320 F. Supp. 605. *JD*, 619.
- France. Foreign Investment in, R. B. Dickie, *BN*, 881; international organizations in, Chebali, V.-Y., *La France en Guerre et les Organisations Internationales 1939-1945*, *BR*, 223; recognition of U. S. sovereignty, 570; repertory of practice in public international law, A.-C. Kiss, *BR*, 839; statement regarding Biafra's right to self-determination, 554.
- Franck, Thomas. Who Killed Article 2 (4)? L. Henkin. *Ed*, 544.
- Fraud. Invalidity of treaties due to. Vienna Convention provisions. S. E. Nahlik. *LA*, 741, 742, 754.
- Freedom of movement. American Convention on Human Rights, 1969. 686.
- Freedom of the seas. Canadian Arctic anti-pollution legislation and, L. Henkin, *Ed*, 131; Fahl, G., *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648*, *BN*, 867; *Selden redivivus?* W. Friedmann, *LA*, 757.
- Freedom of thought and expression. American Convention on Human Rights, 1969. 684.
- Fried, John H. E. *BR*: Rüter-Ehlermann and Rüter, 423.
- Friedmann, Wolfgang. Cited on United Nations as source of law, 460; comments on legality of U. S. action in Cambodia, *LA*, 77; *The North Sea Continental Shelf Cases*, cited, 775, 780; *Selden redivivus—towards a partition of the seas?* *LA*, 757.
- Friendly Relations and Co-operation among States:
- U. N. General Assembly Declaration, 1970. 244; cited, 274; quoted on peaceful settlement of international disputes, 264, on use of force, 258; R. Rosenstock, *LA*, 713.
- U. N. Special Committee on Principles of International Law concerning. Declaration of Sept. 15, 1970, cited on self-determination, 467, 468, 470; Report, 1966, cited on compulsory jurisdiction of I.C.J., 254; Report, 1970, cited on self-determination, 465.
- Frowein, Jochen A. Transfer or recognition of sovereignty: some early problems in connection with dependent territories, *CN*, 568; *BN*: Fahl, 867.

- Fulbright, Senator William. Quoted on Southeast Asia resolution and SEATO Treaty. 65.
- Fulda, Carl H., and W. F. Schwartz. Cases and Materials on the Regulation of International Trade and Investment. *BN*. 232.
- Gál, Gyula. Space Law. *BN*. 256.
- Galvanoni & Nevy Bros. Inc., *Van Engelbrechten v.*, 302 N.Y.S. 2d 691. Cited. 213.
- Gardner, Richard N. Sterling-Dollar Diplomacy. The Origins and the Prospects of Our International Economic Order. *BR*. 857.
- Gases, poisonous. Use in War. Geneva Protocol of 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 189; U. S. proposed reservation, 190; U. S. proposed understandings, 191.
- Gelberg, Ludwik. Powstanie Polski Ludowej. Problemy Prawa Międzynarodowego. *BN*. 873.
- General Act for Pacific Settlement of International Disputes, 1928. Cited. 261, 264.
- General Agreement on Tariffs and Trade. Law and International Economic Organization, K. W. Dam, *BR*, 853; World Trade and, J. H. Jackson, *BR*, 853; Schieffelin & Co. v. United States, 424 F. 2d 1396, *JD*, 208; non-self-executing character, Judgment, Hamburg Tax Court, 1969, *JD*, 627, S. A. Riesenfeld, *Ed*, 548; U. S. suspension of trade agreement concessions, *Star Industries Inc. v. United States*, 320 F. Supp. 1018, *JD*, 621.
- General Dyestuff Corp. of New York. Non-enemy status. *Bonnar v. United States*, 438 F. 2d 540. *JD*. 820.
- Geneva. Graduate Institute of International Studies. *Annales d'Etudes Internationales*, 1970. *BN*. 436.
- Geneva Conference on Indochina, 1954. Settlement of the Indochinese War, R. F. Randle, *BR*, 651; U. S. military actions in Cambodia and Geneva Accords, W. Friedmann, *LA*, 77; Final Declaration, cited, 47, quoted, 38, 40, 45, 48.
- Geneva Convention on the Continental Shelf, 1958. Definition of shelf. Cited, 759, 768; quoted, 758.
- Geneva Conventions on Protection of War Victims, 1949. Grave breaches of. U. N. Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, 487; Convention on Protection of Civilians, Art. 147, cited, 487, 491, U. S. proposed procedure for appointment of Protecting Powers, 808; U. S. statement regarding Israeli activities in occupied Arab territory, 809.
- Geneva Protocol for Pacific Settlement of International Disputes, 1924. Art. 2 quoted. 255.
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 189; U. S. proposed reservation, 190; U. S. proposed understandings, 191.
- Genocide. Convention on Prevention and Punishment of, Art. I quoted, 489, Art. II quoted, 489; U. N. Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, 481, 489.
- Germany:
- Deutsche Mark. Festsetzung und Vollzug der DM-Parität im Verfassungs-, Verwaltungs- und Völkerrecht. W. Hoffmann. *BR*. 225.
- Four-Power rights respecting. U. S. note to German Federal Republic regarding its non-aggression treaty with U.S.S.R., 1970. 178.
- Nazi Crimes. Justice and. Amsterdam University. *BR*. 423.
- Germany-Poland. Oder-Neisse boundary. S. Krülle, *BN*, 874; K. Skubiszewski, *BR*, 418.
- Germany, Federal Republic of:
- Constitution. Art. 19 (3) regarding guarantee of fundamental rights. F. A. Mann. *CN*. 793.
- Criminal Code. Art. 67 on time limitation on prosecution. Quoted. 479.

- Penal Code of 1871. Punishment of war crimes and crimes against humanity under. 478.
- Statutory limitation on criminal prosecutions. 478.
- Turnover Tax Law. Art. III of GATT and. Judgment of Hamburg Tax Court, 1969. *JD.* 627; S. A. Riesenfeld, *Ed.* 548.
- Germany, Federal Republic of—Denmark. Treaty Relating to the Delimitation of the Continental Shelf under the North Sea, 1971. 904.
- Germany, Federal Republic of—Denmark—The Netherlands. Protocol concerning delimitation of continental shelf under the North Sea, 1971. 901.
- Germany, Federal Republic of—Union of Soviet Socialist Republics. Non-Aggression Treaty of Aug. 12, 1970. U. S. note to German Government concerning rights of Four Powers in Germany and Berlin. 178.
- Germany, Federal Republic of—United Kingdom. Boundary line of North Sea continental shelf. Germany-Denmark-Netherlands Protocol, 1971. 902.
- Germany, Federal Republic of—United States. Dispute regarding Young Loan under London Agreement on German External Debts, 1953, 805; Treaty of Friendship, Commerce and Navigation, 1954: Batson Yarn and Fabrics Machinery Group, Inc. v. Sauer-Allma GmbH-Allgauer Maschinenbau, 311 F. Supp. 68, *JD.* 198; the German Constitution and, F. A. Mann, *CN.* 793.
- Gheballi, Victor-Yves. La France en Guerre et les Organisations Internationales 1939-1945. *BR.* 223.
- Gilas, Janusz. Transyt przez porty morskie w świetle Prawa Międzynarodowego. *BN.* 237.
- Ginsburgs, George. *BN:* Veiter, 873.
- Ginther, Konrad. Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten. *BN.* 236.
- Glen Cove, City of, United States v., 322 F. Supp. 149. *JD.* 832.
- Gold, Joseph. Unauthorized changes of par value and fluctuating exchange rates in the Bretton Woods system. *LA.* 113.
- Goldberg, Ambassador Arthur J. Quoted on U. S. position regarding payment of U. N. assessments. 140.
- Goldie, L. F. E. ASIL eighth annual regional meeting at Syracuse, 1971. *CN.* 585.
- Goldmann, Dr. Nahum. Article on the future of Israel, cited, 167; proposed neutralization of Israel, J. F. Murphy, *CN.* 167.
- Goldstein a/k/a Pietraru v. Cox. 394 U. S. 996; 396 U. S. 471. Cited. 213.
- Gonzalez y Camejo v. Sun Life Assurance Co. of Canada, 313 F. Supp. 1011. *JD.* 400.
- Gooch v. Clark, 433 F. 2d 74. *JD.* 618.
- Goodrich, Leland M. *BN:* Gutteridge, 434; Harbottle, 878.
- Goodrich, Leland M., E. Hambro, and A. P. Simons. Charter of the United Nations: Commentary and Documents. *BN.* 434.
- Gordon, Edward. Resolution of the Bahrain dispute. *CN.* 560.
- Gorres-Gesellschaft. Staatslexikon. Supp. Vols. I-III. *BN.* 883.
- Gotlieb, Allan. Human Rights, Federalism and Minorities. *BN.* 869.
- Gould, Wesley L. *BN:* Cosgrove and Twitchett, 661.
- Governments-in-exile. Passports issued by. J. F. Engers. *CN.* 571.
- Graven, J. Quoted on statutes of limitation as to criminal offenses. 484.
- Great Britain. House of Commons Committee report on relations with African rulers, quoted, 154; position at Bretton Woods Conference on changes in monetary exchange rates, 116; recognition of sovereignty of South American states, 571.
- Great Britain-Brazil. The Slave Trade Question, 1807-1869. L. Bethell. *BN.* 663.
- Greece. Statutory limitation applied to war crimes. 476.
- Green, Andrew W. Political Integration by Jurisprudence. *BN.* 233.
- Green, L. C. International Law through the Cases. *BR.* 837.
- Greenspan, The Modern Law of Land Warfare. Quoted on belligerent rights regarding neutral territory, 52; on duties of neutral states, 46.

- Gros, Judge Andre. Opinion in Barcelona Traction Co. case, I.C.J. Cited, 343; quoted on application of municipal law to international shareholder claims, 530, 531; on claims settlement agreements as source of international law, 528.
- Gross, Leo. Book reviews and notes, 214, 411, 632, 836; quoted on the right of self-determination in international law, 461; the International Court of Justice, consideration of requirements for enhancing its rôle in the international legal order, *LA*, 253; treaty interpretation: the proper rôle of an international tribunal, quoted, 370, 371.
- Gutteridge, J. A. C. The United Nations in a Changing World. *BN*. 434.
- Grzybowski, Kazimierz. Soviet Public International Law, *BR*, 840, quoted on Tunkin's position on treaty-making power of international organizations, 519; *BN*: Gelberg, 873; Kiel University, Institute for International Law, 430; McWhinney, 237.
- Haas, Ernst B. Human Rights and International Action. The Case of Freedom of Association. *BN*. 871.
- Hague Academy of International Law. Recueil des Cours, 1966. *BR*. 632.
- Hague Conference on Air Law, December, 1970. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970. 440.
- Hague Convention for Pacific Settlement of International Disputes, 1899. Art. 1 quoted, 255; Art. 3 quoted, 274; Art. 27 quoted, 255, 274.
- Haile Selassie, Emperor of Ethiopia. Quoted on Organization of African Unity and the Nigerian civil war. 556.
- Hall, William E. Treatise on International Law. Quoted on the Caroline case. 58.
- Hambro, Edvard, L. M. Goodrich, and A. P. Simons. Charter of the United Nations, Commentary and Documents. *BN*. 434.
- Hamilton, Alexander. Quoted on powers of President as Commander-in-Chief of armed forces, 63; on President's war-making power, 30, 68.
- Hammarskjöld, Dag. Quoted on I.C.J. and settlement of international legal disputes, 263, 264; and United Nations, *M. W. Zacher*, *BR*, 426.
- Hammond v. National Life & Accident Insurance Co., 243 So. 2d 902. *JD*. 822.
- Harbottle, Michael. The Impartial Soldier. *BN*. 878.
- Hardy, Michael. International Control of Marine Pollution. Quoted. 105.
- Hargrove, John Lawrence. Comments on legality of U. S. action in Cambodia. *LA*. 81.
- Hazard, John N. Quoted on most-favored-nation clause and state-trading countries, 730; renewed emphasis upon a Socialist international law, *Ed*, 142.
- Heirs, foreign. Proof of identity. In re Estate of Scardigli, 467 Pac. 2nd 841. *JD*. 200.
- Henkin, Louis. Cited on the continental shelf, 758, 762, 766; Arctic anti-pollution, does Canada make or break international law? *Ed*, 131; the Connally Reservation revisited, *Ed*, 374; the reports of the death of Article 2 (4) are greatly exaggerated, *Ed*, 544.
- Hertslet, The Map of Africa by Treaty. Cited. 154.
- Hickel, Texaco, Inc. v., 437 F. 2d 636. *JD*. 823.
- Hickenlooper amendment to U. S. Foreign Assistance Act. Banco Nacional de Cuba v. First National City Bank of New York, 431 F. 2d 394, *JD*, 195, 442 F. 2d 530, *JD*, 812; Occidental Petroleum Corp. v. Buttes Gas & Oil Co., U. S. Dist. Ct., C. D. Calif., 1971, *JD*, 815.
- Higgins, Rosalyn. Quoted on I.C.J. and development of international law, 529, 531, 532, on international legal effect of General Assembly resolutions, 460, on self-determination as a legal right, 464, 474; United Nations Peacekeeping 1946-1967, Vol. II, Asia, *BR*, 221.
- High seas:
- Canadian extension of fishery jurisdiction in special zones. U. S. statement, Dec. 18, 1970. 388.
- Freedom of. W. Friedmann. *LA*. 757.
- Geneva Convention, 1958. Art. 2 quoted, 135; Art. 24 quoted on oil pollution, 92,

- 134; Art. 25, cited, 98, 104, 108, 111, quoted on radioactive pollution of the seas, 92, 134.
- Law of. A. Sobarzo. *BN*. 868.
- Pollution of. Canadian legislation regarding Arctic Sea. L. Henkin. *Ed*. 131.
- Historical objects and monuments. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership, 1970, 887; U. S.-Mexican Treaty for the Recovery and Return of Stolen Properties, 1971, 895.
- Hoffmann, Stanley. *BR*: Fisher, 845.
- Hoffmann, Wolfgang. Rechtsfragen der Währungsparität. *BR*. 225.
- Holleaux, Dominique. Compétence du Juge Étranger et Reconnaissance des Jugements. *BN*. 880.
- Holton, Thomas. An International Peace Court. *BN*. 238.
- Holy Roman Empire after 1648. A. Randelzhofer. *BN*. 436.
- Horman, In re Estate of, 90 Calif. Repr. 439. *JD*. 615.
- Hostilities, termination of. U. S. Congressional powers and the Viet-Nam war. J. N. Moore. *LA*. 66.
- Hudson, Manley O. International Legislation, *BN*, 664; International Tribunals, quoted on rôle of P.C.I.J. in peacekeeping, 256; The Permanent Court of International Justice, 1920-1942, quoted on *ad hoc* judges of the International Court, 296, on compulsory jurisdiction of P.C.I.J., 260; registration and publication of treaties, quoted, 771.
- Hula, Erich. *BN*: Rabl, 661; Randelzhofer, 436; Staatslexikon, 833.
- Human rights:
- Aims and Methods in. International Group Protection. J. J. Lador-Lederer. *BR*. 420.
- American Convention on, 1969. 679.
- European Convention. Walter, H. Die Europäische Menschenrechtsordnung. *BN*. 870.
- Federalism, Minorities and. A. Gotlieb. *BN*. 869.
- The Inter-American Commission on. A. P. Schreiber, *BN*, 432; American Convention on Human Rights, 1969, 690, 700.
- Inter-American Court. American Convention on Human Rights, 1969. 695, 701.
- International Protection of. A. Luini del Russo, *BN*, 888; The Case of Freedom of Association, E. B. Haas, *BN*, 871.
- New York State law. South African Airways v. New York Division of Human Rights, 315 N.Y.S. 2d 851. *JD*. 403.
- Respect for. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 1970. 248, 249.
- Van Dyke, Vernon. Human Rights, the United States and World Community. *BR*. 224.
- Human Rights Committee, International. Jurisdiction of claims of individuals against states. 270.
- Humanity, crimes against. U. N. Convention on Non-Applicability of Statutory Limitations, 1968. R. H. Miller. *LA*. 476.
- Hyde, Charles Cheney. International Law Chiefly as Interpreted and Applied by the United States. Quoted on recognition of civil war belligerent as intervention, 559; on rights of belligerents with regard to neutral territory, 52.
- Ijalaye, David A. Was "Biafra" at any time a state in international law? *CN*. 551.
- Immigrants. Commuters from Canada or Mexico under U. S. Immigration Act. Gooch v. Clark, 433 F. 2d 74. *JD*. 618.
- Importation into the United States. Status of Panama Canal Zone. United States v. Matthews, 427 F. 2d 992. *JD*. 204.
- Importation of stolen cultural property. UNESCO Convention on Means of Prohibiting and Preventing, 1970, 887; U. S.-Mexican Treaty on Recovery and Return of Stolen Properties, 1971, 897.



- Imports. Duty-free, sale abroad by diplomatic personnel, *Artwohl v. United States*, 434 F. 2d 1319, *JD*, 608; taxation of, *Schieffelin & Co. v. United States*, 424 F. 2d 1396, *JD*, 208.
- India-China War. N. Maxwell. *ER*. 859.
- India-Pakistan. Rann of Kutch boundary arbitration. J. G. Wetter. *LA*. 346.
- Individuals. Application of Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 494; petitions by, competence of Inter-American Commission on Human Rights, American Convention, 1969, 691; proposed access to I.C.J., L. Gross, *LA*, 303.
- Indochina. Geneva Conference, 1954, Final Declaration, quoted, 38, 40, 45; settlement of war in, R. F. Randle, *BR*, 651; U. S. military operations in, Congressional authority to limit or terminate, J. N. Moore, *LA*, 66.
- Indo-Pakistan Western Boundary Case Tribunal. Rann of Kutch Award, J. G. Wetter, *LA*, 346, quoted, 349, 352, 355; discovery and inspection of documentary evidence, 356, rule quoted, 347.
- Institute of International Law. Resolutions:
- I.C.J. Competence of, 1954, quoted, 302; composition of, 1952, 289, L. Gross, *LA*, 290; compulsory jurisdiction, 1959, quoted, 257, 274, 314; judges of, 1954, quoted, 282, 285, 291, 292, 296, L. Gross, *LA*, 282, 293.
  - League of Nations Mandates, 1951. Quoted. 158.
  - Pollution of the seas, 1969. Cited. 93.
  - Recognition of new states, 1936. Quoted. 556.
- Insurance. War clause in. *Hammond v. National Life & Accident Insurance Co.*, 243 So. 2d 902. *JD*. 822.
- Inter-Allied Committee Report, 1944. Quoted on function of *ad hoc* judge of I.C.J. 297.
- Inter-American Commission on Human Rights. A. P. Schreiber, *BN*, 432; American Convention on Human Rights, 1969, 690, 700.
- Inter-American Committee on Peaceful Settlement. Reference of Ecuador-U. S. fisheries dispute to. U. S. note to Permanent Council of O.A.S., 599; statement by U. S. Representative to O.A.S., 601.
- Inter-American Council of Jurists. 1965 recommendation on revision of the Bustamante Code of Private International Law. 783.
- Inter-American Court of Human Rights. American Convention on Human Rights, 1969, 695, 701; advisory opinions, Convention, 697, quoted, 321; jurisdiction, Convention, 1969, 696; procedure, Convention, 1969, 698.
- Inter-American Juridical Committee. Report on Harmonization of the Laws of the Latin American States on Commercial Companies, 1968, 785; rôle in revision of Bustamante Code, K. H. Nadelmann, *CN*, 791, 792.
- Inter-American Specialized Conference on Private International Law. K. H. Nadelmann. *CN*. 783, 785, 786, 792.
- Inter-Governmental Maritime Consultative Organization. Proposed conference on marine pollution by ships, cited, 93; Report on Questionnaire on Pollution of Marine Environment, cited, 105.
- International adjudication. C. W. Jenks quoted on, 253, 254; requirements for enhancing the rôle of the I.C.J., L. Gross, *LA*, 253.
- International Air Transport Association. Pillai, K.G.J. The Air Net: The Case Against the World Aviation Cartel. *BR*. 227.
- International Atomic Energy Agency. Authorization to request I.C.J. advisory opinions, 277; standards regarding disposal of radioactive wastes, 104, 107, 108.
- International Bank for Reconstruction and Development. Draft Articles of Agreement of the International Investment Insurance Agency. 538; quoted, 539, 540.
- International Civil Aviation Organization. Assembly Declaration of June 30, 1970, regarding aircraft hijacking, 452; Council, reports to, Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 443; Resolution of Oct. 1, 1970, regarding aerial hijacking, 453.

- International Commission for Supervision and Control in Cambodia. 6th Interim Report quoted. 40.
- International Conference on Air Law, The Hague, December, 1970. Convention for the Suppression of Unlawful Seizure of Aircraft. 440.
- International Conflict for Beginners. R. Fisher. BR. 845.
- See International disputes and War.
- International co-operation. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. General Assembly Res. 2625 (XXV). 243, 245, 247, 248, 249; R. Rosenstock, LA, 713, 721, 729.
- International Council of Scientific Unions. Committee on Space Research. Standards for decontamination of space equipment. Cited. 108.
- International Court of Justice:
- Access to. L. Gross. LA. 302, 306, 308.
  - Advisory jurisdiction. L. Gross, LA, 266, 320; use by U. N. Specialized Agencies, 267, ASIL conference of Legal Advisers quoted on, 267, 278.
  - Committee to study incompatibility of functions of judges and disqualification of judges. 295; report cited, 295.
  - Competence. Extension to cases between individuals, corporations and states, L. Gross, LA, 269; to questions arising in national courts, L. Gross, LA, 303.
  - Composition of. L. Gross, LA, 281; Art. 9 of Statute quoted, 281.
  - Compulsory jurisdiction. L. Gross, LA, 253, 275, 313; C. W. Jenks quoted on, 253; acceptance of, and composition of the Court, L. Gross, LA, 283, Japanese proposal, 283; reservations to, L. Gross, LA, 262, 314; U. S. reservation, 262, 271, quoted, 272; U. N. Special Committee on Friendly Relations discussion, 254, 1966 Report cited, 254, quoted, 254, 255; Vienna Convention provision, S. E. Nahlik, LA, 755.
  - Decisions as source of international law. N. G. Onuf. CN. 778.
  - Internal judicial practice. L. Gross. LA. 301.
- Judges:
- Ad hoc. L. Gross, LA, 295; Institute of International Law resolution, 1954, quoted, 296.
  - Election. 289, 291; L. Gross, LA, 282, 290; Institute of International Law resolutions, 1952, 289, 1954, 291; table, 324.
  - Disqualification of. L. Gross, LA, 294; S. Rosenne quoted, 294.
  - Incompatibility of functions. L. Gross. LA. 294.
  - Nomination. L. Gross. LA. 286.
  - Number. L. Gross, LA, 284; Institute of International Law resolution, 1954, quoted, 285.
  - Qualifications. L. Gross, LA, 281; Institute of International Law resolution, 1954, quoted, 282; table, 325.
  - Term of office. L. Gross, LA, 292; Art. 13 (3) of Statute quoted, 286; Institute of International Law resolution, 1954, quoted, 292.
- Law applied by. L. Gross. LA. 317.
- National courts. Link with. L. Gross. LA. 269.
- Peaceful settlement of international disputes. C. A. Stavropoulos quoted, 259; Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 443.
- Requirements for enhancing its rôle in the international legal order. L. Gross. LA. 253.
- Rules. Art. 7 (1) on assessors, quoted, 277; Art. 82 (2) on advisory opinions quoted, 278.
- Seat of. L. Gross. LA. 299.
- Statute. Art. 2 on qualifications of judges, L. Gross, LA, 281, Institute of International Law resolution, 1954, quoted, 282; Art. 3 on number of judges, L. Gross, LA, 284; Arts. 4-6 on nomination of judges, L. Gross, LA, 286; Arts. 8, 10-12 on election of judges, L. Gross, LA, 289, 291; Art. 9 on composition of the Court, L. Gross, LA, 281, Institute of International Law resolution, 1954, quoted 282; Arts. 13 and 15 on judges' term of office, quoted, 286, L. Gross, LA, 292; Arts. 16 and 17 on in-

- compatibility of functions of judges, L. Gross, *LA*, 294, S. Rosenne quoted, 294; Art. 22 on seat of the Court, L. Gross, *LA*, 299, proposed amendment to, 299; Art. 23 (2) quoted, 285; Art. 24 on disqualification of judges, quoted, 294, L. Gross, *LA*, 294; Art. 25 quoted, 285. Art. 30 on rules of procedure, L. Gross, *LA*, 301, quoted on assessors, 277; Art. 31 on *ad hoc* judges, L. Gross, *LA*, 295; Art. 34 on access to the Court, quoted, 302, L. Gross, *LA*, 302, 306, 308; Art. 35 on access to the Court, quoted, 306, L. Gross, *LA*, 306; Art. 36 on jurisdiction of the Court, cited, 256, 377, quoted, 275, 307, 375; L. Gross, *LA*, 306, 313, 322; Art. 38 on law to be applied, L. Gross, *LA*, 317; Art. 49 on production of documents, quoted, 279; Arts. 65-68 on advisory opinions, L. Gross, *LA*, 320, Art. 65 quoted, 277.
- Study group on. Cited. 280, 235, 321.
- Summary proceedings before. L. Gross. *LA*. 278.
- International criminal law. U. N. Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968. R. H. Miller. *LA*. 476.
- International disputes, peaceful settlement of. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 443; Denmark-Germany Treaty on Delimitation of the North Sea Continental Shelf, 1971, 905, 906; Fisher, R., International Conflict for Beginners, *BR*, 845; Germany-Netherlands Treaty on Delimitation of the North Sea Continental Shelf, 1971, 910, 911; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Assembly. Res. 2625 (XXV), 245, 247, R. Rosentock, *LA*, 725; U. S. draft U. N. Convention on the International Seabed Area, Summary, 182; Vienna Convention on Treaties, provisions on, S. E. Nahlik, *LA*, 754, I.L.C. commentary, quoted, 755.
- International Economic Order. Origins and Prospects of. Sterling-Dollar Diplomacy. R. N. Gardner. *BR*. 857.
- International economic organization. The GATT: Law and. K. W. Dam. *BR*. 853.
- International economic relations. Developments in the law and institutions of. S. D. Metzger. 112.
- International Environmental Authority. Proposed. 84.
- International Global Station Systems. Monitoring of oceans by. 85.
- International Group Protection. J. J. Lador-Lederer. *BR*. 420.
- International Labor Organization. Constitution, Art. 9 quoted on responsibilities of Director General, 139, Art. 13 cited on payment of expenses, 140; Impact after Fifty Years, C. W. Jenks, *BR*, 411; the United States and, S. M. Schwebel, *Ed*, 136.
- International law:
- Akehurst, M. A Modern Introduction to. *BR*. 643.
- And the Resources of the Sea. J. Andrassy. *BN*. 867.
- British Year Book, 1967. *BR*. 429.
- Canadian legislation regarding pollution of Arctic Sea. L. Henkin. *Ed*. 131.
- Canadian Yearbook, 1969. *BR*. 229.
- Cisneros, Cesar Diaz. Derecho Publico Internacional. *BR*. 836.
- Development of. By United Nations resolutions and declarations, L. Gross, *LA*, 318; United Nations rôle, seminar on, S. C. Jain, *CN*, 582, Patna Declaration, 583.
- De Visscher, Charles. Problèmes de Confins en Droit International Public. *BR*. 412.
- Diplomatic protection of national shareholders in foreign company. Barcelona Traction Co. case, I.C.J. H. W. Briggs. *LA*. 327.
- Falk, R. A. The Status of Law in International Society. *BR*. 637.
- French practice. A.-C. Kiss. *BA*. 839.
- General Agreement on Tariffs and Trade in. Judgment of Hamburg Tax Court, 1969. *JD*. 627.
- Generally recognized principles. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 1970. 250.
- Green, L. C. International Law through the Cases. *BR*. 837.
- In Historical Perspective. Vol. III J. H. W. Verzijl. *BR*. 220.
- Judicial decisions involving. *JD*. 195, 398, 608, 812.

- Jus cogens in. G. B. Zotiades. *BN*. 866.
- Lauterpacht, Hersch. Collected Papers. *BR*. 214.
- Lewin, D. B. Grundprobleme des Modernen Völkerrechts. *BN*. 430.
- National security and. J. N. Moore. *LA*. 72.
- Neutralization of states in. 168.
- Persons entitled to special protection under. O.A.S. Convention to Prevent and Punish Acts of Terrorism in form of Crimes and Related Extortion against, 1971. 898.
- Poland in. L. Gelberg, Powstanie Polski Ludowej. Problemy Prawa Miedzynarodowego. *BN*. 873.
- Present crisis, a cause of. M. Sukijasović. *CN*. 378.
- Principles concerning friendly relations and co-operation among states, progressive development and codification. U. N. General Assembly Res. 2625 (XXV). 243; R. Rosenstock, *LA*, 713.
- Rabl, K. Die Völkerrechtsgrundlagen der Modernen Friedensordnung. *BN*. 661.
- Schwarzenberger, Georg. International Law as Applied by International Courts and Tribunals. The Law of Armed Conflict. *BR*. 635.
- Self-determination in. R. Emerson. *LA*. 459.
- Social Justice in. The ILO Impact after Fifty Years. C. W. Jenks. *BR*. 411.
- Socialist. Renewed emphasis upon, J. N. Hazard, *Ed*, 142; or "Socialist principles of international relations"? W. E. Butler, *CN*, 796.
- Sources of. Art. 38 of I.C.J. Statute, L. Gross, *LA*, 317; further thoughts on, Professor D'Amato's "manifest intent," N. G. Onuf, *CN*, 774.
- Soviet Public International Law. K. Grzybowski, *BR*, 840; University of Kiel, Institute of International Law, Drei Sowjetische Beiträge zur Völkerrechtslehre, *BN*, 430.
- States in. Was Biafra a state? D. A. Ijalaye. *CN*. 551.
- Student journals. E. H. Finch. *CN*. 584.
- Studies in. C. F. Amerasinghe. *BN*. 865.
- Subjects of. Soviet doctrine. C. Osakwe. *LA*. 502.
- Teaching of. W. L. Butte. *CN*. 597.
- Tunkin, G. I. Grundlagen des Modernen Völkerrechts, *BN*, 430; Der Ideologische Kampf und das Völkerrecht, *BN*, 430, cited 147; Teorii Mezhdunarodnogo Prava, *BR*, 416, W. E. Butler, *CN*, 796, J. N. Hazard, *Ed*, 142.
- U. N. Declaration on Principles concerning Friendly Relations and Co-operation among States. General Assembly Res. 2625 (XXV). 243.
- U. S. contemporary practice relating to. S. C. Nelson, 178, 388, 599, 805; U. S. failure to pay contribution to I.L.O., S. M. Schwebel, *Ed*, 139; U. S. military action in Cambodia and, G. H. Aldrich, *LA*, 76, R. A. Falk, *LA*, 1, W. Friedmann, *LA*, 77, J. L. Hargrove, *LA*, 81, J. N. Moore, *LA*, 38; Department of State, Legal Adviser's Office, Memorandum regarding attempted defection by Lithuanian seaman in U. S. territorial waters, 389.
- War in. Weber, H. Der Vietnam-Konflikt—bellum legale? *BR*. 850.
- Yearbook, 1969. University of Kiel. *BR*. 658.
- International Law Association. Resolutions on access to I.C.J. by United Nations and specialized agencies, cited, 302, quoted, 304; on requests for advisory opinions of I.C.J., cited, 320, quoted, 321.
- International Law Commission. Codification of law of treaties, H. W. Briggs, *LA*, 705; draft articles on interpretation of treaties, commentary quoted, 709; draft articles on invalidity and termination of treaties, S. E. Nahlik, *LA*, 737, 740, 743, 744, 745, 748, 749, 752, 753; proceedings and reports as travaux préparatoires in interpretation of Vienna Convention on Law of Treaties, H. W. Briggs, *LA*, 707, 711; quoted on municipal law and crimes under international law, 493; Statute, Art. 6 quoted on nominations for membership on, 288; Yearbooks, cited, 705, 707, 709, 711.
- International Legal Materials. List of current documents. 251, 454, 703, 924.
- International Legal Order, Future of. R. A. Falk and C. E. Black. *BR*. 218.

International Legislation. M. O. Hudson. *BN*. 664.

International Monetary Fund:

Agreement. Art. IV, Sec. 1, quoted, 113, Sec. 3 quoted, 113, Sec. 4 quoted, 114, Sec. 5 quoted, 114, Sec. 6 quoted, 114, J. Gold, *LA*, 113; Art. VIII, Sec. 3 on multiple currency practices and discriminatory currency arrangements, quoted, 126, J. Gold, *LA*, 126; Art. XV, Sec. 2 (b), quoted, 115, J. Gold, *LA*, 118.

Executive Directors' decision of March 1, 1948, regarding changes in monetary par value. 123.

Joint Statement by Experts on Establishment of, April 21, 1944. Sec. IV quoted. 115.

Preliminary Draft of Suggested Articles of Agreement for. J. Gold. *LA*. 117.

International monetary law. Hoffmann, W. Festsetzung und Vollzug der DM-Parität im Verfassungs-, Verwaltungs- und Völkerrecht. *BR*. 225.

International organization. A.-V. N. Papacostas, *BN*, 875; and Integration, H. F. Van Panhuys *et al.*, *BN*, 433; Etzicni, M. M., The Majority of One: Towards a Theory of Regional Compatibility, *BR*, 427; Kutzner, G., Die Organisation der Amerikanischen Staaten (OAS), *BN*, 877; Rodriguez, L. V., Fundamentos y Propósitos de las Naciones Unidas, *BN*, 876; Woronoff, J., Organizing African Unity, *BN*, 877.

International organizations:

Access to I.C.J. L. Gross. *LA*. 302.

Constituent instruments as basis for legal personality. Soviet doctrine. 510, 517.

Contemporary Soviet doctrine on juridical nature. C. Osakwe. *LA*. 502.

Definition of. C. Osakwe. *LA*. 507, 513.

Ghebali, V.-Y. La France en Guerre et les Organisations Internationales 1939-1945. *BR*. 223.

International responsibility of. Ginther, K., Die völkerrechtliche Verantwortlichkeit internationaler Organisation gegenüber Drittstaaten. *BN*. 236.

Proposed authorization to request I.C.J. advisory opinions. L. Gross. *LA*. 276.

Treaty-making power. Soviet doctrine. 510, 519.

International Peace Court. T. Holten. *BN*. 238.

International personality in international law. Soviet doctrine. C. Osakwe. *LA*. 502.

International relations. "Socialist international law" or "Socialist principles of"? W. E. Butler, *CN*, 796; G. I. Tunkin, V. I. Lenin i printsipy otnoshenii mezhdru sotsialisticheskimi gosudarstvami, quoted, 797, 799; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly Res. 2625 (XXV), 243, 248, R. Rosenstock, *LA*, 713.

International seabed authority. W. Friedmann, *LA*, 766, 767; proposals for, 767; U. S. draft U. N. Convention on the International Seabed Area, summary, 181, 182.

International Seabed Boundary Review Commission. U. S. draft U. N. Convention on the International Seabed Area. Summary. 183.

International trade and investment. Cases and Materials on Regulation of. C. H. Fulda and W. F. Schwartz. *BN*. 232.

International Trusteeship Area. U. S. draft U. N. Convention on the International Seabed Area. Summary. 180, 181, 185.

Internationalism, proletarian. Soviet doctrine of. W. E. Butler, *CN*, 796; V. I. Lisovskii cited on, 145; G. I. Tunkin cited on, 144, 146, quoted, 798.

Intervention:

And Negotiation. The United States and the Dominican Revolution. J. Slater. *BN*. 875.

Armed. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Gen. Assembly Res. 2625 (XXV). 245, 248; R. Rosenstock, *LA*, 720, 726.

In internal wars. Art. 2 (4) of U. N. Charter and. L. Henkin. *Ed*. 546.

Investment. In developing countries, U. S. tax treaties, P. L. Kelley, *CN*, 159; international Trade and, Cases and Materials on Regulation of, C. H. Fulda and W. F. Schwartz, *BN*, 232.

- Investment disputes. Convention on Settlement between States and Nationals of Other States. P. C. Szasz *et al.* *BR.* 846.
- Investment guarantees. Nationality of corporate investment under. S. D. Metzger, *Ed.* 532; summary of nationality eligibility aspects, 542, 543.
- Iowa City. ASIL regional meeting, 1970. E. J. Lemons. *CN.* 174.
- Iran, Shah of. Quoted on attitude toward Bahrain question. 562.
- Iran-Great Britain. Bahrain dispute, resolution of. E. Gordon. *CN.* 560.
- Ireland-United States. Treaty of Friendship, Commerce and Navigation, 1950. Schiefelin & Co. v. United States, 424 F. 2d 1396. *JD.* 208.
- Irish International Airlines, Molitch v., 436 F. 2d 42. *JD.* 827.
- Israel. Declaration of acceptance of I.C.J. compulsory jurisdiction, quoted, 315; the future of, N. Goldmann, cited, 167; Military Prosecutor v. Omar Mahmud Kassem *et al.*, Mil. Ct. Ramallah, 1969, *JD.* 409; v. Adnan Ibn Adal Ibn Badawi al Bahsh, Mil. Ct. Nablus, 1969, *JD.* 410; neutralization of, J. F. Murphy, *CN.* 167.
- Italy-United States. Consular Convention, 1878. In re Estate of Scardigli, 467 Pac. 2d 841. *JD.* 200.
- Iwanejko, Marian E. *BN:* Dembiński, 872.
- Jackson, John H. World Trade and the Law of GATT. *BR.* 853.
- Jackson, Justice Robert H. Quoted on Congress and the President's powers. 37.
- Jain, Subhash C. Seminar at Patna on the U. N. rôle in the development of international law. *CN.* 582.
- Japan. Proposal regarding composition of I.C.J. and acceptance of its compulsory jurisdiction. 283.
- Japan-United States. Treaty of Peace, 1951. U. S. powers of administration of Ryukyu Islands under. Williamson v. Alldridge, 320 F. Supp. 840. *JD.* 624.
- Jefferson, President Thomas. Report to Congress on military operations against Barbary pirates. Quoted. 29.
- Jenks, C. Wilfred. Quoted on access of international organizations to the I.C.J., 306, on application of customary international law by the I.C.J., 317; proposed amendment to Art. 34 of I.C.J. Statute, 303; The Prospects of International Adjudication, quoted, 253, 254, 257, 269, 275, 276, 303, 304, 306, 308, 315, 317, 318, 321, 322, 524, 532; Social Justice in the Law of Nations: The ILO Impact after Fifty Years, *BR.* 411.
- Jennings, R. Y. The limits of continental shelf jurisdiction. Quoted. 762.
- Jessup, Judge Philip C. Quoted on definition of state in international law, 551; A Modern Law of Nations, quoted on use of force in anticipation of attack, 722; Opinion in Barcelona Traction Co. case, I.C.J., cited, 343, 528; *BR:* Lauterpacht, 214.
- Jiménez de Aréchaga, Eduardo. Quoted on preparatory work in interpretation of treaties. 710.
- Johnson, Harold S. Quoted on right of self-determination. 462.
- Jones, Harry LeRoy. *BN:* Russotto, 662.
- Journal of Maritime Law and Commerce. E. H. Finch. *CN.* 175.
- Judicial assistance, international. Letter of Assistant Legal Adviser, Department of State, regarding service in the United States of foreign judicial documents, 601; Department of State note to foreign embassies regarding letters rogatory, 186.
- Judicial proceedings. U. S.-Mexican Treaty for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 1971. 896, 897.
- Judicial Protection against the Executive. National Reports: Australia-Yugoslavia. Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. *BR.* 421.
- Judicial remedies. In the European Communities. L. J. Brinkhorst and H. G. Schermers. *BN.* 233.
- Judicial settlement of international disputes. Holton, T., An International Peace Court, *BN.* 238; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Assembly Res. 2625 (XXV), 247,

- R. Rosenstock, *LA*, 725; U. S. draft U. N. Convention on the International Seabed Area, summary, 182.
- Juridical personality. Right to. American Convention on Human Rights, 1969. 680.
- Jurisprudence. Political Integration by. A. W. Green. *BN*. 233.
- Jurists' Committee, 1920, The Hague. Cited on *ad hoc* judges of I.C.J. 296.
- Jus cogens. Definition of, Vienna Convention on Law of Treaties, quoted, 371; international, G. B. Zotiades, *BN*, 866; interpretation of treaties and, Sir Gerald Fitzmaurice, *LA*, 371; invalidity and termination of treaties conflicting with, Vienna Convention provisions, S. E. Nahlik, *LA*, 744, 747, 754.
- Kahin, George McT. Quoted on Cambodia and the SEATO Treaty. 10.
- Kassem, Omar Mahmud, *et al.*, Military Prosecutor v., Mil. Ct. Ramallah, 1969. *JD*. 409.
- Kasson, John Adam. Quoted on European occupation of African territory, 156; on U. S. policy regarding Africa, 153.
- Katzenbach, Nicholas DeB., Under Secretary of State. Quoted on Tonkin Gulf resolution as declaration of war. 33.
- Kay, David A. Quoted on U. N. General Assembly resolutions. 466.
- Kearney, Richard D., and Robert E. Dalton. The Treaty on Treaties. Cited. 736.
- Kelley, Patrick L. Tax treaties between the United States and developing countries. *CN*. 159.
- Kellogg-Briand Pact, 1928. Cited on peaceful settlement of international disputes, 261; quoted, 256.
- Kennan, George. Proposed International Environmental Authority. 84.
- Kennedy, Welch v., 319 F. Supp. 945. *JD*. 623.
- Khan, Rahmatullah. Implied Powers of the United Nations. *BR*. 650.
- Kidnaping. O.A.S. Convention to Prevent and Punish Acts of Terrorism against Persons that are of International Significance, 1971. 898.
- Kiel University, Institute for International Law. Drei Sowjetische Beiträge zur Völkerrechtslehre, *BN*, 430; Jahrbuch für Internationales Recht, 1969, *BN*, 658.
- Kiss, Alexandre-Charles. Répertoire de la Pratique Française en Matière de Droit International Public, Vol. VI. *BR*. 839.
- Kita v. Matuszak, 175 N. W. 2d 551. *JD*. 620.
- Koo, Judge Wellington. Opinion in Barcelona Traction Case, I.C.J., 1964. Quoted. 524.
- Korea. U. S. action in. Constitutionality of. W. D. Rogers. *LA*. 31.
- Koretsky, Judge V. M. Quoted on Continental Shelf Convention as general international law. 779.
- Korovin, E. A. Cited on international organizations as subjects of international law. 503.
- Kos-Rabcewicz-Zubkowski, L. East European Rules on the Validity of International Commercial Arbitration Agreements. *BN*. 881.
- Kozhevnikov, F. I. Cited on Socialist international law, 143; quoted on international organizations as subjects of international law, 512; Uchebnik Mezhdunarodnogo Prava, quoted on legal personality of the United Nations, 506.
- Krülle, Siegrid. Die Völkerrechtlichen Aspekte des Oder-Neisse-Problems. *BN*. 874.
- Krylov, S. B. Quoted on status of United Nations in international law. 503.
- Kulski, W. W. *BN*: Rubinstein, 435.
- Kunz, Josef L. H. W. Briggs. *EL*. 129.
- Kurs Mezhdunarodnogo Prava (1967). Cited on legal personality of international organizations, 506; quoted, 507.
- Kutch, Rann of, Arbitration. J. Cillis Wetter. *LA*. 346.
- Kutzner, Gerhard. Die Organisation der Amerikanischen Staaten (OAS). *BN*. 877.
- Lador-Lederer, J. J. International Group Protection. *BR*. 420.
- Laos. Neutralization of. J. F. Murphy. *CN*. 171.

- Latin America. Nationalization of foreign property, L. G. Aguayo, *BN*, 880; working paper on regime for the sea and seabed beyond national jurisdiction, 766, 767.
- Lauterpacht, E. Collected Papers of Hersch Lauterpacht. *BR*. 214.
- Lauterpacht, Judge Sir Hersch. Cited on nominations to I.C.J., 287, quoted, 288; cited on rules of treaty interpretation, 367; quoted on *ad hoc* judges on I.C.J., 296, on compulsory jurisdiction of the I.C.J., 313, on international law and private law analogies, 529, on rights of belligerents with regard to neutrals, 53; *International Law*, Collected Papers, *BR*, 214; *Recognition in International Law*, quoted on definition of state, 551, on recognition of new states, 558.
- Law. And International Economic Organization, The GATT, K. W. Dam, *BR*, 853; equal protection of, American Convention on Human Rights, 1969, 687; policy and, a cause of present crisis of international law, M. Sukijasović, *CN*, 378; Status in International Society, R. A. Falk, *BR*, 637.
- Law of nations. See International law.
- Lawson, Ruth C. *BR*: Council of Europe Manual, 849; Lindberg and Scheingold, 847.
- Lay, S. Houston. Mexican-American Border Relationship Conference, San Diego, California, May 7-8, 1971. *CN*. 803.
- Lay, S. Houston, and H. J. Taubenfeld. The Law Relating to Activities of Man in Space. *BR*. 639.
- League of Nations. Betrayal from Within, Joseph Avenol, Secretary-General, 1933-1940, J. Barros, *BR*, 862; Mandate system, sacred trust of civilization and, 157; peaceful settlement of disputes, L. Gross, *LA*, 260.
- League of Nations Covenant. Art. 12 quoted on peaceful settlement of international disputes, 255; Art. 23 quoted, 158.
- Lear-Siegler, Inc., Canadian Filters (Harwich) Limited v., 412 F. 2d 577. *JD*. 610.
- Lee, Luke T. *BN*: Boskey and Willrich, 878.
- Legal process, service of. Department of State note to foreign embassies regarding letters rogatory. 186.
- Lemons, Edward J. Regional meeting of the Society, Iowa City, 1970. *CN*. 174.
- Lesotho. Application of 1951 Convention on Status of Refugees to. Molefi v. Principal Legal Adviser, [1970] 3 W.L.R. 338. *JD*. 407.
- Letiche, John M. *BR*: Gardner, 857.
- Letters rogatory. Department of State note to foreign embassies. 186.
- Levin, D. B. Quoted on international organizations as subjects of international law, 504; Grundprobleme des Modernen Völkerrechts, *BN*, 430; Mezdunarodnoe Pravo —Uchebnik dlia Iuridicheskikh Vuzov, quoted on United Nations as a subject of international law, 507.
- Liang, Yuen-li. *BR*: Cohen, 655.
- Liberty, right to. American Convention on Human Rights, 1969. 682.
- Licenses. U. S. draft U. N. Convention on the International Seabed Area. Summary. 180, 181, 183, 184.
- Life, right to. American Convention on Human Rights, 1969. 680.
- Lillich, Richard B. Barcelona Traction, Light and Power Co. Ltd. case, I.C.J., rigidity of, *Ed*, 522; the obligation to register treaties and international agreements with the United Nations, *Ed*, 771; *BR*: Czasz *et al.*, 846.
- Limitation of actions. International air carrier liability. Molitch v. Irish International Airlines, 436 F. 2d 42. *JD*. 827.
- Limitation, statutes of. Spain-United States Extradition Treaty, 1970, 917; non-applicability to war crimes and crimes against humanity, U. N. Convention, 1968, R. H. Miller, *LA*, 476.
- Lindberg, Leon N., and S. A. Scheingold. Europe's Would-be Polity. Patterns of Change in the European Community. *BR*. 847.
- Lisovsky, V. I. International Law. Cited on Socialist international law. 144.
- Lissitzyn, Oliver J. *BR*: Parry, 864.
- London Agreement on German External Debts, 1953. U. S.-German dispute regarding Young Loan. 805.



- London Steam-Ship Owners' Mutual Insurance Association, Ltd., *Continental Oil Co. v.*, 397 U. S. 911. Cited. 213.
- Los Angeles, City of, *Department of Water and Power, Bethlehem Steel Corporation v.*, 80 Calif. Repr. 800. *JD.* 609.
- Louisiana, State of. Seaward boundary. *Texaco, Inc. v. Hickel*, 437 F. 2d 636. *JD.* 823.
- Lowenfeld, Andreas F. *BR: Dam*, 853; *Green*, 857; *Jackson*, 853.
- Lukashuk, I. I. Cited on attributes of international organizations as subjects of international law. 514.
- Lump-sum agreements in settlement of international claims. I.C.J. quoted on. 526.
- Macomber, William B., Jr., Deputy Under Secretary of State. Quoted on failure of U. S. to pay I.L.O. contribution. 138.
- Maktos, John. *BN: Papacostas*, 375.
- Manelis, B. L. Cited on Soviet constitutional concept of sovereignty. 146.
- Mangano, Philip C. *BN: Shore*, 660.
- Manley v. Schoenbaum, 395 U. S. 906. Cited. 213.
- Mann, F. A. *The U. S. Treaty of Commerce with Germany and the German Constitution*. *CN.* 793.
- Maps as evidence of title. *Rann of Kutch arbitration*. J. G. Wetter. *LA.* 347, 351, 354.
- Marginal seas. *See Territorial sea.*
- Marine pollution. Institute of International Law resolution, 1969, on measures concerning, cited, 93; problems and remedies, O. Schachter and D. Serwer, *LA*, 84.
- Maritime disputes. *Arbitration of G. B. Michael v. S. S. Thanasis*, 311 F. Supp. 170. *JD.* 202.
- Matte, Nicolas M. *Aerospace Law*. *BR.* 843.
- Matthews, *United States v.*, 427 F. 2d 992. *JD.* 204.
- Matuszak, *Kita v.*, 175 N. W. 2d 551. *JD.* 620.
- Mavrommatis case, P.C.I.J. Quoted. 335.
- Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. *Judicial Protection against the Executive*. *BR.* 421.
- Maxwell, Neville. *India's China War*. *BR.* 859.
- McDougal, Myres S. Quoted on customary international law, 525, on I.L.C. draft articles on treaty interpretation, 709.
- McDougal, Myres S., and F. Feliciano. *Law and Minimum World Public Order*. Quoted on belligerent rights regarding neutral territory, 58; on belligerent violation of neutral territory, 47; on collective and individual self-defense, 13, 14, 53.
- McDougal, Myres S., H. D. Lasswell, and J. C. Miller. *The Interpretation of Agreements and World Public Order*. Quoted, 358, 362, 364, 365, 368, 369, 373; Sir Gerald Fitzmaurice, *LA*, 358.
- McGill University, Institute of Air and Space Law. *New Frontiers in Space Law*. *BN.* 234.
- McGovern-Hatfield amendment. U. S. military operations in Viet-Nam and. 26, 69.
- McKnight, J. W. *BN: Bethell*, 663.
- McWhinney, Edward. *Conflit ICéologique et Ordre Public Mondial*, *BN*, 237; *BN: Delcoigne and Rubinstein*, 873.
- McWhinney, Edward, and M. A. Bradley. *New Frontiers in Space Law*. *BN.* 234.
- Menzel, Eberhard. *Jahrbuch für Internationales Recht*, 1969. *BR.* 658.
- Merryman, John Henry. *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*. *BN.* 663.
- Metzger, Stanley D. Developments in the law and institutions of international economic relations, 112; nationality of corporate investment under investment guaranty schemes, the relevance of *Barcelona Traction*, *Ed*, 532.
- Mexican-American Border Relationship Conference, San Diego, California, May 7-8, 1971. S. H. Lay. *CN.* 803.

- Mexico. Attorney General, judicial action for recovery and return of stolen archaeological, historical or cultural property, U. S.-Mexican Treaty, 1971, 897; divorce decrees, recognition of, *Ramm v. Ramm*, 310 N.Y.S. 2d 111, *JD*, 207; statement on American Convention on Human Rights, 702.
- Mexico, Colegio de. Center of International Studies. *La ONU: Dilema a los 25 Años*. BN. 876.
- Mexico-United States. Treaty of Co-operation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 1971. 895.
- Michael, G. B., v. S. S. Thanasis, 311 F. Supp. 170. *JD*. 202.
- Middle East. Conflict in. Neutralization of Israel. J. F. Murphy. CN. 167.  
See Arab-Israeli conflict.
- Military necessity. U. S. operations in Cambodia. J. N. Moore, *LA*, 51, 57; W. D. Rogers, *LA*, 34.
- Military service, exemption from. Argentina-U. S. Treaty of Friendship, Commerce and Navigation, 1853. *Vazquez v. Attorney General of the United States*, 433 F. 2d 516. *JD*. 625.
- Miller, Robert H. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. *LA*. 476.
- Milligan, Ex parte, 71 U. S. 2. Quoted on Congress and the President's powers as Commander-in-Chief of the armed forces. 68.
- Minorities. Human Rights, Federalism and, A. Gotlieb, BN, 869; Veiter, T., *Das Recht der Volksgruppen und Sprachminderheiten in Österreich*, BN, 873.
- Minors. Extradition of. Spain-United States Treaty, 1970. 918.
- Modzhorian, L. A. Cited on international organizations as subjects of international law, 511; quoted on subjects of international law, 505, 512.
- Molefi v. Principal Legal Adviser, [1970] 3 W.L.R. 338. *JD*. 407.
- Molitch v. Irish International Airlines, 436 F. 2d 42. *JD*. 827.
- Monetary exchange, international. Hoffmann, W., *Rechtsfragen der Währungsparität*, BR, 225; unauthorized changes of par value and fluctuating exchange rates in the Bretton Woods system, J. Gold, *LA*, 113.
- Montevideo Convention, 1933, on Rights and Duties of States. Art. 1 quoted on definition of state. 551.
- Montevideo Declaration on the Law of the Sea, 1970. Cited. 764.
- Moore, John Norton. The Control of Foreign Intervention in Internal Conflict, cited, 73; legal dimensions of the decision to intercede in Cambodia, *LA*, 38, G. H. Aldrich, *LA*, 76, W. Friedmann, *LA*, 78, J. L. Hargrove, *LA*, 81; BR: Castañeda, 647.
- Morelli, Judge Gaetano. Opinion in Barcelona Traction Co. case, I.C.J. Quoted. 333, 345.
- Morozov, G. I. Classification of international organizations, 513; definition of international organization, 508.
- Moser, F. C. Quoted on recognition of sovereignty of The Netherlands. 568.
- Moser, J. J. Cited on recognition of sovereignty of former dependencies, 570; quoted on sovereignty of Swiss Confederation, 569.
- Mössner, J. M., and O. Strössenreuther. *Fundheft für Öffentliches Recht*. BN. 238.
- Most-favored-nation treatment. Schieffelin & Co. v. United States, 424 F. 2d 1396, *JD*, 208; suspension of trade concessions, *Star Industries, Inc. v. United States*, 320 F. Supp. 1018, *JD*, 621.
- Multinational corporation. In the World Economy, S. E. Rolfe and W. Damm, BR, 657; National Interests and, J. B. Behrman, BR, 851.
- Multiple currency practices. International Monetary Fund agreement and. J. Gold. *LA*. 126.
- Municipal law:  
Application to international shareholder claims. Barcelona Traction Co. case, I.C.J. Quoted, 338, 529; H. W. Briggs, *LA*, 338; Judge Sir Gerald Fitzmaurice quoted, 531; Judge André Gros quoted, 530, 531; Judge Kotaro Tanaka quoted, 530.  
Application to war crimes and crimes against humanity. R. H. Miller. *LA*. 476.

- Implementation of Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity. 495.
- Murder. O.A.S. Convention to Prevent and Punish Acts of Terrorism against Persons that are of International Significance, 1971. 898.
- Murphy, John F. Neutralization of Israel. *CN*. 167.
- Nadelmann, Kurt H. The need for revision of the Bustamante Code on Private International Law. *CN*. 782.
- Nahlik, S. E. The grounds of invalidity and termination of treaties. *LA*. 736.
- Namibia. See South West Africa.
- Nanda, Ved P. Regional meetings of the ASIL, Denver, Colorado, May 8, 1970, *CN*, 800, April 16, 1971, *CN*, 801.
- Nansen passport. J. F. Engers. *CN*. 571.
- Narcotic Drugs, Single Convention on, 1961. U. S. suggested amendments, 193; Memorandum regarding proposed amendments, 602; working paper, 191.
- Nathanson, Nathaniel L. *BN*: Schreiber, 432.
- National courts. Application of international law principles and interpretation of treaties by, L. Gross, *LA*, 311; reference of international law questions to I.C.J., L. Gross, *LA*, 269, 308.
- National Life & Accident Insurance Co., *Hammond v.*, 243 So. 2d 902. *JD*. 822.
- National Socialists, Germany. German criminal judgments for murder, 1945-1947. Amsterdam University. *BR*. 423.
- National treatment. Under U. S.-German Treaty of Commerce, the German Constitution and, F. A. Mann, *CN*, 793, under U. S. Treaty of Commerce with Ireland, 1950, *Schieffelin & Co. v. United States*, 424 F. 2d 1396, *JD*, 208.
- Nationality. Acquisition and loss of, Memorandum by Office of Legal Adviser, Department of State, in *Rigerman cases*, 394; dual, Memorandum from Office of the Legal Adviser, Department of State 187; *Vazquez v. Attorney General of the United States*, 433 F. 2d 516, *JD*, 625; right to, American Convention on Human Rights, 1969, 686.
- Nationalization of alien property. Aguayo, L. G. *La Nacionalización de Bienes Extranjeros en América Latina*. *BN*. 880. See Aliens, property.
- Nelson, Steven C. Contemporary U. S. practice relating to international law. 178, 388, 599, 805.
- Netherlands. Recognition of sovereignty. J. A. Frowein. *CN*. 568.
- Netherlands-Federal Republic of Germany. Treaty on the Delimitation of the Continental Shelf under the North Sea, 1971. 909.
- Netherlands-United Kingdom. Boundary line of North Sea Continental Shelf. Amendment of 1965 agreement. Germany-Denmark-Netherlands Protocol, 1971. 902.
- Neutral states. Duties of. Cambodia in Viet-Nam war. J. N. Moore. *LA*. 45.
- Neutral territory. Belligerent rights and duties respecting. J. N. Moore. *LA*. 47, 57.
- Neutrality. Cambodian position at Geneva Conference, 1954, 39, Declaration, quoted, 39, R. Randle quoted on, 39; Cambodian law, 1957, 40; U. S. military action and, G. H. Aldrich, *LA*, 76, R. A. Falk, *LA*, 4, 6, 10, 15, 17, 18, 19, W. Friedmann, *LA*, 77, J. L. Hargrove, *LA*, 82; law of, and the U. N. Charter, J. N. Moore, *LA*, 48, 51, 53.
- Neutralization. Israel. J. F. Murphy. *CN*. 167.
- New School for Social Research, New York City. Regional Conference of ASIL, 1971. N. S. Rodley. *CN*. 802.
- New York City, Association of the Bar. Committee on International Law. Report on Connally reservation, 1964. Cited, 374; quoted, 377.
- New York State:
- Civil Rights Act. U. S. military action in Viet-Nam and. *Berk v. Laird*, 429 F. 2d 302, *JD*, 401; *Switkes v. Laird*, 316 F. Supp. 358, *JD*, 402.
- Division of Human Rights, *South African Airways v.*, 315 N.Y.S. 2d 651. *JD*. 403.
- New Zealand. Claim to Ross Dependency. F. M. Auburn. *CN*. 578.

- New Zealand-United States. Condominium over Ross Dependency and the Antarctic Treaty. F. M. Auburn. *CN*. 580.
- Nixon, President Richard M. Cited on U. S. operations in Cambodia, 74, quoted, 2, 4, 5, 6, 15, 56; message transmitting to the Senate the Geneva Protocol on Poisonous Gases and Bacteriological Warfare, 1925, 189; Six Crises, quoted on position regarding Cuba.
- Non-intervention:
- Self-determination and. R. Emerson. *LA*. 465.
  - United Nations Declaration on Inadmissibility of Intervention. Quoted, 45, 48, 466; R. Rosenstock, *LA*, 726, 727; United Nations Special Committee on Principles of International Law concerning Friendly Relations of States, Resolution, 728.
  - United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 244, 245, 248; R. Rosenstock, *LA*, 717, 726.
  - United States position. Quoted. 726, 727.
  - Viet-Nam war. Cambodian duties with respect to, J. N. Moore, *LA*, 45; North Vietnamese and Viet Cong military activities in Cambodia, J. N. Moore, *LA*, 48.
- Non-self-governing territories. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 249; R. Rosenstock, *LA*, 730.
- Nordquist, Myron H. *BR*: Lay and Taubenfeld, 639.
- North Atlantic Treaty Organization. Status of Forces Agreement, 1951. *Bell v. Clarke*, 437 F. 2d 200. *JD*. 826.
- North Sea continental shelf. Delimitation of. Denmark-Federal Republic of Germany, Treaty, 1971, 904; Denmark-Federal Republic of Germany-Netherlands, Protocol, 1971, 901; Federal Republic of Germany-Netherlands, Treaty, 1971, 909.
- North Sea Continental Shelf cases, I. C. J. Cited on determination by I.C.J. of applicable rules of international law, 279, on effect on use of I.C.J., 268, on treaties as source of customary international law, 774, 775, 779, 780; quoted on rights of coastal states in continental shelf, 762; *Isi Foighel* quoted on, 268; Germany-Denmark-Netherlands, Protocol, 1971, 901; Germany-Denmark Treaty, 1971, 904; Netherlands-Germany Treaty, 1971, 909.
- North Viet-Nam. Violation of Cambodian neutrality. J. N. Moore. *LA*. 47.
- Nottebohm case, I.C.J. Genuine link theory and Barcelona Traction Co. case. H. W. Briggs. *LA*. 340, 342.
- Nuclear weapons, non-proliferation. Boskey, B., and M. Willrich, Nuclear Proliferation: Prospects for Control, *BN*, 878; Delcoigne, G. and G. Rubinstein, Non-Prolifération des Armes Nucléaires et Systèmes de Contrôle, *BN*, 879.
- Nuremberg. And Vietnam, An American Tragedy. T. Taylor. *BR*. 640.
- Nuremberg International Military Tribunal. Quoted on German war crimes, 485; Charter, Art. 6, defining war crimes and crimes against humanity, quoted, 485, 489, 490.
- Nye, Joseph S. *BN*: Goodrich, Hambro and Simons, 434; Woronoff, 877.
- Occidental Petroleum Corp. v. Buttes Gas & Oil Co., U. S. Dist. Ct., C. D. Calif., 1971. *JD*. 815.
- Occupied territory. Belligerent rights in. U. S. State Department statement regarding Israeli activities in occupied Arab territory. 809.
- Oceans. Pollution of. See Marine pollution.
- Oder-Neisse boundary, Germany-Poland. See Germany-Poland.
- Oil. Marine pollution by. O. Schachter and D. Serwer, *LA*, 88; Civil Liability for Damage, Brussels Convention, 1969, cited, 94, 132; Intervention on the High Seas in Cases of Casualties, Brussels Convention, 1969, cited, 94, quoted, 132; Prevention of, Convention, 1954, cited, 92, 134.
- Okinawa, U. S. Armed Forces in. Jurisdiction over. *Williamson v. Alldridge*, 320 F. Supp. 840. *JD*. 624.
- Oliner v. Canadian Pacific Railway Company, 311 N.Y.S. 2d 429. *JD*. 205.

- Onuf, N. G. Further thoughts on a new source of international law: Professor D'Amato's "Manifest Intent." *CN*. 774.
- Opium. U. S. suggested amendments to Single Convention on Narcotic Drugs, 1961, 193; U. S. working paper, 191.
- Oppenheim, L., -Lauterpacht, International Law. Quoted on recognition of new states. 557.
- Organization for Economic Co-operation and Development. Draft Double Taxation Convention on Income and Capital. P. L. Kelley. *CN*. 162.
- Organization of African Unity. Woronoff, J., Organizing African Unity. *BN*. 877.
- Organization of American States. G. Kutzner. *BN*. 877.
- Charter. Provisions on peaceful settlement of international disputes. L. Gross, *LA*, 266; U. S. Delegation to Third Special Conference quoted on, 266.
- Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance, 1971. 898.
- The Majority of One: Towards a Theory of Regional Compatibility. M. M. Etzioni. *BR*. 427.
- Permanent Council. U. S. Note regarding reference of Ecuador-U. S. fisheries dispute to Inter-American Committee on Peaceful Settlement, 599; statement of U. S. Representative, 601.
- Osakwe, Chris. Contemporary Soviet doctrine on the juridical nature of universal international organizations. *LA*. 502.
- Oudendijk, J. M. Status and Extent of Adjacent Waters. *BR*. 841.
- Outer continental shelf. Report of Senate Special Subcommittee on, 1970. Quoted, 759, 761; W. Friedmann, *LA*, 759.
- Outer space, law of. Matte, N. M. Aerospace Law. *BR*. 843. See Space law.
- Ownership of cultural property. Forced transfer. UNESCO Convention on Means of Prohibiting and Preventing, 1970. 887.
- Packard, David, Deputy Secretary of Defense. Quoted on U. S. military action in Cambodia. 18, 20.
- Pacta sunt servanda. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 245, 247, 250, R. Rosenstock, *LA*, 721, 734; U. S. statement to I.C.J. re status of South Africa in South West Africa, 604; Vienna Convention on Law of Treaties, S. H. Nahlik, *LA*, 739, 746, 754.
- Padilla Nervo, Judge. Quoted on arbitral decisions as source of international law. 525.
- Palestine Liberation Front. Laws of war and. Military Prosecutor v. Omar Mahmud Kassem *et al.*, Mil. Ct. Ramallah, 1969. *JD*. 409.
- Panama. Statement regarding asylum in Panama Canal Zone in connection with O.A.S. Convention on Terrorism, 1971. 901.
- Panama Canal Zone. Status as foreign country. United States v. Matthews, 427 F. 2d 992. *JD*. 204.
- Papacostas, Alkis-Vasileou N. International Organization. *BN*. 875.
- Par value. Unauthorized changes, and fluctuating exchange rates in the Bretton Woods system. J. Gold. *LA*. 113.
- Pardo, Arvid. Preliminary Draft Ocean Space Treaty. W. Friedmann. *LA*. 765.
- Paroutsas, Athanasios D. *BN*: Zotades, 866.
- Parry, Clive. Consolidated Treaty Series, *BR*, 864; The Sources and Evidences of International Law, quoted on decisions of I.C.J. as source of international law, 779, on I.C.J. and customary law, 523.
- Pashukanis, E. B. Cited on Socialist international law. 143.
- Passports. Issuance by governments-in-exile. J. F. Engers. *CN*. 571.
- Patents, foreign. Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F. 2d 577. *JD*. 610.
- Patna University. Seminar on U. N. rôle in development of international law. S. C. Jain, *CN*, 582; Declaration, 583.

## Peace, international:

- Maintenance of. By the United Nations, statement by U. S. Representative before Special Committee on Peacekeeping Operations, 809; Fact-Finding in, W. I. Shore, *BR*, 660; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 244, 245, 247, 248, R. Rosenstock, *LA*, 717, 721. *See also* Peacekeeping and United Nations.
- McWhinney, E. Conflict Idéologique et Ordre Public Mondial. *BN*. 237.
- Rabl, Kurt. Die Völkerrechtsgrundlagen der Modernen Friedensordnung. *BN*. 661.
- Peaceful coexistence. G. I. Tunkin cited on. 144.
- Peaceful settlement of international disputes:
- Fisher, R. International Conflict for Beginners. *BR*. 845.
- International Court of Justice. Requirements for enhancing rôle of, L. Gross, *LA*, 253; U. N. Conference on International Organization, Rapporteur of Committee I quoted on, 253, 255, 256.
- Stavropoulos, C. A. Quoted on. 259.
- U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 245, 247; R. Rosenstock, *LA*, 725.
- U. S.-Ecuador fisheries dispute. U. S. request to refer to Inter-American Committee on Peaceful Settlement. 599.
- U. S.-German dispute regarding Young Loan before Arbitral Tribunal for Agreement on German External Debts, 1953. 805.
- Peacekeeping. United Nations, 1946-1967. Vol. II: Asia. R. Higgins. *BR*. 221. *See* Peace, international, and United Nations.
- Pelcovits, Nathan A. *BR*: Zacher, 426.
- Pelzer, Norbert. Rechtsprobleme der Beseitigung radioaktiver Abfälle in das Meer. *BN*. 431.
- Permanent Court of Arbitration. Settlement of international disputes by. 260.
- Permanent Court of International Justice. Settlement of international disputes by. 260.
- Pesticides. Marine pollution by. O. Schachter and D. Serwer. *LA*. 95.
- Petitions by individuals. Receipt by Inter-American Commission on Human Rights. American Convention, 1969. 691.
- Petroleum. Enterprises authorized to extract on North Sea continental shelf. Denmark-Germany Treaty, 1971, 906, 909; Netherlands-Germany Treaty, 1971, 911, 914. *See also* Oil.
- Philippine Society of International Law. Annual meeting. E. H. Finch. *CN*. 387.
- Pietraru, Goldstein a/k/a, v. Cox, 394 U. S. 996; 396 U. S. 471. Cited. 213.
- Pillai, K. G. J. The Air Net: The Case against the World Aviation Cartel. *BR*. 227.
- Pipelines. North Sea continental shelf. Denmark-Germany Treaty, 1971, 905; Germany-Netherlands Treaty, 1971, 911.
- Piracy, aerial. Spain-United States Extradition Treaty, 1970. 916, 917. *See also* Aerial hijacking.
- Poisonous gases, use in war. Geneva Protocol of 1925. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 189; U. S. proposed reservation, 190; U. S. proposed understandings, 191.
- Poland. Peoples'. Emergence of, L. Gelberg, *BN*, 873; Western Frontier, K. Skubiszewski, *BR*, 418.
- Political offenses. Spain-United States Extradition Treaty, 1970. 917.
- Political questions. Justiciability. Berk v. Laird, 429 F. 2d 302, *JD*, 401; Switkes v. Laird, 316 F. Supp. 358, *JD*, 402.
- Portugal-India. Rights of Passage case, I.C.J. Quoted on the optional clause. 315.
- Postal conventions. Status in U. S. law. Williams v. Blount, 314 F. Supp. 1356. *JD*. 405.
- Postal correspondence, foreign. Carriage in the U. S. Williams v. Blount, 314 F. Supp. 1356. *JD*. 405.

- Prisoners of war. Geneva Convention of 1949 on Treatment of. Application to members of Palestine Liberation Front, Military Prosecutor v. Omar Mahmud Kassem *et al.*, Mil. Ct. Ramallah, 1969, *JD*, 409; U. S. proposed procedure for appointment of Protecting Powers, 808.
- Privacy, right to. American Convention on Human Rights, 1969. 683.
- Private international law. Bustamante Code, need for revision, K. H. Nadelmann, *CN*, 782; Holleaux, D., Compétence du Juge Étranger et Reconnaissance des Jugements, *BN*, 880.
- See also* Conflict of laws.
- Propaganda, war. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 246; R. Rosenstock, *LA*, 718.
- Property, right to. American Convention on Human Rights, 1969. 686.
- Property rights. Under U. S. Treaty of Commerce with Germany and the German Constitution. F. A. Mann. *CN*. 793.
- Public danger. Suspension of guarantees during. American Convention on Human Rights, 1969. 688.
- Rabl, Kurt. Die Völkerrechtsgrundlagen der Modernen Friedensordnung. *BN*. 661.
- Racial discrimination, elimination of. Principle of non-intervention and, R. Emerson, *LA*, 466; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 248.
- Radioactive pollution of the seas. O. Schachter and D. Serwer, *LA*, 106, 107, 108; N. Pelzer, Rechtsprobleme der Beseitigung Radioaktiver Abfälle in das Meer, *BN*, 431.
- Raman, K. V. Quoted on I. C. J. and customary international law. 525.
- Ramm v. Ramm, 310 N.Y.S. 2d 111. *JD*. 207.
- Randelzhofer, Albrecht. Völkerrechtliche Aspekte des Heiligen Römischen Reiches nach 1648. *BN*. 436.
- Randle, Robert F. Geneva 1954: The Settlement of the Indochinese War. *BR*, 651; quoted on the Cambodian settlement, 39.
- Rappard, William E. Quoted on rôle of P.C.I.J. 256.
- Rebus sic stantibus. Vienna Convention provisions on termination of treaties. S. E. Nahlik. *LA*. 748.
- Recognition of new states. Was Eiafra a state? D. A. Ijalaye. *CN*. 551.
- Red Cross International Committee. Conference on International Humanitarian Law, 1971. U. S. proposed draft procedure for appointment of Protecting Powers. 808.
- Refugees:
- Admission to United States. Rosenberg v. Yee Chien Woo, 402 U. S. 49. *JD*. 828.
- Convention on Status of, 1951. Application to Lesotho. Molefi v. Principal Legal Adviser, [1970] 3 W.L.R. 338. *JD*. 407.
- International law concerning asylum to. U. S. Department of State Legal Adviser's Office memorandum. 389.
- Lesotho law. Molefi v. Principal Legal Adviser, [1970] W.L.R. 338. *JD*. 407.
- Travel documents for. J. F. Ergers. *CN*. 572.
- Regional agencies. Settlement of international disputes. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 247.
- Regional organizations. Proposed authorization to request I.C.J. advisory opinions. L. Gross. *LA*. 277.
- Regional security organizations. Art. 2 (4) of U. N. Charter and. L. Henkin. *Ed*. 546.
- Regionalism. The Majority of One: Towards a Theory of Regional Compatibility. M. M. Etzioni. *BR*. 427.
- Reisman, Michael. *BN*: Holton, 238; Tobiassen, 235.
- Religion, freedom of. American Convention on Human Rights, 1969. 684.
- Reparations for war damage. U. S.-German dispute regarding Young Loan under London Agreement on German External Debts, 1953. 805.

- Reply, right of. American Convention on Human Rights, 1969. 684.
- Reprisals. U. N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, 246, R. Rosenstock, *LA*, 719; U. N. Security Council Res. 188 (1964) quoted, 719.
- Res judicata. Foreign divorce decree. *Ramm v. Ramm*, 310 N.Y.S. 2d 111. *JD*. 207.
- Residence, freedom of. American Convention on Human Rights, 1969. 686.
- Reuter, Paul. *BR*: Ghebali, 223.
- Revenue laws, foreign. Enforcement in national courts. *Brokaw v. Seatrain U. K. Ltd.*, [1971] 2 W. L. R. 791. *JD*. 834.
- Revolution, right of. Self-determination as. R. Emerson, *LA*, 474; U. N. General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 249.
- Riesenfeld, Stefan A. The doctrine of self-executing treaties and GATT: A notable German judgment. *Ed*. 548.
- Rigerman, Esther, Henry and Leonid. Memorandum of Legal Adviser's Office of State Department re U. S. nationality. 394.
- Riphagen, Professor W. Quoted on interpretation of Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 716; dissenting opinion as *ad hoc* Judge in Barcelona Traction Co. case, I.C.J., quoted on application of municipal law to international claims, 530.
- Rodley, Nigel S. Regional Conference of ASIL at the New School for Social Research, April 2-3, 1971. *CN*. 802.
- Rodriguez, Luis Valencia. Fundamentos y Propósitos de las Naciones Unidas. *BN*. 876.
- Rogers, William D. The Constitutionality of the Cambodian incursion. *LA*, 26; G. H. Aldrich, *LA*, 76; R. H. Bork, *LA*, 79.
- Rogers, William P., Secretary of State. Quoted on legal aspects of international crises, 25, on legality of U. S. actions, 1, on U. S. position with regard to violation of boundaries, 718, 719; proposals for greater use of I.C.J., cited, 273; Report to the President on the Geneva Protocol on Poisonous Gases and Bacteriological Warfare, 1925, 189.
- Rogers, Silverman v., 437 F. 2d 102. *JD*. 831.
- Rolfe, Sidney E., and W. Damm. The Multinational Corporation in the World Economy. *BR*. 657.
- Rooney, Congressman John H. Quoted on Communist influence in I.L.O., 139; on U. S. contribution to I.L.O., 136.
- Rosenberg v. Yee Chien Woo, 402 U. S. 49. *JD*. 828.
- Rosenne, Shabtai. The Law and Practice of the International Court, quoted on judges of the I.C.J., 293, 294, 297; The Law of Treaties, A Guide to the Legislative History of the Vienna Convention, H. W. Briggs, *LA*, 705.
- Rosenstock, Robert. The Declaration of Principles of International Law Concerning Friendly Relations. *LA*. 713.
- Ross Dependency. Legal rights in. F. M. Auburn. *CN*. 578.
- Royal Saxe Corp., D. M. & Antique Import Corp. v., 311 F. Supp. 1261. *JD*. 199.
- Rubin, Alfred P. *BN*: Strössenreuther and Mössner, 238; *BR*: Maxwell, 859; Menzel, 658; Tung, 859; Verzijl, 220.
- Rubinstein, Alvin Z. Yugoslavia and the Nonaligned World. *BN*. 435.
- Rubinstein, Georges, and G. Delcoigne. Non-Prolifération des Armes Nucléaires et Systèmes de Contrôle. *BN*. 879.
- Ruddy, F. S. *BN*: Amerasinghe, 865.
- Rudzinski, Aleksander W. Quoted on election procedure in U. N., 292; *BN*: Gilas, 237; *BR*: Skubiszewski, 418.
- Rusk, Dean, Secretary of State. Quoted on U. S. involvement in Southeast Asia. 33.
- Russell, Ruth B. *BN*: Slater, 875.
- Russotto, Jean. L'Application des Traités Self-Executing en Droit Américain. *BN*. 662.
- Rüter-Ehlermann, A. I., and C. F. Rüter. Justiz und NS-Verbrechen. *BR*. 423.



Ryukyu Islands. U. S. administration under Treaty of Peace with Japan. *Williamson v. Aldridge*, 320 F. Supp. 840. *JD.* 624.

San Diego, California. ASIL regional conference, 1971. S. H. Lay. *CN.* 803.

Santiago Declaration, 1952, on territorial sea limits. W. Friedmann. *LA.* 763.

Saurer-Allma GmbH-Allgauer Maschinenbau, Batson Yarn and Fabrics Machinery Group, Inc., v., 311 F. Supp. 68. *JD.* 198.

Sayne v. Shipley, 398 U. S. 903. Cited. 213.

Scardigli, In re Estate of, 467 Pac. 2d 841. *JD.* 200.

Scelle, Georges. Quoted on attitude of states to compulsory arbitration, 264; Plateau Continental et Droit International, cited on continental shelf and claims in the high seas, 762.

Schachter, Oscar, and D. Serwer. Marine pollution problems and remedies. *LA.* 84. Scheingold, Stuart A., and L. N. Lindberg. Europe's Would-be Polity. Patterns of Change in the European Community. *BR.* 847.

Schermers, H. G., and L. J. Brinkhorst. Judicial Remedies in the European Communities. *BN.* 233.

Schieffelin & Co. v. United States, 424 F. 2d 1396. *JD.* 208.

Schoch, M. Magdalena. *BN: Döle and Zweigert*, 435.

Schoenbaum v. Firstbrook, 395 U. S. 906. Cited. 213.

Schreiber, Anna P. The Inter-American Commission on Human Rights. *BN.* 432.

Schwartz, Warren F., and C. H. Fulda. Cases and Materials on the Regulation of International Trade and Investment. *BN.* 232.

Schwarzenberger, Georg. International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict, *BR.* 635; Manual of International Law, quoted on recognition of states and diplomatic relations, 555.

Schwebel, Stephen M. The United States assaults the I.L.O., *Ed.* 136; *BR:* Barros, 862.

Schwelb, Egon. *BN:* Del Russo, 868; Haas, 871; Walter, 870; *BR:* Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht, *BR.* 421.

Scott, James Brown. Prizes in international law. E. H. Finch. *CN.* 175.

Sea:

Law of. A. Sobarzo, *BN.* 868; Canadian Fishing Zones Order, Dec. 18, 1970, U. S. statement, 388; Oudendijk, J. K., Status and Extent of Adjacent Waters, *BR.* 841.

Pollution of. Denmark-Germany Treaty on Delimitation of North Sea Continental Shelf, 1971, 906; Germany-Netherlands Treaty on Delimitation of North Sea Continental Shelf, 1971, 911; problems and remedies O. Schachter and D. Serwer, *LA.* 84; radioactive pollution, N. Pelzer, Rechtsprobleme der Beseitigung Radioaktiver Abfälle in das Meer, *BN.* 431

Resources of. International Law and. J. Andrassy. *BN.* 867.

Seabed beyond national jurisdiction. Claims to, U. N. General Assembly resolution, quoted, 757, W. Friedmann, *LA.* 757; exploitation of resources, U. S. draft U. N. Convention, Summary, 180, 131.

Seabed area, international. U. S. draft U. N. Convention. Summary, 179; W. Friedmann, *LA.* 757, 767; O. Schachter and D. Serwer, *LA.* 84, 92, 109.

Seatrains U. K. Ltd., *Brokaw v.*, [1971] 2 W.L.R. 791. *JD.* 834.

Secession. Right of self-determination and. R. Emerson, *LA.* 464; U. N. Secretary General U Thant quoted on U. N. attitude, 464.

Selden, John. Mare Clausum. Cited, 763; Selden redivivus—towards a partition of the seas? W. Friedmann, *LA.* 757.

Self-defense. Art. 2 (4) of U. N. Charter and, L. Henkin, *Ed.* 545; collective, U. S. military action in Cambodia, R. A. Falk, *LA.* 11, J. L. Hargrove, *LA.* 81, J. N. Moore, *LA.* 49, 55, 57.

Self-determination, right of. R. Emerson, *LA.* 459; United Nations law and practice, L. Dembiński, *BN.* 872; resolutions on, cited, 460, 462, 470, 730, quoted, 463, 466, 471, 713; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 245, 246, 249, R. Rosenstock, *LA.* 717, 719, 730.

- Serwer, Daniel, and O. Schachter. Marine pollution problems and remedies. *LA*. 84.
- Shaplen, Robert. Quoted on North Vietnamese and Viet Cong troops in Cambodia. 49.
- Shibaeva, E. A. Definition of international organization as subject of international law. 509, 514.
- Shipley, Sayne v., 398 U. S. 903. Cited. 213.
- Ships. Wastes discharged from. Marine pollution by. O. Schachter and D. Serwer, *LA*, 105; IMCO proposed conference on, cited, 93.
- Shore, William I. Fact-Finding in the Maintenance of International Peace. *BN*. 660.
- Shukri, Muhammad A. Cited on right of self-determination in international law. 461.
- Shurshalov, V. M. Cited on international organizations as subjects of international law, 506, 511, on Socialist international law, 143, 144.
- Silverman v. Rogers, 437 F. 2d 102. *JD*. 331.
- Simma, Bruno. *BR*: Akehurst, 643.
- Simons, Anne P., L. M. Goodrich, E. Hambro. Charter of the United Nations. Commentary and Documents. *BN*. 434.
- Sinclair, I. M. Quoted on U. K. understanding of the term "intervention" in international relations, 729; on U. S. proposal on interpretation of treaties at Vienna Conference, 711.
- Skubiszewski, Krzysztof. Zachodnia Granica Polski, *BR*, 418; *BN*: Krülle, 874.
- Slater, Jerome. Intervention and Negotiation: The United States and the Dominican Revolution. *BN*. 875.
- Slave trade. Abolition of the Brazilian Slave Trade. L. Bethell. *BN*. 663.
- Slavery, freedom from. American Convention on Human Rights, 1969. 681.
- Smuggling. Cultural property, UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership, 1970, 887, U. S.-Mexican Treaty for the Recovery and Return of Stolen Properties, 1971, 897; Panama Canal Zone as foreign country, United States v. Matthews, 427 F. 2d 992, *JD*, 204.
- Sobarzo, Alejandro. Régimen Jurídico del Alta Mar. *BN*. 868.
- Social justice. In the Law of Nations. C. W. Jenks. *BR*: 411.
- Social rights, progressive development. American Convention on Human Rights, 1969. 687.
- "Socialist international law" or "Socialist principles of international relations"? W. E. Butler. *CN*. 796. See also Union of Soviet Socialist Republics.
- Sohn, Louis B. *BR*: Lador-Lederer, 420.
- South Africa. Mandate for South West Africa, sacred trust of civilization, C. H. Alexandrowicz, *CN*, 149; status in South West Africa, U. S. statement to I.C.J. regarding, 604; visa policy, South African Airways v. New York State Division of Human Rights, 315 N.Y.S. 2d 651, *JD*, 403.
- South African Airways v. New York State Division of Human Rights, 315 N.Y.S. 2d 651. *JD*. 403.
- South Viet-Nam. Military actions in Cambodia. Lawfulness of. J. N. Moore. *LA*. 49.
- South West Africa. South African Mandate for, C. H. Alexandrowicz, *CN*, 149; U. S. statement to I.C.J. re application of treaty law, 604; U. N. travel and identity document for Namibians, J. F. Engers, *CN*, 571.
- South West Africa Cases, I.C.J., 1966. Cited, 267; quoted, 149; L. C. Green quoted on, 267; dissenting opinion of Judge Forster, quoted, 150; dissenting opinion of Judge Tanaka, quoted, 150.
- Southeast Asia Collective Defense Treaty, 1954. Cited, 26; Art. IV quoted, 60; U. S. operations in Cambodia and, J. N. Moore, *LA*, 60, W. D. Rogers, *LA*, 26.
- Southeast Asia Resolution. Cited, 67; quoted, 28, 33, 64; President's war-making power and, R. H. Bork, *LA*, 80, J. N. Moore, *LA*, 69; U. S. operations in Cambodia and, J. N. Moore, *LA*, 64, W. D. Rogers, *LA*, 27, 33; U. S. operations in Viet-Nam and, State Department Memorandum, 1966, quoted, 27.
- Sovereign immunity. Oliner v. Canadian Pacific Railway Company, 311 N.Y.S. 2d 429, *JD*, 205; South African Airways v. New York State Division of Human Rights, 315 N.Y.S. 2d 651, *JD*, 403; waiver of, Kita v. Matuszak, 175 N. W. 2d 551, *JD*, 620.

- Sovereignty. V. I. Lisovsky cited on, 145; B. L. Manelis cited on, 146; G. I. Tunkin cited on, 145; acts of, as evidence of title, *Ram of Kutch arbitration*, J. G. Wetter, *LA*, 349, 351, 352; transfer or recognition, early problems in connection with dependent territories, J. A. Frowein, *CN*, 568.
- Space law. G. Gál, *BN*, 236; S. H. Lay and H. J. Taubenfeld, *The Law Relating to Activities of Man in Space*, *BR*, 639; N. M. Matte, *Aerospace Law*, *BR*, 843; E. McWhinney and M. A. Bradley, *New Frontiers in*, *BN*, 234.
- Spain. Preliminary objections in *Parcelona Traction Co. case*, *I.C.J.* 328, 329, 332, 334, 335; quoted, 330, 523; R. B. Lillich, *Ed*, 522.
- Spain-United States. Extradition Treaty, 1970. 914.
- Spiropoulos, Judge J. Quoted on political elements in election of *I.C.J.* judges. 283, 287.
- Staatslexikon. Supp. Vols. I-III. *BN*. 883.
- Star Industries, Inc. v. United States, 320 F. Supp. 1018. *JD*. 621.
- Starke, J. G. Quoted on treaties as a source of international law. 527, 528.
- State responsibility. Treaties and Vienna Convention provisions. S. E. Nahlik. *LA*. 753.
- State-owned ships. Attachment of. Letter of State Department Legal Adviser to Deputy U. S. Attorney General, 806; statement of Soviet Ambassador to Secretary of State, 806.
- States:
- Was Biafra at any time a state in international law? D. A. Ijalaye. *CN*. 551.
- Competence of Inter-American Commission on Human Rights with regard to, American Convention, 1969, 692; competence of Inter-American Court of Human Rights, American Convention, 1969, 396.
- Neutralization in international law. 163.
- Small. Right of self-determination. R. Emerson. *LA*. 468.
- Sovereign equality. Definition by UNCIO Technical Committee, quoted, 733; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 245, 247, 248, 249, 250, R. Rosenstock, *LA*, 725, 733.
- States of the United States:
- Interference with U. S. foreign relations. *South African Airways v. New York State Division of Human Rights*, 315 N.Y.S. 2d 651. *JD*. 403.
- Jurisdiction of courts over foreign consul. *Kita v. Matuszak*, 175 N. W. 2d 551. *JD*. 620.
- Legislation interfering with U. S. foreign relations. *Bethlehem Steel Corporation v. Board of Commissioners of the Department of Water and Power of the City of Los Angeles*, 80 Calif. Repr. 80C, *JD*, 609; *In re Estate of Horman*, 90 Calif. Repr. 439, *JD*, 615.
- Statutory control of distribution of estates to non-resident aliens. *Bjarsch v. DiFalco*, 314 F. Supp. 127. *JD*. 39E.
- Stegeman v. United States*, 425 F. 2d 984. *JD*. 211.
- Stein, Eric. *BR*: Campbell, 644.
- Sterling-Dollar Diplomacy. R. N. Gardner. *BR*. 857.
- Stevenson, Adlai. Quoted on use of force in international relations. 3.
- Stevenson, John R., Legal Adviser, Department of State. Address on United States military actions in Cambodia, cited, 3, 6, 17, 28, 76; quoted, 1, 7, 9, 11, 27, 41, 51; statement before U. N. Seabed Committee, Aug. 20, 1970, quoted on marine pollution and draft Convention on International Seabed Area, 109.
- Stolen property. UNESCO Convention on Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, 887; U. S.-Mexican Treaty for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 1971, 895.
- Stommel, Henry. Future Prospects for Physical Oceanography. Quoted. 85.
- Strössenreuther, Otto, and J. M. Mössner. *Fundheft für Öffentliches Recht*. *BN*. 238.
- Student journals of international law, new. E. H. Finch. *CN*. 584.
- Succession of states. Treaties and *Molafi v. Principal Legal Adviser*, [1970] 3 W.L.R. 338, *JD*, 407; Vienna Convention provision, S. E. Nahlik, *LA*, 752.

- Sukijasović, Miodrag. A cause of the present crisis of international law. *CN*. 378.
- Suleyman Stalskiy, Soviet ship. Attachment of. Letter of State Department Legal Adviser to Deputy U. S. Attorney General, 806; statement of Soviet Ambassador to Secretary of State, 806.
- Sun Life Assurance Co. of Canada, *Gonzalez y Camejo v.*, 313 F. Supp. 1011. *JD*. 400.
- Swiss Confederation. Recognition of sovereignty. *J. A. Frowein*. *CN*. 569.
- Switkes v. Laird, 316 F. Supp. 358. *JD*. 402.
- Switzerland. Neutralization of. Cited. 168, 169, 170.
- Syracuse, N. Y. ASIL eighth annual regional meeting, 1971. *L. F. E. Goldie*. *CN*. 585.
- Syrian Arab Republic. Reservation to Vienna Convention on Law of Treaties. Note of U. S. Representative to U. N. Secretary General. 810.
- Taft, Senator Robert A. Quoted on U. S. action in Korea and Congressional war-making power. 32.
- Tanaka, Judge Kotaro. Dissenting opinion in South West Africa cases, I.C.J., quoted, 150; opinion in Barcelona Traction Co. case, I.C.J., cited on diplomatic protection of shareholders, 340; quoted, 530.
- Tanzania, United Republic of. Draft statute for an international seabed authority, 766, 767; statement on apartheid as crime against humanity, 491, 498.
- Taubenfeld, Howard J. *BN*: Gál, 236.
- Taubenfeld, Howard J., and S. H. Lay. The Law Relating to Activities of Man in Space. *BR*. 639.
- Tax treaties. Between the United States and developing countries. *P. L. Kelley*. *CN*. 159.
- Taxation. Discriminatory, *Schieffelin & Co. v. United States*, 424 F. 2d 1396, *JD*, 208; immunity of property occupied by Soviet representative to the U. N., *United States v. City of Glen Cove*, 322 F. Supp. 149, *JD*, 832.
- Taxes. Enforcement of liens in foreign court. *Brokaw v. Seatrain U. K. Ltd.*, [1971] 2 W. L. R. 791. *JD*. 834.
- Taylor, Telford. Nuremberg & Vietnam: An American Tragedy. *BR*. 640.
- Territorial disputes. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 246.
- Territorial jurisdiction. Panama Canal Zone. *United States v. Matthews*, 427 F. 2d 992. *JD*. 204.
- Territorial limits. De Visscher, Charles. Problèmes de Confins en Droit International Public. *BR*. 412.
- Territorial sea. Claims to, *W. Friedmann*, *LA*, 757; Geneva Convention, 1958, Art. 24 quoted, 92, 132, Canadian anti-pollution legislation and, *L. Henkin*, *Ed*, 132; Oudendijk, *J. K.*, Status and Extent of Adjacent Waters, *BR*, 841.
- Territory:
- Acquisition by force. U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 246; *R. Rosenstock*, *LA*, 720.
  - Verzijl, *J. H. W.* International Law in Historical Perspective. *BR*. 220.
  - Title to. Rann of Kutch arbitral award. *J. G. Wetter*. *LA*. 346.
- Terrorism. O.A.S. Convention to Prevent and Punish Acts against Persons of International Significance, 1971, 898; U. N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 246, 248, *R. Rosenstock*, *LA*, 720.
- Texaco, Inc. v. Hickel, 437 F. 2d 636. *JD*. 823.
- Thanasis, S. S., *G. B. Michael v.*, 311 F. Supp. 170. *JD*. 202.
- Tobiassen, Lief Kr. The Reluctant Door: The Right of Access to the United Nations. *BN*. 235.
- Tonkin Gulf Resolution. See Southeast Asia Resolution and United States Congress.
- Toryu, M/S, *Transomnia v.*, 311 F. Supp. 751. *JD*. 212.
- Trade Agreements for Developing Countries. *G. P. Verbit*. *BN*. 882.

## Trade, international:

Dam, K. W. The GATT: Law and International Economic Organization. *BR.* 853.

Jackson, J. H. World Trade and the Law of GATT. *BR.* 853.

Most-favored-nation treatment. *Star Industries, Inc. v. United States*, 320 F. Supp. 1018. *JD.* 621.

Verbit, G. P. Trade Agreements for Developing Countries. *BN.* 882.

Trademarks. *D. M. & Antique Import Corp. v. Royal Saxe Corp.*, 311 F. Supp. 1261, *JD.* 199; *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F. 2d 686, *JD.* 611.

Transit, right of. Maritime ports. *Gilas, J. Tranzyt przez Porty Morskie w świetle Prawa Międzynarodowego.* *BN.* 237.

Transomnia v. M/S Toryu, 311 F. Supp. 751. *JD.* 212.

Travel documents. U. N. document for Namibians. J. F. Engers. *CN.* 571.

## Treaties:

Argentina. Vanossi, J. R. A. Regimen Constitucional de los Tratados. *BN.* 433.

Between African rulers and European countries. 151.

Binding effect. *Williams v. Blount*, 314 F. Supp. 1356. *JD.* 405.

Customary international law from. A. A. D'Amato cited, 774; N. G. Onuf, *CN.* 774.

Denunciation of. Vienna Convention provisions. S. E. Nahlik. *LA.* 749.

## Interpretation:

Argentine-U. S. Treaty of Friendship, Commerce and Navigation, 1853. *Vazquez v. Attorney General of the United States*, 433 F. 2d 516. *JD.* 625.

Commercial treaties. Germany-United States, 1954, *Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, *JD.* 198; U. S.-Ireland, 1950, and United Kingdom, 1815, *Schieffelin & Co. v. United States*, 424 F. 2d 1396, *JD.* 208.

Italy-U. S. Consular Convention, 1878. *In re Estate of Scardigli*, 467 Pac. 2d 841. *JD.* 200.

McDougal, Lasswell, Miller, *The Interpretation of Agreements and World Public Order.* Sir Gerald Fitzmaurice. *LA.* 358.

Vienna Convention. Arts. 31 and 32, quoted, 708, 715; travaux préparatoires, H. W. Briggs, *LA.* 707.

Warsaw Convention on International Air Transportation. *Molitch v. Irish International Airlines*, 436 F. 2d 42. *JD.* 827.

Invalidity of. Vienna Convention provisions. S. E. Nahlik. *LA.* 736, 740.

Law of. Vienna Convention, 1939. Arts. 31 and 32 on interpretation, quoted, 708, 715; Art. 52 on threat or use of force in conclusion of treaties, quoted, 257; Art. 66 on adjudication of disputes, cited, 265; Rosenne, S., *Guide to the Legislative History of, H. W. Briggs, LA.* 705; Syrian Arab Republic reservations to, Note of U. S. Representative to U. N. Secretary General, 810.

Non-self-executing. Judgment re GATT, Hamburg Tax Court, 1969. *JD.* 627; S. A. Riesenfeld, *Ed.* 548.

Observation of. U. S. statement to I.C.J. re status of South Africa in South West Africa. 604.

Registration with the United Nations. Obligation of. R. B. Lillich. *Ed.* 771.

Reservations to. Note by U. S. Representative to the U. N. Secretary General regarding Syrian reservation to Vienna Convention on Law of Treaties. 810.

Self-executing. Rusotto, J. *L'Application des Traités Self-Executing en Droit Américain.* *BN.* 662.

State succession and. *Molefi v. Principal Legal Adviser*, [1970] 3 W.L.R. 338, *JD.* 407; Vienna Convention provisions, S. E. Nahlik, *LA.* 752.

Status in municipal law. *United States v. City of Glen Cove*, 322 F. Supp. 149, *JD.* 832; U. S. Treaty of Commerce with Germany and the German Constitution, F. A. Mann, *CN.* 793.

Suspension or termination. U. S. statement to I.C.J. re status of South Africa in South West Africa, 604; Vienna Convention provisions, S. E. Nahlik, *LA.* 736, 746, 751, 752.

Unequal. China and the Foreign Powers. W. L. Tung. *BR.* 859.

- Violation of. Termination due to. Vienna Convention provisions. S. E. Nahlik. LA. 750.
- War. Effect on. Vienna Convention provisions. S. E. Nahlik. LA. 753.
- Withdrawal from. Vienna Convention provisions. S. E. Nahlik. LA. 749.
- Treaty Series, Consolidated. C. Parry. BR. 864.
- Trial, fair, right to. American Convention on Human Rights, 1969. 682.
- Trucial states. Sovereign status. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., U. S. Dist. Ct., C.D. Calif., 1971. JD. 815.
- Trusteeship. U. S. draft U. N. Convention on the International Seabed Area. Summary. 180.
- Tung, William L. China and the Foreign Powers. BR. 859.
- Tunkin, G. I. Cited on law of peaceful coexistence, 144, on proletarian internationalism, 144, on subjects of international law, 502; quoted on international organizations and peaceful coexistence, 516, on legal status of international organizations, 503, on treaty-making powers of international organizations, 519.
- Grundlagen des Modernen Völkerrechts. BN. 430.
- Der Ideologische Kampf und das Völkerrecht. BN, 430; cited, 147.
- The Legal Nature of the United Nations. Quoted on definition of international organizations, 513, on establishment of international organizations by treaty, 517, on legal personality of international organizations, 510, on status of United Nations, 518, on statutes of international organizations, 518, on U. N. Charter, 520.
- V. I. Lenin i printipy otnoshenii mezhdru sotsialisticheskimi gosudarstvami. Quoted, 797, 799; W.E. Butler, CN, 796.
- A New Type of International Law. Cited. 144.
- Teoriia Mezhdunarodnogo Prava. BR, 416; quoted on international organizations as subjects of international law, 510, 515, on jus cogens, 799, on proletarian internationalism, 798; W. E. Butler, CN, 796; J. N. Hazard, Ed, 142, 145.
- Twitchett, Kenneth J., and C. A. Cosgrove. The New International Actors: The United Nations and the European Economic Community. BN. 661.
- Union of Soviet Socialist Republics:
- Contemporary doctrine on the juridical nature of universal international organizations. C. Osakwe. LA. 502.
- Draft treaty on the use of the seabed for peaceful purposes. 766, 767.
- Influence in I.L.O. and U. S. position. S. M. Schwebel. Ed. 137, 141.
- Public International Law. Doctrines and Diplomatic Practice, K. Grzybowski, BR, 840; University of Kiel, Drei Sowjetische Beiträge zur Völkerrechtslehre, BN, 430.
- Union of Soviet Socialist Republics-United States:
- Attachment of Soviet ship by U. S. company. Letter of State Department Legal Adviser to Deputy U. S. Attorney General, 806; statement by Soviet Ambassador to Secretary of State, 806.
- Consular Convention, 1964. Forceful entry of Soviet police into U. S. Embassy, Moscow, note from Embassy to Soviet Ministry of Foreign Affairs, 807; United States v. City of Glen Cove, 322 F. Supp. 149, JD, 832.
- United and Associated Nations. Joint Statement by Experts on the Establishment of an International Monetary Fund, April 21, 1944. Sec. IV quoted. 115.
- United Kingdom. Declaration of acceptance of I.C.J. compulsory jurisdiction, quoted, 315; position regarding national determination of monetary exchange rate, 115, statement quoted, 116.
- United Kingdom-United States. Convention to Regulate Commerce, 1815, Schieffelin & Co. v. United States, 424 F. 2d 1396, JD, 208; joint proposal at Bretton Woods on control of monetary exchange rates, 117, quoted, 118.
- United Nations:
- Access to, The Right of. L. Kr. Tobiasen. BN. 235.
- Access to I.C.J. International Law Association proposal, 302; 1954 Resolution quoted, 304.

- And the European Economic Community. C. A. Cosgrove and K. J. Twitchett. *BN*. 661.
- Colegio de Mexico. La ONU: Dilema a los 25 Años. *BN*. 876.
- Committee on Applications for Review of Administrative Tribunal Judgments. Power to request I.C.J. advisory opinions. Cited. 276.
- Committee on Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction. 1971 meetings, 757, 766; U. S. Delegation draft U. N. Convention on the International Seabed Area, Summary, 179; working papers on regime for sea and subsoil beyond national jurisdiction, 766.
- Conference on the Human Environment, 1972. Cited. 111.
- Conference on International Organization, 1945. Special Subcommittee on Interpretation of the Charter, Report quoted, 715; Technical Committee, definition of sovereign equality of states, quoted, 733.
- Conference on the Law of Treaties. Declaration on coercion in conclusion of treaties, quoted, 257; Official Records, cited, 706, 709, 710, 711; proceedings as travaux préparatoires in interpretation of Vienna Convention, H. W. Briggs, *LA*, 711.
- Conference on Tax Treaties between Developed and Developing Countries, 1968. 160.
- Convention on International Seabed Area. U. S. draft, 109; cited, 84, 92; summary, 179.
- Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, 1968. R. H. Miller. *LA*. 476.
- Co-operation with. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. 248.
- Council for Namibia. Travel and identity documents for Namibians. J. F. Engers, *CN*, 574; agreements with Uganda and Zambia, quoted 576, 577.
- Development of international law by. R. Emerson, *LA*, 460; L. Gross, *LA*, 318; Seminar at Patna, S. C. Jain, *CN*, 582.
- Fact-finding and rôle of Secretary General. E. Gordon. *CN*. 565.
- Dag Hammarskjöld's. M. W. Zacher. *BR*. 426.
- Human Rights Commission. Consideration of non-applicability of statutory limitations to war crimes and crimes against humanity. 480.
- Implied Powers. R. Khan. *3R*. 650.
- In a Changing World. J. A. C. Gutteridge. *BN*. 434.
- Laissez-passer documents. J. F. Engers. *CN*. 573.
- Legal personality. Soviet doctrine. 503, 504, 505, 506, 510, 511, 515, 518.
- Narcotic Drugs Commission. U. S. Memorandum on proposed amendments to Single Convention on Narcotic Drugs, 1961, 602; U. S. Delegation working paper, 191.
- Peacekeeping. M. Harbottle, The Impartial Soldier, *BN*, 878; 1946-1967, Asia, R. Higgins, *BR*, 221; statement by Ambassador George Bush before Special Committee on Peacekeeping Operations, 809.
- Regionalism and. Toward a Theory of Regional Compatibility. M. M. Etzioni. *BR*. 427.
- Registration of treaties and agreements with. Obligation of. R. B. Lillich. *Ed*. 771.
- Resolutions. Legal Effects. J. Castañeda. *BR*. 647.
- Rodriguez, L. V. Fundamentos y Propósitos de las Naciones Unidas. *BN*. 876.
- Self-Determination. Law and Practice with regard to. L. Dombiński. *BN*. 872.
- Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. Declaration, Sept. 15, 1970, 244, R. Emerson, *LA*, 467, 468, 470, R. Rosenstock, *LA*, 713; Report, 1966, cited on compulsory jurisdiction of I.C.J., 254; Report, 1970, cited on self-determination, 465, 468; U. K. and U. S. proposals on self-determination, 468.
- Specialized Agencies. Use of advisory jurisdiction of I.C.J. L. Gross, *LA*, 267, 278; ASIL Conference of Legal Advisers quoted on, 267, 278.
- Survey of marine pollution problems. Cited. 100.
- Temporary Executive Authority. Travel documents for West Iranese. J. F. Engers. *CN*. 572.

- Travel and identity document for Namibians. J. F. Engers. *CN*. 571.
- Viet-Nam war and. R. A. Falk, *LA*, 8; J. N. Moore, *LA*, 59, 73.
- United Nations Charter. As constituent instrument, Soviet doctrine, 520; Chinese representation in U. N. and provisions on expulsion of Members, Letter of Deputy Legal Adviser George H. Aldrich to Professor Jerome A. Cohen, 396; Commentary and Documents, L. M. Goodrich, E. Hambro, and A. P. Simons, *BN*, 434; customary law of neutrality and, J. N. Moore, *LA*, 48, 51, 53; interpretation of, Report of U.N.C.I.O. Special Subcommittee, quoted, 715; U. N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with, 243, 247, 248, 249, 250, 251, R. Rosenstock, *LA*, 713.
- Art. 2. Par. 3 on peaceful settlement of international disputes, cited, 256, 257, 717; par. 4 on threat or use of force, cited, 256, 257, 717, quoted, 12, 44, L. Henkin, *Ed*, 544; par. 6 on non-members of U. N., quoted, 717; par. 7 on non-intervention in domestic jurisdiction of states, U. S. position, 726.
- Art. 23 (1) on qualifications of non-permanent members of Security Council. Quoted. 283.
- Art. 33 on judicial settlement of disputes. Quoted. 256.
- Art. 35 on settlement of disputes. Quoted. 262.
- Art. 36 on reference of disputes to I.C.J. Cited, 275; quoted, 256.
- Art. 51 on right of self-defense. Quoted, 12; U. S. operations in Cambodia and, R. A. Falk, *LA*, 12 W. Friedmann, *LA*, 77, J. L. Hargrove, *LA*, 82, J. N. Moore, *LA*, 46, 55, 59.
- Art. 96 on requests for I.C.J. advisory opinions. Cited, 277; L. Gross, *LA*, 320.
- Art. 102 (1) on registration of treaties and agreements. Quoted. 771.
- Art. 107 and Declaration of Principles concerning Friendly Relations and Co-operation among States. R. Rosenstock. *LA*. 721.
- United Nations Economic and Social Council. Res. 1273 (XLIII) on tax treaties with developing countries. Quoted. 161.
- United Nations Educational Scientific and Cultural Organization. Complaints against, I.L.O. Administrative Tribunal judgments upon, I.C.J., cited on advisory opinions, 276; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, 887.
- United Nations General Assembly. Proposed resolution on use of I.C.J., L. Gross, *LA*, 274; resolutions as source of international law, R. Emerson, *LA*, 460, R. A. Falk cited, 774, 776, N. G. Onuf, *CN*, 774.
- Resolutions: aerial hijacking (2645 (XXV)), 445; colonial independence: (1514 (XV)), cited, 460, 462, 470, 730, quoted, 463, R. Rosenstock, *LA*, 730; (1541 (XV)), cited, 470; (1654 (XVI)), cited, 460; (2625 (XXV)), 245, 246, 249, R. Rosenstock, *LA*, 713, 717, 719; extradition and punishment of war criminals (3 (I)), 486; (170 (II)), quoted, 497; friendly relations and co-operation among states: (1966 (XVIII)), quoted, 713; (2625 (XXV)), 243, quoted on peaceful settlement of international disputes, 264, on use of force, 258, R. Rosenstock, *LA*, 713; I.C.J., use of (171 (II)), cited, 274; non-intervention (2131 (XX)), quoted, 45, 48, 466, 467, R. Rosenstock, *LA*, 726, 727; Nuremberg principles (95 (I)), 486, 497; seabed and ocean floor beyond national jurisdiction (2749 (XXV)), quoted 757, 759; South Africa, apartheid policy (2202 (XXI)), cited, 497, 498; South African territories, annexation (1954 (XVIII)), quoted, 471.
- United Nations Institute of Training and Research. Status and Problems of Very Small States and Territories. Cited. 470, 471.
- United Nations Secretariat. Survey of tax treaties. 164, 165.
- United Nations Secretary General:
- Fact-finding, rôle in. E. Gordon. *CN*. 535.
- Good Offices mission to settle Bahrain dispute. E. Gordon, *CN*, 560; statement quoted, 567; Report of Personal Representative in Charge, cited, 560, quoted, 562, 563, 565.
- Note Verbale concerning recognition of Namibian travel and identity documents. Quoted. 575.



- Proposed global authority on environment. 84.
- Quoted on composition of I.C.J., 232; on use of I.C.J. by U. N. Members, 273; on right of self-determination and membership in U. N., 469; on U. N. attitude on right of secession from a Member state of U. N., 464.
- Statement concerning aerial hijacking. 447.
- United Nations Security Council Resolution 286 (1970) on aircraft hijacking, 445; rôle in peaceful settlement of international disputes, 261; U. S. operations in Cambodia and, J. N. Moore, *LA*, 59, 73; Voting in, S. D. Bailey, *BR*, 425.
- United States:
- Antitrust laws. Extraterritorial jurisdiction. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, U. S. Dist. Ct., C. D. Calif., 1971. *JD*. 815.
- Assaults the I.L.O. S. M. Schwab. *Ed.* 136.
- Attorney General. Judicial action for recovery and return of stolen archaeological, historical or cultural property, U. S.-Mexican Treaty, 1971, 897; *Vazquez v.*, 433 F. 2d 516, *JD*, 625.
- Bankruptcy Act. Extraterritorial application. *Stegeman v. United States*, 425 F. 2d 984. *JD*. 211.
- Berlin Conference, 1884-1885 on Africa. Participation in. 152.
- Bustamante Code, revision of. Reply to O.A.S. Council, quoted, 787; K. H. Nadelmann, *CN*, 787.
- Cambodia, military actions in. Address by Department of State Legal Adviser before Hammarskjöld Forum, cited, 3, 6, 11, 17, 28, 76, quoted, 1, 7, 9, 11, 27, 41; Constitutionality of: G. H. Aldrich, *LA*, 76; R. H. Bork, *LA*, 79; R. A. Falk, *LA*, 6; J. N. Moore, *LA*, 61; W. D. Rogers, *LA*, 26; international law and: G. H. Aldrich, *LA*, 76; R. A. Falk, *LA*, 1; W. Friedmann, *LA*, 77; J. L. Hargrove, *LA*, 81; J. N. Moore, *LA*, 38.
- Claim to Ross Dependency. F. M. Auburn. *CN*. 580.
- Contemporary practice relating to international law. S. C. Nelson. 178, 388, 599, 805.
- Council on Environmental Quality. Report on Ocean Dumping. Cited. 105.
- Fair Share Refugee Act, 1960 *Rosenberg v. Yee Chien Woo*, 402 U. S. 49. *JD*. 828.
- Foreign Assistance Act. Definition of investors for purposes of insurance and guaranty, 535; Hickenlooper amendment, *see* Hickenlooper amendment; provisions concerning multinational investments, 537.
- Foreign Claims Settlement Commission. Judicial review of decisions. *Fraenkel v. United States*, 320 F. Supp. 605. *JD*. 619.
- Foreign relations of. Diplomatic Papers, publication, ASIL resolution, 591; State legislation and, *Bethlehem Steel Corporation v. Board of Commissioners*, Department of Water and Power, City of Los Angeles, 80 Calif. Repr. 800, *JD*, 609; *Bjarsch v. DiFalco*, 314 F. Supp. 127, *JD*, 298; *In re Estate of Hornman*, 90 Calif. Repr. 439, *JD*, 615; *South African Airways v. New York State Division of Human Rights*, 315 N. Y. S. 2d 651, *JD*, 403.
- Geneva Protocol on Poisonous Gases and Bacteriological Warfare, 1925. Proposed reservation, 190; proposed understandings, 191.
- Human Rights, and World Community. V. Van Dyke. *BR*. 224.
- Immigration and Nationality Act, 1952. Commuting laborers as immigrants, *Gooch v. Clark*, 433 F. 2d 74, *JD*, 618; refugee status under, *Rosenberg v. Yee Chien Woo*, 402 U. S. 49, *JD*, 828; waiver of requirements regarding admission of alien as immigrant, *Silverman v. Rogers*, 437 F. 2d 102, *JD*, 831.
- Incursion into foreign territory to suppress raids across the border. 52.
- Indochina. Military operations in. Congressional power to limit or terminate. J. N. Moore. *LA*. 36.
- International Claims Settlement Act, 1949. Claims against Cuba under. *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F. 2d 394. *JD*. 195.

- International Court of Justice. Acceptance of compulsory jurisdiction. Reservation to. Quoted, 272, 375; L. Gross, *LA*, 262, 271; invocation of, L. Henkin, *Ed*, 374, R. R. Baxter and T. Buergenthal quoted, 374.
- International Seabed Area. Draft U. N. Convention on. 109; Summary, 179; cited, 84, 92, 757, 759, 767, 768; Art. 46 on requests for I.C.J. advisory opinions, quoted, 323; Art. 56 on requests by national courts for advisory opinions of international tribunal, quoted, 309.
- Intervention policy. W. Friedmann, *LA*, 77; The United States and the Dominican Revolution, J. Slater, *BN*, 875.
- Narcotic Drugs Convention, 1961. Suggested amendments, 193; Memorandum regarding proposed amendments, 602; Working Paper, 191.
- National determination of monetary exchange rate. Position on. 117; H. D. White quoted, 117.
- Non-intervention under U. N. Charter. Position quoted. 726, 727.
- Organization of American States. The Majority of One: Towards a Theory of Regional Compatibility. M. M. Etzioni. *BR*. 427.
- Outer Continental Shelf Lands Act, 1953. *Texaco, Inc. v. Hickel*, 437 F. 2d 636. *JD*. 823.
- Postmaster General. Supervisory power over mail. *Williams v. Blount*, 314 F. Supp. 1356. *JD*. 405.
- President:
- Authority to suspend trade agreement concessions under Trade Expansion Act. *Star Industries, Inc. v. United States*, 320 F. Supp. 1018. *JD*. 621.
  - Constitutional powers as Commander-in-Chief of armed forces. G. H. Aldrich, *LA*, 76; R. H. Bork, *LA*, 79; R. A. Falk, *LA*, 6; J. N. Moore, *LA*, 61, 66, 67; W. D. Rogers, *LA*, 26.
  - War powers. G. H. Aldrich, *LA*, 76; *Berk v. Laird*, 429 F. 2d 302, *JD*, 401; R. H. Bork, *LA*, 79; R. A. Falk, *LA*, 6; J. N. Moore, *LA*, 61, 66, 67; W. D. Rogers, *LA*, 26.
- Protecting Powers for victims of war. Proposed procedure for appointment. 808.
- Recognition and Enforcement of Foreign Arbitral Awards. Act to implement Convention, 1970. 922.
- South Africa. Status in South West Africa. Statement to I.C.J. 604.
- Submerged Lands Act, 1953. *Texaco, Inc. v. Hickel*, 437 F. 2d 636. *JD*. 823.
- Tax lien on American property abroad, enforcement of, *Brokaw v. Seatrain U. K. Ltd.*, [1971] 2 W. L. R. 791, *JD*, 834; tax treaties with developing countries, P. L. Kelley, *CN*, 159.
- Trading with the Enemy Act. *Bonnar v. United States*, 438 F. 2d 540, *JD*, 820; *D. M. & Antique Import Corp. v. Royal Saxe Corp.*, 311 F. Supp. 1261, *JD*, 199; *Welch v. Kennedy*, 319 F. Supp. 945, *JD*, 623.
- Treaties. Interpretation, proposal at Vienna Conference, quoted, 710, H. W. Briggs, *LA*, 709, 711; publication of information regarding, S. Engel, *CN*, 593; self-executing, Russotto, J., *L'Application des Traités Self-Executing en Droit Américain*, *BN*, 662.
- U. N. assessments. Position on payment. 140; Ambassador Arthur J. Goldberg quoted, 140.
- U. N. Declaration on Principles of International Law concerning Friendly Relations among States. Position on legal status. Quoted. 714.
- Viet-Nam war. Legality of, *Berk v. Laird*, 429 F. 2d 302, *JD*, 401, *Switkes v. Laird*, 316 F. Supp. 358, *JD*, 402; Nuremberg principles and, T. Taylor, *BR*, 640. See President, war powers, above, and War powers, below.
- War powers. R. H. Bork, *LA*, 79; J. N. Moore, *LA*, 61; W. D. Rogers, *LA*, 26.
- United States Congress. Constitutional power to limit or terminate U. S. military operations in Indochina, J. N. Moore, *LA*, 66; failure to appropriate funds for U. S. contribution to I.L.O., S. M. Schwebel, *Ed*, 136; Southeast Asia Resolution, U. S.

- operations in Cambodia and, J. N. Moore, *LA*, 64; war powers and powers of President as Commander-in-Chief, R. H. Bork, *LA*, 79, J. N. Moore, *LA*, 61.
- United States Constitution:
- Application to U. S. nationals abroad. *Williams v. Blount*, 314 F. Supp. 1356. *JD*. 405.
- Legality of U. S. action in Viet-Nam. *Berk v. Laird*, 429 F. 2d 302. *JD*. 401.
- President's powers under, and the Cambodian military action. G. H. Aldrich, *LA*, 76; R. H. Bork, *LA*, 79; F. A. Falk, *LA*, 6; J. N. Moore, *LA*, 61, 67; W. D. Rogers, *LA*, 26.
- United States Senate. Report No. 393, 48th Cong., 1st Sess., quoted on work of African International Association, 153, on treaties with African rulers, 153; Special Subcommittee on Outer Continental Shelf, Report to Committee on Interior and Insular Affairs, 1970, W. Friedmann, *LA*, 759, 765.
- United States State Department:
- Assistant Legal Adviser. Letter regarding service in the United States of foreign judicial documents. 601.
- Legal Adviser. Letter to U. S. Supreme Court re act of state doctrine in case of *First National City Bank v. Banco Nacional de Cuba*, 391; *Banco Nacional de Cuba v. First National City Bank of New York*, 442 F. 2d 530, *JD*, 812.
- Legal Adviser's Office. Memorandum regarding acquisition and loss of U. S. nationality by former Russian citizens, 394; Memorandum regarding attempted defection of Lithuanian seamen in U. S. territorial waters, 389; Memorandum regarding dual nationality, 187.
- Note to foreign embassies regarding letters rogatory. 186.
- Publication of U. S. treaties and related information. S. Engel. *CN*. 593.
- Statement regarding Canadian Fishing Zones Order, Dec. 18, 1970. 388.
- United States Steel International, Ltd., *Fiorenza v.*, 311 F. Supp. 117. *JD*. 201.
- United States Treaties Annotated. Proposed publication of. S. Engel. *CN*. 594.
- Uruguay. Reservation to American Convention on Human Rights. 701.
- Vagts, Detlev F. *BR*: Behrman, 851.
- Van Dyke, Vernon. Human Rights, the United States and World Community. *BR*. 224.
- Van Engelbrechten v. Galvanoni & Nevy Bros., Inc., 302 N.Y.S. 2d 691. Cited. 213.
- van Gend en Loos, N. V. *Algemene Transport- en Expeditie Onderneming v. Nederlandse Tariefcommissie*, European Court of Justice, 1963. Quoted. 311.
- Van Panhuys, H. F., *et al.* International Organisation and Integration. *BN*. 433.
- Vanossi, Jorge Reinaldo A. *Regimen Constitucional de los Tratados*. *BN*. 433.
- Vazquez v. Attorney General of the United States, 433 F. 2d 516. *JD*. 625.
- Veiter, Theodor. *Das Recht der Volksgruppen und Sprachminderheiten in Österreich*. *BN*. 873.
- Verbit, Gilbert P. Trade Agreements for Developing Countries. *BN*. 882.
- Verzijl, J. H. W. International Law in Historical Perspective. Vol. III: State Territory. *BR*. 220.
- Vienna Convention on the Law of Treaties. R. D. Kearney and R. E. Dalton, cited, 736; Arts. 31 and 32 on interpretation of treaties, quoted, 708, 715; Art. 66 cited on adjudication of disputes, 265; definition of *jus cogens*, quoted, 371; interpretation of, I.L.C. proceedings and reports as travaux préparatoires, H. W. Briggs, *LA*, 707; provisions on invalidity, termination and suspension of treaties, quoted, 739, 742, 743, 744, 747, 753, S. E. Nahlik, *LA*, 736; quoted on registration and publication of treaties, 772; Rosenne, S., *A Guide to the Legislative History of*, H. W. Briggs, *LA*, 705; Syrian Arab Republic reservations to, note of U. S. Representative to U. N. Secretary General, 810; the travaux préparatoires of, H. W. Briggs, *LA*, 705.
- Viet Cong. Violation of Cambodian territory. J. N. Moore. *LA*. 47.
- Vietnam and China, 1938-1954. K. C. Chen. *BN*. 234.
- Viet-Nam war. Legal status, *Hammond v. National Life & Accident Insurance Co.*, 243 So. 2d 902, *JD*, 822; H. Weber, *BR*, 850; Nuremberg and, T. Taylor, *BR*, 640; rights

- and duties of Cambodia, J. N. Moore, *LA*, 44; United States action in, legality, *Berk v. Laird*, 429 F. 2d 302, *JD*, 401, *Switkes v. Laird*, 316 F. Supp. 358, *JD*, 402; U. S. military actions in Cambodia and: R. H. Bork, *LA*, 79; R. A. Falk, *LA*, 1; W. Friedmann, *LA*, 77; J. L. Hargrove, *LA*, 81; J. N. Moore, *LA*, 49, 64; W. D. Rogers, *LA*, 26; U. S. Trading with the Enemy Act, *Welch v. Kennedy*, 319 F. Supp. 945, *JD*, 623.
- Virally, Professor Michel. Pleading in *Barcelona Traction Co. case*, I.C.J. Quoted. 339.
- Vlasic, Ivan C. *BR*: Matte, 843.
- von Glahn, Gerhard. *BN*: Pelzer, 431.
- Wainhouse, David W. *BR*: Higgins, 221.
- Waldock, Sir Humphrey. Quoted on travaux préparatoires in interpretation of treaties, 710; The Release of the Altmark's Prisoners, quoted on belligerent invasion of neutral territory, 52; Reports on law of treaties, H. W. Briggs, *LA*, 705, cited on invalidity and termination of treaties, 738, 741, 744, 749.
- Waldock, Sir Humphrey, and R. Y. Jennings. *British Year Book of International Law*, 1967. *BR*. 429.
- Walter, Hannfried. *Die Europäische Menschenrechtsordnung*. *BN*. 870.
- War. Effect on treaties, Vienna Convention provision, S. E. Nahlik, *LA*, 753; existence of, *Hammond v. National Life & Accident Insurance Co.*, 243 So. 2d 902, *JD*, 822; in international law, H. Weber, *Der Vietnam-Konflikt—bellum legale?* *BR*, 850; suspension of guarantees during, American Convention on Human Rights, 1969, 688; U. N. Charter, Art. 2 (4) and, L. Henkin, *Ed*, 544.
- War crimes. U. N. Convention on Non-Applicability of Statutes of Limitation, 1968: R. H. Miller, *LA*, 476; Art. I, 481; Art. II, 494; Art. III, 494; Art. IV, 495; Preamble, 497; U. S. military action in Viet-Nam: *Switkes v. Laird*, 316 F. Supp. 358, *JD*, 402; Taylor, T., *Nuremberg & Vietnam: An American Tragedy*, *BR*, 640.
- War criminals. Extradition of, U. N. Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 494; punishment of, Polish proposal before U. N. Commission on Human Rights, 479.
- War, laws of:
- Chemical and biological weapons. Geneva Protocol, 1925, to Prohibit Use of Poison Gas and Bacteriological Methods. Message of President Nixon transmitting to the Senate, 189; Report of Secretary of State Rogers, 189; U. S. proposed reservation, 190; U. S. proposed understandings, 191.
  - Civilians. U. S. draft procedure for appointment of Protecting Powers. 808.
  - Military Prosecutor *v. Adnan Ibn Adal Ibn Badawi al Bahsh*, Mil. Ct. Nablus, 1969, *JD*, 410; Military Prosecutor *v. Omar Mahmud Kassem et al.*, Mil. Ct. Ramallah, 1969, *JD*, 409.
  - Prisoners of war. U. S. proposed procedure for appointment of Protecting Powers. 808.
  - Schwarzenberger, Georg. *The Law of Armed Conflict. International Law as Applied by International Courts and Tribunals*. *BR*. 635.
  - War-making power of the United States. *See* United States, President and War powers.
  - Wars of liberation. Legal effects. ASIL regional conference, Chicago, 1970. M. C. Bassiouni. *CN*. 172.
  - Warsaw Convention on International Air Transportation, 1929. *Molitch v. Irish International Airlines*, 436 F. 2d 42, *JD*, 827; Protocol of Amendment, Guatemala City, 1971, 670.
  - Wastes. Discharged from coasts, marine pollution by, 99; discharged from ships, marine pollution by, 105.
  - Watson, D., *The Constitution*. Quoted on the President as Commander-in-Chief of the U. S. armed forces. 68.
  - Weaver, George L. P. *BR*: Jenks, 411.
  - Weber, Hermann. *Der Vietnam-Konflikt—bellum legale?* *BR*. 850.
  - Webster, Daniel, Secretary of State. Quoted on right of self-defense. 14.
  - Weissberg, Guenter. *BN*: Ginther, 236; *BR*: Khan, 650.

- Welch v. Kennedy, 319 F. Supp. 945. *JD.* 623.
- Wetter, J. Gillis. The Rann of Kutch arbitration. *LA.* 346.
- Wheaton, H. Elements of International Law. Quoted on treaties as source of international law. 527.
- White, Gillian. Quoted on lump-sum claims settlement agreements as source of customary law. 526.
- White, Commonwealth v., 265 N. E. 2d 473. *JD.* 614.
- Williams v. Blount, 314 F. Supp. 1356. *JD.* 405.
- Williamson v. Alldridge, 320 F. Supp. 840. *JD.* 624.
- Willrich, Mason, and B. Boskey. Nuclear Proliferation. Prospects for Control. *BN.* 878.
- Wilson, Robert R. *BR:* Canadian Yearbook of International Law, 1969, 229.
- Wilson, Woodrow. Principle of self-determination. 463.
- Woo, Yee Chien, Rosenberg v., 402 U. S. 49. *JD.* 828.
- World community. Human Rights, the United States and. V. Van Dyke. *BR.* 224.
- World Health Organization. Measures on coastal pollution control. 103.
- World law. Holton, T. An International Peace Court: Design for a Move from State Crime toward. *BN.* 238.
- World public order. Ideological Conflict and. E. McWhinney. *BN.* 237.
- World Trade and the Law of GATT. J. H. Jackson. *BR.* 853.
- World War II. Allied Powers, rights in Berlin and Germany, U. S. note to the Fed. Rep. of Germany, Aug. 11, 1970, regarding its treaty with the U.S.S.R., 178; France, La France en Guerre et les Organisations Internationales 1939-1945, V.-Y. Chebali, *BR.* 223.
- Woronoff, Jon. Organizing African Unity. *BN.* 877.
- Wright, Quincy. E. H. Finch. *Ed.* 130.
- Yost, Charles, U. S. Ambassador to the United Nations. Report to Security Council on U. S. operations in Cambodia. Cited, 3, 59; quoted, 21.
- Young, Richard. *BR:* Al-Baharna, 227.
- Young, Roland, Congressional Politics in the Second World War. Quoted on Congress and World War developments. 68.
- Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579. Justice Jackson quoted on Congress and the President's powers. 37.
- Yugoslavia and the Nonaligned World. A. Z. Rubinstein. *BN.* 435.
- Zacher, Mark W. Dag Hammarskjöld's United Nations. *BR.* 426.
- Zadorozhnyi, G. P. Quoted on international organizations as subjects of international law. 506.
- Zambia. Agreement with U. N. Council for Namibia concerning recognition of Namibian travel and identity documents. 576.
- Zeiss, Carl, Stiftung v. V. E. B. Carl Zeiss, Jena. 298 F. Supp. 1309, cited, 213; 433 F. 2d 686, *JD.* 611.
- Zotiades, George B. International Jus Cogens. *BN.* 866.
- Zweigert, Konrad, and H. Dölle. Rechtsprechungssammlung zum Europarecht, 1961-1962. *BN.* 435.